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PHIL S. GIBSON	San Francisco

Associate Justices

ROGER J. TRAYNOR	San Francisco
B. REY SCHAUER	San Francisco
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MARSHALL F. McCOMB	San Francisco
RAYMOND E. PETERS	San Francisco
THOMAS P. WHITE	San Francisco

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David Blomgren	Deputy Clerk	Los Angeles

Attorney General

STANLEY MOSK	Los Angeles

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Presiding Justice

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Associate Justices

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FRED B. WOOD[2]	San Francisco
MATHEW O. TOBRINER	San Francisco

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Division 1

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Associate Justices

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MILDRED L. LILLIE	Los Angeles

Division 2

Presiding Justice

W. TURNEY FOX	Los Angeles

Associate Justices

ALLEN W. ASHBURN	Los Angeles
ROY L. HERNDON	Los Angeles

---

[1] Took Oath of Office November 6, 1959.
[2] Retired November 1, 1959.
[3] Appointed October 27, 1959.

DISTRICT COURTS OF APPEALS—Continued

Division 3

Presiding Justice

CLEMENT L. SHINN	Los Angeles

Associate Justices

PARKER WOOD[1]	Los Angeles
PAUL VALLÉE	Los Angeles

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George J. Kobelin	Deputy Clerk	San Diego

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[1] Appointed to Division 1, October 27, 1959.

APPELLATE DEPARTMENT, SUPERIOR COURT

ALAMEDA COUNTY

Presiding Judge

S. VICTOR WAGLER	Oakland

Judges

RALPH E. HOYT	Oakland
RICHARD H. CHAMBERLAIN	Oakland

CONTRA COSTA COUNTY

Presiding Judge

HOMER W. PATTERSON	Martinez

Judges

NORMAN A. GREGG	Martinez
WAKEFIELD TAYLOR	Martinez

FRESNO COUNTY

Presiding Judge

PHILIP CONLEY	Fresno

Judges

MILO POPOVICH	Fresno
MATT GOLDSTEIN	Fresno

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Presiding Judge

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Judges

NORMAN F. MAIN	Bakersfield
GORDON L. HOWDEN	Bakersfield

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Presiding Judges

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EDWARD T. BISHOP[2]	Los Angeles

Judges

FRANK G. SWAIN[1]	Los Angeles
LEON T. DAVID	Los Angeles
HAROLD P. HULS[3]	Los Angeles

Clerk

J. J. MacGregor	Los Angeles

---

[1] Became Presiding Judge October 1, 1959.
[2] Retired October 1, 1959.
[3] Appointed October 1, 1959.

APPELLATE DEPARTMENT, SUPERIOR COURT —Continued

MARIN COUNTY

Presiding Judge

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Judges

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APPELLATE DEPARTMENT, SUPERIOR COURT —Continued

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PRESIDING JUDGE

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LOUIS B. DEMATTEIS .... Redwood City

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JUDGE

ATWELL WESTWICK .... Santa Barbara

SANTA CLARA COUNTY

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JUDGES

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Judge	
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SONOMA COUNTY

Presiding Judge	
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Judges	
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LINCOLN F. MAHAN	Santa Rosa

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Presiding Judge	
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Judges	
FRANK C. DAMRELL	Modesto
H. L. CHAMBERLAIN	Modesto

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Presiding Judges	
WILLIAM A. REPPY[1]	Ventura
CHARLES F. BLACKSTOCK[2]	Ventura

Judges	
WILLIAM A. REPPY[1]	Ventura
E. PERRY CHURCHILL	Ventura

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[1] Became Presiding Judge November 1, 1959.
[2] Retired November 1, 1959.

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52 Cal.2d 330

PEOPLE of the State of California, Appellant,
v.
Henry Victor PREWITT, Respondent.
Cr. 6444.

Supreme Court of California.
In Bank.
June 19, 1959.

Prosecution for bookmaking and occupying an apartment for purpose of recording bets. The Superior Court, Los Angeles County, Mark Brandler, J., set aside the indictment, and People appealed. The Supreme Court, Traynor, J., held that information from informer who has proved reliable in past constitutes probable cause for arrest, even when officer does not know identity of informer.

Reversed.

Opinion, reported at 334 P.2d 124, vacated.

1. Criminal Law 🔑394.5(4)

Burden is on defendant to raise issue of illegally obtained evidence.

2. Criminal Law 🔑245

If prosecution is by information, defendant must object to introduction of illegally obtained evidence before magistrate if he seeks to have it excluded as basis of holding him to answer.

3. Criminal Law 🔑394.5(3)

Defendant has no opportunity to object to introduction of evidence before grand jury and, accordingly, when prosecution is by indictment, there can be no waiver, of right to challenge legality of evidence to support indictment, based on failure to object to its introduction.

4. Criminal Law 🔑322

Even though defendant had no opportunity to develop facts that might show that essential evidence was illegally obtained, it must be presumed, where record is silent on question, that officers acted lawfully.

5. Indictment and Information 🔑137(4)

Where evidence before grand jury establishes as a matter of law that essential evidence was illegally obtained or is otherwise inadmissible, motion to set aside indictment should be granted.

6. Arrest 🔑63(4)

Evidence of information from reliable informer may be sufficient to sustain finding that arrest, search, and seizure were made with reasonable cause.

7. Arrest 🔑63(4)

Information from informer who has proved reliable in past constitutes probable cause for arrest, even when officer does not know identity of informer.

8. Criminal Law 🔑322

It cannot be presumed that officers will commit perjury, and it must be presumed that trial courts will be able to detect perjury if it does occur.

9. Witnesses 🔑219(1)

The privilege of nondisclosure of informant must be waived if information is to be relied upon, and, accordingly, officer making arrest may be cross-examined fully as to facts that might tend to identify informer and test credibility of officer claiming that information leading to arrest was received from informer whose identity was unknown, and officer's testimony is not limited to general statements that on previous occasions reliable information was given, and he cannot claim privilege that details would tend to identify informer.

10. Criminal Law ⚷178

Dismissal of information or indictment will not bar trial based on subsequent or accusatory pleading charging identical offense, and this rule specifically applies when previous dismissal was based on magistrate's conclusion that evidence was illegally obtained. West's Ann.Pen.Code, § 999.

11. Constitutional Law ⚷260
Judgment ⚷751

Even if charge contained in indictment was identical with charge contained in complaint filed in municipal court, and even if, after preliminary examination, complaint in municipal court had been dismissed because evidence had been unlawfully obtained, doctrines of res judicata and collateral estoppel would be inapplicable to establish that evidence had been unlawfully obtained, and relitigation of question of admissibility of evidence would not deny defendant due process of law.

◆

Edmund G. Brown and Stanley Mosk, Attys. Gen., William E. James, Asst. Atty. Gen., William B. McKesson, Dist. Atty., Jere J. Sullivan, Lewis Watnick and Robert Lederman, Deputy Dist. Attys., Los Angeles, for appellant.

Albert Jack Chotiner and Russell E. Parsons, Beverly Hills, for respondent.

A. L. Wirin and Paul P. Selvin, Los Angeles, as amici curiae on behalf of respondent.

TRAYNOR, Justice.

The People appeal from an order granting defendant's motion to set aside an indictment charging defendant with bookmaking and with occupying an apartment for the purpose of recording bets. (Pen. Code, § 337a.) Defendant has moved to augment the record to present additional grounds for affirming the order.

The grand jury returned the indictment after hearing the following evidence: Officer Joseph Deiro testified that for the past three years he had been assigned to the Administrative Vice Division of the Los Angeles Police Department and during that time had made more than two hundred bookmaking arrests. He said that he was familiar with the various ways that bookmaking is carried on in Los Angeles.

A person wishing to make a small bet can place it with a "hand book," who is likely to be found in the vicinity of a bar or poolroom. One wishing to bet a larger sum can call an "agent," who will give him a telephone number to call. The bettor then telephones in his bets daily and settles his account with the agent about once a week.

No bookmaker can operate without a system of safely and permanently recording the bets, winnings, and losses. Therefore most bookmakers have one or more "front offices" or "relay spots." At the front office a person answers the telephone and accepts bets placed by the "hand books" and larger bettors. He records the bets on the top of a table, a slate, or on anything that can be written on and erased or destroyed easily, since front offices are often raided by the police.

The permanent records are kept in the "back office." Just before post time of each race the back office calls the front office and accepts all bets that have been received by the front office. The bets are then recorded on professional betting cards and the cards are placed in a rack. These cards contain, in code, the name of the bettor, the horse, the amount of the bet, and the result of the race.

Some time in late January or early February of 1958, Officer Deiro received a telephone call from a person who told him that a back office operation was being carried on at 248 South Western Avenue in Apartment 401. This person did not give his name, but Officer Deiro recognized his voice as that of a person who had twice previously given him information that had proved accurate and resulted in arrests. Although Officer Deiro did not know and never had known the name of this person, he considered his source of information reliable.

On February 20, 1958, acting upon the information received from the informer, Officer Deiro and two fellow officers went to the address on South Western Avenue. Officer Deiro obtained a key to Apartment 401 from the manager's office. The officers slowly unlocked the door to the apartment and opened it about two inches, at which point a night latch prevented further progress. Nothing but a bare wall could be observed through the opening. The officers then forced the latch and entered the apartment. Defendant was standing in the center of the room amid various bookmaking equipment. The officers arrested him and seized the bookmaking paraphernalia. They found a key to the apartment in defendant's pocket. Handwriting analysis indicated that defendant had prepared a number of betting cards found in a rack in the apartment.

[1-5] The foregoing evidence before the grand jury was sufficient to support the indictment unless it was illegally obtained. "If * * * illegally obtained evidence is the sole basis of an indictment or information, defendant is held without reasonable or probable cause; his motion to set aside the accusatory pleading should be granted by the court in which he is arraigned on such pleading; and if the motion is improperly denied an appellate court will grant prohibition to halt proceedings under the accusatory pleading." People v. Valenti, 49 Cal.2d 199, 203, 316 P.2d 633, 635; see also Badillo v. Superior Court, 46 Cal.2d 269, 271, 294 P.2d 23; Priestly v. Superior Court, 50 Cal.2d 812, 815, 330 P.2d 39. In the Badillo case we pointed out that "No problem is presented in applying this rule in cases involving searches and seizures in which the facts bearing on the legality of the search or seizure are undisputed and establish as a matter of law that the evidence is or is not admissible. In many cases, however, the evidence before the magistrate bearing on this issue may be in conflict or susceptible of conflicting inferences or consist only of the testimony of prosecution witnesses, and under these circumstances the court in ruling on a motion to set aside the information will frequently not be in a position to make a final determination as to the admissibility of the evidence. Accordingly, the information should not be set aside on the ground that essential evidence was illegally obtained if there is any substantial evidence or applicable presumption to support a contrary conclusion [citations], and in such cases the ultimate decision on admissibility can be made at the trial on the basis of all of the evidence bearing on the issue." 46 Cal.2d at pages 271-272, 294 P.2d at page 24. The burden is on the defendant to raise the issue of illegally obtained evidence, and if the prosecution is by information, he must object to the introduction of the evidence before the magistrate if he seeks to have it excluded as a basis for holding him to answer. Robison v. Superior Court, 49 Cal.2d 186, 187, 316 P.2d 1. When the prosecution is by indictment, however, the defendant has no opportunity to object to the introduction of evidence before the grand jury, and accordingly, there can be no waiver of the right to challenge the legality of the evidence to support the indictment based on a failure to object to its introduction. Although he has no opportunity to develop facts that may show that essential evidence was illegally obtained, if the record is silent on this question, it must be presumed that the officers acted lawfully. People v. Farrara, 46 Cal.2d 265, 269, 294 P.2d 21. In such a case, just as in the case when the evidence before the magistrate is conflicting on the question of legality or no objection is made to the evidence seized, "the ultimate decision on admissibility can be made at the trial on the basis of all of the evidence bearing on the issue." Badillo v. Superior Court, supra. If, however, the

evidence before the grand jury establishes as a matter of law that essential evidence was illegally obtained or otherwise inadmissible, a motion to set the indictment aside should be granted. People v. Valenti, supra. Defendant contends that this is such a case and that the order should therefore be affirmed.

[6, 7] There was no direct testimony before the grand jury that the officers did not have a warrant. Officer Deiro testified, however, that in making the arrest he was acting on the information received from the informer and the People do not contend that the arrest should be sustained on the ground that the existence of a warrant must be presumed. Under these circumstances the only reasonable inference that can be drawn from the record is that the arrest, search, and seizure were made without a warrant. Accordingly, the question presented is whether information from an informer who has proved reliable in the past constitutes probable cause for an arrest when the officer does not know the identity of the informer.

This question is distinct from that presented in Priestly v. Superior Court, 50 Cal.2d 812, 330 P.2d 39. In that case the officer knew the identity of the informer but claimed a privilege not to disclose it. It was held that in such a case "when the prosecution seeks to show reasonable cause for a search by testimony as to communications from an informer, either the identity of the informer must be disclosed when the defendant seeks disclosure or such testimony must be struck on proper motion of the defendant." 50 Cal.2d at page 819, 330 P.2d at page 43. This rule is based on the requirement that the officer fully disclose the information on which he relies to enable the court to determine whether it constitutes reasonable cause. "A belief must or should rest upon a substantial basis. It is not a question of impugning the motives or doubting the honest belief of the agent in regard to the information which he may have received. It is simply requiring the witness to sustain his motives and his beliefs *by all the evidence at his command.*" United States v. Blich, D.C., 45 F.2d 627, 629. (Italics added.) If the officer does not know the name of the informer he does not suppress evidence by not stating it. He is not seeking to eat his cake and have it too; to rely on information and yet not reveal it. Since no privilege is claimed, the evidence of the information received cannot be excluded on the ground that one is claimed. See Willson v. Superior Court, 46 Cal.2d 291, 295, footnote, 294 P.2d 36. The question remains whether the information should nevertheless be held insufficient to constitute reasonable cause.

Evidence of information from a reliable informer is sufficient to sustain a finding that an arrest, search, and seizure were made with reasonable cause. Willson v. Superior Court, 46 Cal.2d 291, 294–295, 294 P.2d 36; People v. Boyles, 45 Cal.2d 652, 656, 290 P.2d 535; People v. Dupee, 151 Cal.App.2d 364, 367, 311 P.2d 568; People v. Dean, 151 Cal.App.2d 165, 167, 311 P.2d 85; Lorenzen v. Superior Court, 150 Cal.App.2d 506, 513, 310 P.2d 180; Trowbridge v. Superior Court, 144 Cal.App.2d 13, 18, 300 P.2d 222; see 9 Stan.L.Rev. 515, 523–524. "Although information provided by an anonymous informer is relevant on the issue of reasonable cause, in the absence of some pressing emergency [citation], an arrest may not be based solely on such information [citations], and evidence must be presented to the court that would justify the conclusion that reliance on the information was reasonable. [Citation.] In some cases the identity of, or past experience with, the informer may provide such evidence [citation],* and in others it may be supplied by similar information from other sources or by the personal observations of the police." Willson v. Superior Court, 46 Cal.2d 291, 294–295, 294 P.2d 36, 38. In the Willson case, as in this case, the informer did not identify himself to the officer, but we held that his information together with facts personally observed by the officer were sufficient to constitute reasonable cause for an arrest. Admittedly, an informer's failure or refusal to identify himself may cast doubt on the reliability of his information, but the fact that his information has proved reliable in the past is at least as persuasive of his present reliability as the corroborating suspicious circumstances observed by the officer in the Willson case; circumstances that alone were not sufficient to constitute reasonable cause. The testimony before the grand jury does not establish that essential evidence was illegally obtained, and accordingly, the trial court erred in setting aside the indictment.

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* Footnote omitted.

[8, 9] Defendant contends, however, that if reasonable cause may be established by information from an informer whose identity is unknown to the officer, the rule of the Priestly case may be circumvented by the officer's claiming ignorance instead of privilege and the door will be opened to justify illegal arrests on the basis of fictitious information from fictitious anonymous informers. It cannot be presumed, however, that officers will commit perjury (Lorenzen v. Superior Court, 150 Cal.App.2d 506, 510, 310 P.2d 180), and it must be presumed that trial courts will be alert to detect perjury if it does occur. See People v. Roberts, 47 Cal.2d 374, 378, 303 P.2d 721. Moreover, since the privilege of nondisclosure must be waived if the information is to be relied upon, the officer may be cross-examined fully as to facts that might tend to identify the informer and test the officer's credibility. His testimony is not limited to general statements that on previous occasions reliable information was given, and he cannot claim a privilege that the details would tend to identify the informer. His testimony can be elicited as to all of the details of the information claimed to have been received, and the officer must relate that information to actual arrests or investigations made in claimed reliance on it. Not only would it be difficult to fabricate such details, but since they must be related to actual facts, avenues of investigation to refute them may be opened. In the present case, for example, Officer Deiro testified with respect to previous information supplied by his informer as follows:

> "Some time in the latter part of 1956, approximately November or December, I received the first phone call from this person who at that time stated, he gave me a telephone number and told me that bookmaking was being conducted at that telephone number and that it was a 'back office.'
>
> * * *
>
> "It [the telephone number] was checked out through the telephone company and it was registered at 229 North New Hampshire Avenue. An investigation was conducted after this information was received, and surveillance disclosed that two known bookmakers, whom I had arrested before, were entering this location in the morning and leaving in the evening. Our investigation was conducted for approximately two weeks at which time we made an arrest. This particular case went to trial; the individuals were held to answer, the case was dismissed on a 995 motion, and later on the District Attorney's office appealed it, and I have received a subpoena this week to testify in Superior Court in regards to this particular case."

In People v. Cicchello, 157 Cal.App.2d 158, 320 P.2d 528, the District Court of Appeal reversed an order granting a motion to set aside an information charging bookmaking at 229 North New Hampshire. We have found no other appellate opinion filed between the latter part of 1956 and the date Officer Deiro testified in this case involving that address. From the opinion it appears that the arrests were made by Officers Evans and Deiro in February 1957, and that the investigation was undertaken on the basis of information supplied to Officer Evans who in turn passed it on to Officer Deiro. From the record in that case it appears that Officer Deiro was asked at the preliminary hearing whether "Prior to making this arrest, had you received any information from a confidential informant regarding the defendants in this case?" He answered, "Myself, personally, no, sir."

When the present case goes to trial Officer Deiro may be cross-examined as to whether the arrest he testified to before the grand jury was the same arrest described in the Cicchello case, and if so, he may be asked to explain the discrepancy in his testimony on the two occasions. Of course, if he did not personally converse with the informer on the previous occasions referred to, he would have no basis for concluding that the informer in the present case was the same informer who had proved reliable in the past, for it was solely by the sound of the informer's voice that Officer Deiro identified him. These possible discrepancies were not before the grand jury, however, and Officer Deiro has had no opportunity to explain them.

[10, 11] Defendant moved to augment the record on appeal by adding thereto the minutes of the Municipal Court of the Los Angeles Judicial District in case number 143900, entitled People v. Henry Victor Prewitt, and a certified copy of the complaint filed in that court on March 3, 1958, wherein defendant was accused of violating section 337a of the Penal Code. In support of the motion defendant has filed an affidavit of one of his counsel that the defendant named in the municipal court action is the defendant in the present case; that the charge contained in the indictment in the instant case is identical with the charge contained in the complaint filed in the municipal court; and that after a preliminary examination at which substantially the same evidence was presented to the magistrate as was presented to the grand jury, "said case was dismissed by reason of the fact that the evidence had been unlawfully obtained, in violation of the rules laid down in the case of People v. Cahan, 44 Cal.2d 434 [282 P.2d 905, 50 A.L.R.2d 513]."

Defendant contends that the doctrines of res judicata and collateral estoppel are applicable to establish that the evidence in the present case was unlawfully obtained. The dismissal of an information or indictment, however, will not bar a trial based on a subsequent accusatory pleading charging the identical offense. Pen.Code, § 999; Ex parte Fenton, 77 Cal. 183, 19 P. 267; People v. Joseph, 153 Cal.App.2d 548, 314 P.2d 1004; see also In re Begerow, 136 Cal. 293, 298–300, 68 P. 773, 56 L.R.A. 528; People v. Beltran, 94 Cal.App.2d 197, 203–205, 210 P.2d 238. This rule specifically applies when the previous dismissal was based on the magistrate's conclusion that the evidence was illegally obtained. People v. Joseph, supra, 153 Cal.App.2d 548, 314 P.2d 1004; see also Badillo v. Superior Court, 46 Cal.2d 269, 272–273, footnote, 294 P.2d 23. There is no merit in defendant's assertion that to relitigate the question of the admissibility of the evidence denies him due process of law. People v. Ferrera, 149 Cal.App.2d 850, 852, 309 P.2d 533.

The motion to augment the record is denied. The order setting aside the indictment is reversed.

GIBSON, C. J., and SCHAUER, McCOMB and PETERS, JJ., concur.

SHENK and SPENCE, JJ., concur in the judgment.

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52 Cal.2d 310

Lawrence John ARDEN, Petitioner,

v.

STATE BAR OF CALIFORNIA, Respondent.

L. A. 25269.

Supreme Court of California, In Bank.

June 19, 1959.

As Modified July 15, 1959.

Disciplinary proceeding against attorney. The Supreme Court held that record warranted discipline by public reprimand.

Order in accordance with opinion.

1. Attorney and Client 🔑64

Fact that there were no formal arrangements would not negate existence of attorney-client relationship. West's Ann. Bus. & Prof.Code, §§ 6068(e), 6103.

2. Attorney and Client 🔑57

In disciplinary proceeding against attorney, Supreme Court is empowered to review whole record, and, even though findings by Board of Governors of State Bar are entitled to great weight, Court is not bound by them, and their precise wording is not of vital importance. West's Ann.Bus. & Prof.Code, §§ 6067, 6068, and (d, e), 6103; Rules of Professional Conduct, rules 5, 7, West's Ann.Bus. & Prof.Code following section 6076.

3. Attorney and Client 🔑54

In disciplinary proceeding against attorney, record revealed that attorney was not prejudiced because of fact that proceedings exceeded time limits expressed in rules providing such limits with respect to preliminary hearings and proceedings on notice to show cause. Rules of Procedure of State Bar, rules 20(a), 21(a), 34, West's Ann.Bus. & Prof.Code following section 6087.

4. Witnesses 🔑275(1)

In disciplinary proceeding against attorney, record revealed that attorney was not unduly limited in his cross-examination of complaining witness.

5. Attorney and Client 🔑57

In disciplinary proceeding against attorney, record did not sustain attorney's contention that he had been prejudiced by service, in middle of proceedings, of amended notice which merely elaborated on charges contained in original notice and made them more specific and to which he did not object or file an answer.

6. Attorney and Client 🔑53(2)

In disciplinary proceeding against attorney, evidence indicating that natural mother had given her consent to her attorney's representation of persons wishing to adopt her child, sustained local committee's finding that he had not violated rule precluding attorney from representing conflicting interests except with consent of all parties. Rules of Professional Conduct, rule 7, West's Ann.Bus. & Prof.Code following section 6076; Rules of Procedure of State Bar, rule 30, West's Ann.Bus. & Prof.Code following section 6087.

7. Attorney and Client 🔑20

Where, with consent of mother of child, attorney was employed both by her and by persons seeking to adopt child, communications between mother and persons seeking to adopt child and between mother and attorney were not confidential within meaning of rule providing that member of bar shall not accept employment, adverse to client or former client without consent of client or former client, relating to a matter with reference to which he has obtained confidential information by reason of or in course of his employment by such client or former client. Rules of Professional Conduct, rule 5, West's Ann.Bus. & Prof.Code following section 6076.

8. Attorney and Client 🔑38

In view of disparity of opinion over whether mere representation of both parties to adoption proceeding, with consent, constitutes violation of rules of ethics, it would not be proper to discipline an attorney for so representing both parties with consent. Rules of Professional Conduct, rule 5, West's Ann.Bus. & Prof.Code following section 6076.

9. Attorney and Client 🔑58

Evidence warranted discipline of attorney by public reprimand.

10. Attorney and Client 🔑58

Attorney's motives and character of his acts could be considered in mitigation of and determination of measure of discipline to be imposed on him.

11. Attorney and Client 🔑58

That disciplinary proceedings had been pending for over three years could be considered in determining measure of discipline to be imposed on attorney.

Darling, Shattuck & Edmonds and Edward S. Shattuck, Los Angeles, for petitioner.

Charles F. Howard, Beverly Hills, and Garrett H. Elmore, San Francisco, for respondent.

PER CURIAM.

Petitioner seeks review of a recommendation of the Board of Governors of the State Bar that he be suspended from the practice of the law for thirty days. Five of the thirteen members of the Board of Governors participating in the proceedings voted against the recommendation, four on the expressed ground that the "degree of discipline recommended is too severe".

Petitioner was admitted to the practice of the law in 1951. At the time of the occurrences here involved he had been in practice for three years, and was 28 years of age. Prior to the filing of the original notice to show cause in this proceeding, no prior charge of misconduct had been filed against petitioner.

The notice to show cause was amended during the trial of these proceedings. As amended, it charged petitioner with (1) Violation of the confidence of a client in violation of section 6068, subd. (e) of the Business and Professions Code; (2) Failing to fairly and honestly represent a client in violation of sections 6067 and 6068 of the Business and Professions Code; (3) Commission of various acts involving moral turpitude; (4) Misleading a judge in violation of section 6068, subd. (d) of the Business and Professions Code; (5) Violation of Rule 7 of the Rules of Professional Conduct by representing conflicting interests; (6) Violation of Rule 5 of the Rules of Professional Conduct by accepting employment adverse to a client without the consent of that client; and (7) Wantonly disregarding the oath and duties of an attorney within the meaning of section 6103 of the Business and Professions Code.

The facts as found by the Board, it having adopted in part the findings of the local committee, are as follows:

In early 1954 petitioner was employed by Miss Karen Mattson, an unmarried girl 18 years old, who told him that she was pregnant and that, when the child was born, she wanted to have it adopted. Petitioner undertook to handle the problem, informing her that a public agency could handle the adoption, or that it could be handled privately. Miss Mattson preferred a private adoption. Petitioner first advised his client to tell her parents about her pregnancy, but she refused. He thereupon placed her in the home of one of his friends where she remained until the birth of the child. To assist in the deception of the parents, he arranged a false mailing address for her in Detroit.

Through the efforts of petitioner, Miss Mattson was introduced to several prospective parents. She selected a Mr. and Mrs. Abraham Cohen to be the adoptive parents of her child. At their request, and with the knowledge and consent of Miss Mattson, petitioner was employed to represent the Cohens in the adoption proceedings. Petitioner was paid $250.00 by the Cohens for this purpose. He was paid nothing by Miss Mattson.

The child was born in August of 1954, and, with Miss Mattson's consent, was immediately delivered to the Cohens. On August 26, 1954, the court appointed the Cohens guardians of the child. The petition, which had been filed by petitioner, contained the express consent of Miss Mattson to the appointment. Several days later, with Miss Mattson's knowledge and consent, petitioner filed a petition for adoption of the child on behalf of the Cohens.

In November of 1954 Miss Mattson told petitioner that she thought she now wanted to keep her child. She did not, however, request petitioner to take any legal action to revoke the guardianship or to in any way interfere with the adoption proceedings. In December, 1954, she apparently changed her mind again because, in that month, she gave her written consent to the adoption at a conference at the Los Angeles County Bureau of Adoptions.

On January 14, 1955, Miss Mattson visited the Cohens at their home and demanded $3000.00 or the return of the child. Mr. Cohen told her to call him at the petitioner's office at a designated time on the following day. She telephoned that office three times. The first two of these telephone communications were tape recorded by petitioner. In the third telephone conversation, petitioner told Miss Mattson that he had advised the Cohens not to pay her, that he had recorded their prior conversations, that the recordings showed an attempt at extortion which was a criminal offense for which she could be prosecuted, that the tapes would be available in connection with any action she might take to have her child returned, but that if the adoption went through without any action on her part to obtain the child, he would destroy the tapes. Thereafter petitioner discussed the matter of the tape recordings with the District Attorney. The nature of this discussion does not appear in the record.

In March, 1955, the court granted a petition to have Miss Mattson's consent to the adoption set aside. This petition was filed by an attorney other than petitioner employed by Miss Mattson in January of that year. Prior to the hearing on the petition to revoke consent, an attorney was substituted for the petitioner as the attorney of record for the Cohens. Prior to and during this hearing the petitioner cooperated with the Cohens and their attorney in the preparation and conduct of their opposition to the petition. After the court had granted Miss Mattson's petition, petitioner was substituted as attorney of record for the Cohens. As their attorney he filed an appeal from the court's order, but was in turn substituted out of the case prior to any hearings or action on the appeal.

[1] The petitioner challenges some of these findings. He first challenges the finding that he "was employed by Miss Karen Mattson," on the ground that the record shows that no formal employment was ever entered into. The point is without merit. Obviously, an attorney-client relationship existed. The fact that there were no formal arrangements is immaterial. Brydonjack v. Rieck, 5 Cal.App.2d 219, 42 P.2d 336. It is of some significance that petitioner, throughout the hearings before the local committee, referred to his being "hired" by Miss Mattson.

As to the balance of the findings, petitioner does not claim that they are unsupported by the record or are erroneous, but does urge that they do not adequately present the facts. He contends that the findings should have shown that the petition to set aside the consent to the adoption was largely predicated on a personal attack on him. An examination of that petition discloses that it does contain serious charges against petitioner. As to the balance of the findings, petitioner would like them reworded so as to place him in a more favorable light. An examination of the record, however, discloses that the findings are reasonably accurate and do not omit any material facts.

[2] The precise wording of the findings is not of vital importance because this court is not bound by the Board's findings (Higgins v. State Bar, 46 Cal.2d 241, 293 P.2d 455), even though such findings are "entitled to great weight" (Light v. State Bar, 14 Cal.2d 328, 94 P.2d 35, 36). This court is empowered to review the whole record. This has been done.

[3] The petitioner next attacks some of the proceedings before the local committee. He contends that the hearings before the local committee violated the Rules of Procedure of the State Bar in that they were of a far longer duration than provided for in Rules 21(a) and 34. That the proceedings exceeded the time limits expressed in these rules is obvious. The original notice to show cause was filed May 15, 1956. Thereafter, there were certain delays exceeding the time periods set forth in the Rules of Procedure of the State Bar. Rule 21(a) prescribes certain time limits for preliminary hearings, and Rule 34 prescribes certain time limits for the pro-

ceedings on a notice to show cause. But Rule 20(a) provides that "the purpose of rule 21(a) and rule 34 is to expedite processing of complaints, the conduct of preliminary investigations and formal disciplinary proceedings, so that such matters shall be disposed of at the earliest practicable time. Failure to act within the time or times specified in rules 21(a) and 34 shall not bar consideration of an action on a complaint nor any proceedings, formal or informal, as in these rules provided."

Petitioner asserts, however, that Rule 20(a) should not apply because in this case a "gross injustice" was done to him by the violation of Rules 21(a) and 34. The claimed "injustice" done to the petitioner is that because of the delay his future was made uncertain for about two years. Undoubtedly this created a period of pressure and tension for petitioner, but this fact alone does not require a dismissal of these proceedings. The drafters of the rules knew, of course, of the inconvenience that would be occasioned by delays in disciplinary proceedings. Had they felt that compliance with Rules 21(a) and 34 should be jurisdictional, they would have so stated. To the contrary, it was expressly stated that noncompliance was not jurisdictional. It should also be pointed out that petitioner admits that during the pendency of the proceedings, he has been engaged in an active practice. Under these circumstances, no prejudicial error appears because of the long duration of the proceedings.

[4] The petitioner next complains that he was unduly limited in his cross-examination of the complaining witness. Miss Mattson was a difficult witness. She was obviously hostile to petitioner. The record shows that she frequently became emotionally upset. The local committee, in an apparent effort to obviate her temper tantrums which had resulted in her absence from the proceedings on several occasions, did limit petitioner's questioning. But the record also shows that this was only done when it was clear that nothing beneficial could be secured from the witness by further questioning. Where evidence was important the committee gave the petitioner broad leeway enabling him to bring out matters not in the scope of direct, and other evidence which was merely cumulative. The hostility and antagonism of the witness often prevented her from answering the petitioner's questions. At these times the committee would suggest questions to the petitioner, or assume the questioning itself, in order to attempt to ascertain the relevant facts. Under all the circumstances, it is clear that petitioner was not improperly limited in his cross-examination.

[5] The petitioner's next contention is that the amendment of the notice to show cause in the middle of the proceedings was erroneous and prejudicial. The original notice is dated May 15, 1956, and the amended notice was filed on August 24, 1956. The amended notice merely elaborated on the charges contained in the original notice, and made them more specific. The amendment was proper. Rule 30 of the Rules of Procedure provides that amendments to a notice to show cause may be made at any time prior to the conclusion of the hearing, and that the respondent must be given a reasonable opportunity to answer and prepare his defense against the charges stated in the amendment. Such opportunity was here given. Moreover, it should be mentioned that petitioner did not object to the filing of the amended notice or submit an answer thereto.

[6] The local committee concluded that petitioner had not violated Rule 7 of the Rules of Professional Conduct, because Miss Mattson had knowledge of and consented to the petitioner's representation of the Cohens in the adoption proceedings, and also because no conflict of interests existed until some time after her consent to the adoption had been filed. This determination was correct.

Rule 7 provides that "a member of the State Bar shall not represent conflicting interests, except with the consent of all parties concerned." There is evidence in the record indicating that Miss Mattson gave her consent to petitioner's representation of the Cohens as early as June of 1954. Miss Mattson told petitioner she wanted the baby back in November of 1954, but this appears to have been merely an illustration of her variable attitude toward the adoption. She later changed her mind again and signed the consent for adoption. Under these circumstances, it cannot be said that petitioner was improperly representing conflicting interests.

[7] Strangely enough, although the local committee found petitioner had not violated Rule 7, it found that petitioner had violated Rule 5 of the Rules of Professional Conduct, which provides that "a member of the State Bar shall not accept employment adverse to a client or former client, without the consent of the client or former client, relating to a matter in reference to which he has obtained confidential information by reason of or in the course of his employment by such client or former client."

Since it had properly been found that the petitioner had not represented conflicting interests until some time after the consent to adoption had been filed, it is apparent that the found violation of Rule 5 must have occurred after that time. It may be assumed that the found conflict is supposed to have occurred after the time Miss Mattson demanded money or the child, and after the time of the taped telephone conversations. Thus the claimed violation of Rule 5 must be that after that time petitioner represented the Cohens and assisted them in the action to set aside the consent to adoption.

The cases show that these facts do not constitute a violation of Rule 5. There are two cases discussed by the parties. In Croce v. Superior Court, 21 Cal.App.2d 18, 68 P.2d 369, the petitioner sought to disqualify the attorney who was representing the adverse party in a lawsuit. This attorney had formerly represented both of the parties. In Petty v. Superior Court, 116 Cal.App.2d 20, 253 P.2d 28, the petitioner, an attorney, sought to annul an order restraining him from representing a client in an action where he had formerly been employed by both litigants. In both cases the courts held that the attorney was properly representing one of the clients against the other client. The rationale for these decisions is that the common employment of the attorney removed the communications of the parties to one another and to the attorney from the privileged category. The communications not being deemed confidential, there is no impediment to or impropriety in the adverse representation by the attorney. In the Croce case, the petitioner urged the applicability of Rule 5 of the Rules of Professional Conduct in support of its motion to disqualify. This contention was rejected, the court saying, at page 20, of 21 Cal.App.2d, at page 370, of 68 P.2d, that Rule 5 was only "controlling in cases of disclosure to a stranger of confidential information obtained from a client."

The rule stated in these cases applies to the facts of the instant case. Here petitioner had been employed by both Miss Mattson and the Cohens in the adoption proceeding. As has been pointed out above, this dual representation was found to be proper. The communications from Miss Mattson to the Cohens and to the petitioner, and vice versa, were, therefore, not confidential.

It is suggested that the mere representation of both parties to an adoption, even with consent, may constitute a violation of the rules of professional conduct. On this issue the members of the Bar have expressed opposite views. In a handbook published in 1956 by the Continuing Education of the Bar entitled "Family Law for California Lawyers" it was urged that such dual representation was permissible. In the State Bar Journal of July–August 1957 (32 State Bar Journal 343) opinions to the contrary were published. The issue is a highly debatable one. No clear-cut rule on the subject has been announced. It is not proper to discipline an attorney for a violation of a claimed principle that was and is so highly debatable.

Of course, as part of a lawyer's dual representation in such cases a lawyer must convey information from one party to the other. But this was fully disclosed to Miss Mattson.

Petitioner testified before the local committee: "* * * I told Miss Mattson that in a matter such as this, it would be necessary, if I were to handle her matter, for me to tell any party interested in the matter all the information that would come to my attention; and likewise, to tell Miss Mattson any information that would come to my attention with respect to the other party; that * * * there would be a complete and free exchange of all information, and there would be no confidences as such; that as against all third parties and the rest of the world, obviously, there would be a maintenance of confidences; and that unless I had the freedom of telling any interested parties all that I knew about Miss Mattson, including information that she gave me, including opinions I might have, and the result of any observations I might have made, and that I would likewise be able to make similar statements to her about the other parties, I would not be interested in representing her."

For these reasons, it does not appear that the information obtained by petitioner was confidential as between the parties to the adoption. The information not being confidential, there has been no violation of Rule 5.

It should also be pointed out that in the proceeding to revoke consent Miss Mattson in her petition made a strong attack upon petitioner. It has been stated that: "Whenever the disclosure of a communication, otherwise privileged, becomes necessary to the protection of the attorney's own rights, he is released from those obligations of secrecy which the law places upon him." Thornton, Attorneys at Law, Vol. I, § 127, p. 220; Canon 37, Canons of Professional Ethics of the American Bar Association. The charges made in Miss Mattson's petition were most serious and called for refutation by petitioner. Since these charges were a part of, if not the basis for, the petition to set aside the consent, it would appear that they would best be answered by aiding the Cohens in preparing their defense.

There remains for consideration the charge that petitioner committed acts involving moral turpitude in violation of section 6106 of the Business and Professions Code. In general, the acts alleged to involve moral turpitude are: (1) failure to give notice to Miss Mattson of the time and place of the hearing for the appointment of a guardian; (2) concealment of the mental illness of Miss Mattson's mother; (3) abandonment of the cause of a client; (4) participation in a plan to conceal the fact of pregnancy from Miss Mattson's parents; and (5) tape recording a telephone conversation of a client, or former client, without her knowledge at the time, and disclosing the contents to adverse parties and threatening and attempting to use the recordings adversely to the interests of a client or former client.

The local committee concluded that only (2) and (5) were violations of section 6106. The Board omitted (2) from its findings. Thus the only charge found to involve section 6106 is the tape recording incident. This, we believe, was a violation of the section.

After Miss Mattson had demanded $3,000 from the Cohens, and after petitioner had recorded his conversations with Miss Mattson, he told her "that the tape recordings would be available in connection with any action she might take to have her child returned" and "that if the adoption went through without any action on her part, seeking to return the child, that so far as I [he] was concerned, I [he] would destroy the tapes." Petitioner contends that this statement was merely a statement of intent on his part and was not in any way a threat.

It is quite obvious that this constituted a threat. Miss Mattson's demand for $3,000 or return of the baby bordered on, if it did not constitute, attempted extortion. In the taped conversation between petitioner and Miss Mattson, petitioner told Miss Mattson that her demand was an attempt at extortion for which she could be prosecuted. Thus, it is clear that petitioner was threatening her with a prosecution unless she desisted from her threat to interfere with and overturn the pending adoption.

[9] "Moral turpitude, broadly defined, is conduct which is contrary to justice, honesty and good morals." Fall v. State Bar, 25 Cal.2d 149, 160, 153 P.2d 1, 6. Petitioner's conduct, whether or not it constitutes attempted extortion (see Librarian v. State Bar, 38 Cal.2d 328, 239 P.2d 865, and Lindenbaum v. State Bar, 26 Cal.2d 565, 160 P.2d 9), is such as to fall within this definition. Although petitioner is a young attorney and his conduct may have been prompted by the reprehensible actions of Miss Mattson, it is nonetheless conduct that cannot be countenanced.

[10, 11] The Board has recommended that petitioner be suspended for thirty days. We believe that, under the circumstances, that punishment is too severe. It will be remembered that four members of the Board of Governors believed that the punishment was excessive. Petitioner's youth and inexperience have already been mentioned. While the circumstances in which he acted can furnish no excuse, his motive and the character and acts of his client may be considered in mitigation in determining the measure of discipline. McGrath v. State Bar, 21 Cal.2d 737, 741, 135 P.2d 1. Clearly, at all times, petitioner had the best interests of the child in mind. Miss Mattson's character has been sufficiently indicated herein. Further, we must also consider that these proceedings have been hanging over the petitioner's head for more than three years. That, in itself, is a severe ordeal. Gray v. State Bar, 7 Cal.2d 177, 181, 59 P.2d 1033.

It is our conclusion that petitioner should be disciplined by a public reprimand and that this opinion shall constitute such reprimand. It is so ordered.

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52 Cal.2d 373

C. K. SIMMONS, Petitioner,
v.
SUPERIOR COURT of the State of California IN AND FOR SANTA BARBARA COUNTY, Respondent,

Santa Barbara Ice & Cold Storage Co. (a Corporation) et al., Real Parties In Interest.

L. A. 25320.

Supreme Court of California,
In Bank.
June 24, 1959.
Rehearing Denied July 22, 1959.

Proceeding for certiorari to review order of Superior Court, Santa Barbara County, Ernest D. Wagner, J., dismissing petitioner's second amended complaint. The Supreme Court, Traynor, J., held that where order of dismissal was entered in minutes of court by clerk pursuant to oral instruction in chambers by judge, and although petitioner was required to appeal within 60 days therefrom, he failed to do so because clerk had never sent him notice of order and he did not obtain actual notice until almost 7 months after entry, certiorari was not available to petitioner.

Order of dismissal affirmed.

Shenk and Schauer, JJ., dissented.

See also 162 Cal.App.2d 23, 327 P.2d 141.

1. Certiorari ⚷5(1), 28(1)

Certiorari is available only when it can be shown that inferior court has exceeded its jurisdiction and that there is no appeal, nor any plain, speedy, and adequate remedy open to party seeking the writ, but writ will not issue if petitioner had right of appeal from order or judgment in question and permitted time to lapse without perfecting appeal. West's Ann.Code Civ.Proc. § 1068.

2. Certiorari ⚷5(2)

Where clerk of superior court, pursuant to oral instruction by judge in chambers entered in minutes of court order of dismissal of second amended complaint, and although petitioner was required to take appeal within 60 days therefrom, he failed to do so because clerk did not send him notice of order and he did not obtain actual notice until almost 7 months after entry, certiorari was not available to petitioner. West's Ann.Code Civ.Proc. § 1068.

3. Pleading 🔑360(1)

Petitioner was not entitled to notice of dismissal of complaint by superior court.

4. Certiorari 🔑5(2)

It is duty of litigant to protect his own record in each step of proceedings, and his failure to do so, in absence of reasonable justification, does not entitle him to extension of time for appeal by resort to writ of certiorari. West's Ann.Code Civ. Proc. § 1068.

5. Pleading 🔑254

Where demurrer to second amended complaint was sustained with leave to amend but petitioner elected to stand on pleadings, although court could reconsider the demurrer, defendant was entitled to have dismissal entered on motion in absence of counsel for plaintiff and without notice to counsel for plaintiff.

6. Certiorari 🔑28(2)

Under statute which provides for writ of certiorari if inferior tribunal exceeds jurisdiction, superior court, in causing order of dismissal of second amended complaint to be entered by clerk in minutes of court by oral direction from chambers, after matter had been properly noticed and hearing had been held in which parties appeared, did not exceed its jurisdiction. West's Ann.Code Civ.Proc. § 1068.

7. Courts 🔑92

Incidental statements of conclusions by Supreme Court not necessary to decision are not to be regarded as authority but are only dicta.

8. Motions 🔑56(1)

Crucial question in determining proper procedure for rendition of order that has been heard in open court is whether written record of disposition of motion is made by court.

9. Judges 🔑27

Where motion to dismiss second amended complaint had been brought on for hearing pursuant to due and sufficient notice thereof, and after hearing in open court in presence of both parties, who had opportunity to argue merits, matter was submitted to court for determination, and only act done in chambers was oral instruction by judge to clerk to enter in minutes of court final determination of motion, statute relating to powers of judges of superior courts at chambers in matters within court's jurisdiction did not apply. West's Ann.Code Civ.Proc. § 166.

Price, Postel & Parma, H. Clarke Gaines and Gerald S. Thede, Santa Barbara, for petitioner.

No appearance for respondent.

Griffith & Thornburgh and Laselle Thornburgh, Santa Barbara, for real parties in interest.

TRAYNOR, Justice.

Petitioner commenced an action in the respondent court against the Santa Barbara Ice and Cold Storage Company and others. After the defendants' demurrer to a second amended complaint was sustained with leave to amend, a "Notice of Motion to Dismiss" was filed on the ground that petitioner had failed to amend his complaint within the time allowed by the court. The matter came on for hearing on August 27, 1956. Petitioner appeared at the hearing and stated that he elected to stand on the pleadings, but opposed the motion on the ground that the demurrer had been improperly sustained. The court then stated that it desired to check the file, and after doing so instructed the clerk, in chambers, that the motion to dismiss was granted. The order was entered in the minutes of the court on the same day. No notice appears to have been given petitioner or his counsel of the fact that the motion had been granted, and he states that he did not learn of the dismissal until March 18, 1957, almost five months after the time for appeal had expired. In this proceeding, petitioner seeks certiorari to review the order of dismissal on the grounds that the respondent court exceeded its jurisdiction by causing the order of dismissal to be entered in this manner, and that since he had no notice of the fact that the order had been entered, the remedy of appeal was not available to him.

[1] Certiorari is available only when it can be shown that an inferior court has exceeded its jurisdiction and that "there is no appeal, nor * * * any plain, speedy, and adequate remedy" open to the party seeking the writ. Code Civ.Proc. § 1068; Noble v. Superior Court, 109 Cal. 523, 526, 42 P. 155; Olcese v. Justice's Court, 156 Cal. 82, 84–88, 103 P. 317; Leach v. Superior Court, 215 Cal. 531, 534–535, 12 P.2d 1; Ivory v. Superior Court, 12 Cal.2d 455, 459–460, 85 P.2d 894; Redlands High School Dist. v. Superior Court, 20 Cal.2d 348, 351, 125 P.2d 490. The writ will not issue if the petitioner had a right of appeal from the order or judgment in question and permitted the time to lapse without perfecting an appeal. If there was an opportunity to appeal and it was lost through the neglect of the aggrieved party, the subsequent absence of this remedy cannot be asserted as a reason for issuing the writ. Leach v. Superior Court, 215 Cal. 531, 534–535, 12 P.2d 1; State Board of Equalization v. Superior Court, 9 Cal.2d 252, 255, 70 P.2d 482; Ivory v. Superior Court, 12 Cal.2d 455, 459–460, 85 P.2d 894; Howaldt v. Superior Court, 18 Cal.2d 114, 116–117, 114 P.2d 333; Phelan v. Superior Court, 35 Cal.2d 363, 370–371, 217 P.2d 951.

[2] Under these rules it is clear that certiorari is not available to petitioner. The record shows that the order of dismissal was entered on August 27, 1956, and that petitioner was required to take his appeal within sixty days of that date. He offers no excuse for his failure to do so except that he did not have actual knowledge of the court's ruling. He offers no explanation for his failure to discover the court's order until March 18, 1957, except that the clerk did not send him notice. Such circumstances do not justify an exception to the general rules.

[3–5] Petitioner was not entitled by law to any notice of the court's ruling, and the fact that he did not have actual notice of the ruling is therefore immaterial. Arens v. Superior Court, 45 Cal.2d 623, 625, 290 P.2d 257. It is a litigant's duty to protect his own record in each step of the proceedings, and his failure to do so, in the absence of reasonable justification, does not entitle him to an extension of the time for appeal by resort to a writ of certiorari. See In re Estate of Hanley, 23 Cal.2d 120, 122–124, 142 P.2d 423, 149 A.L.R. 1250; Palomar Refining Co. v. Prentice, 47 Cal.App.2d 572, 573, 118 P.2d 322. No circumstances are disclosed that would justify petitioner's failure to keep himself informed of the court's action on the motion to dismiss. He could have become aware of the court's ruling merely by checking the minutes of the court Even a telephone inquiry would have disclosed the status of the case. Such a minimum amount of diligence would seem to be particularly essential in a case like the present one, where the adverse party was entitled to have the order in question entered as a matter of course, and where, therefore, it was likely that a ruling would be forthcoming shortly.[1] Having had an appeal available that was lost through the running of the time within which to appeal, petitioner may not now have certiorari to review the order of dismissal.

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[1] It appears that defendant's demurrer to the complaint was sustained with leave to amend, but that defendant elected to stand on the pleadings. In such a case, although the court may reconsider the demurrer, the defendant is entitled to have a dismissal entered on motion in the absence of counsel for plaintiff and without notice to him. Saddlemire v. Stockton Savings & Loan Soc., 144 Cal. 650, 655–656, 79 P. 381; Berri v. Superior Court, 43 Cal.2d 856, 860, 279 P.2d 8.

Petitioner's reliance on Elder v. Justice's Court, 136 Cal. 364, 68 P. 1022, and Grinbaum v. Superior Court, 192 Cal. 528, 221 P. 635, is misplaced. In each case extremely unusual circumstances existed that were held to justify issuance of the writ, even though there was a right to appeal in the first instance. In the Elder case, the aggrieved party not only had no notice of the fact that a default judgment had been entered against him, but had no notice or knowledge of the time fixed for trial of the dispute or that the matter had been called and the motion for default made and granted. In setting aside the judgment, the court held that certiorari was a proper remedy since the statutory requirement for notice of the day fixed for trial (Code Civ.Proc. § 850) had not been complied with and defendant had acted with diligence as soon as he learned that the default judgment had been entered against him. It does not appear that the defendant was negligent in failing to discover entry of the judgment, which, for some unexplained reason, did not occur until over four years after the action was commenced. In the Grinbaum case the petitioner was adjudged insane in a proceeding in which she did not appear. She was given no notice of the original proceedings or of the application for the order or of the hearing thereon, as required by statute. Code Civ.Proc. §§ 1763, 1793. In answer to the contention that certiorari was not a proper remedy to review the order because of the fact that an appeal had been available, the court stated: "[I]t is obvious from the state of this record that the petitioner neither had nor was in any condition to receive notice of the making of such order or of the defects in the same during the statutory time when such appeal might have been taken." 192 Cal. at page 556, 221 P. at page 647. Only two other cases have been found that hold that certiorari is a proper remedy when the right to appeal has been lost by the running of time due to lack of knowledge of the fact that judgment had been entered. Lee v. Small Claims Court, 34 Cal.App.2d 1, 92 P.2d 937; O'Kuna v. Small Claims Court, 81 Cal.App. 588, 254 P. 291. Neither case holds, however, that lack of knowledge, in itself, is sufficient justification for issuance of the writ. In neither case is it suggested that the petitioner was in any way negligent in failing to discover that judgment had been entered against him. In light of the fact that both cases involved small claims judgments, where the time for appeal was extremely short[2] and where litigants are not permitted to be represented by counsel, there was reasonable justification for the failure of the aggrieved party to discover the entry of judgment. (See 1 Witkin, California Procedure, 235; 36 Cal.L.Rev. 558, 568.) These cases are all clearly distinguishable from the present one, where the reason for petitioner's lack of knowledge of the order of dismissal was merely his failure to keep himself informed of the status of the case.

[6–9] Moreover, in causing the order of dismissal to be entered in the minutes by oral direction from chambers, the court did not exceed its jurisdiction. The order was entered in the minutes of the court on the same day that the motion to dismiss was made, after the matter had been properly noticed and a hearing had been held in which the parties appeared, in accordance with the judge's instructions to his clerk. Petitioner contends that the trial judge lacked the authority to order in chambers that the dismissal be entered in the minutes without filing a formal written order to that effect. In support of this contention petitioner relies on a statement in United Railroads of San Francisco v. Superior Court, 197 Cal. 687, 242 P. 701, that an order granting a new trial can only be made by oral pronouncement in open court or by filing a formal written order signed by the judge. In that case, a motion for new trial was granted by a formal written order duly signed and filed by the judge. It was urged that an order granting such a motion could not be effective unless the judge "betake himself to the courtroom in which the hearing had been had and there mount the bench and formally and audibly pronounce an order granting the motion for a new trial, and that by no other method could such an order be lawfully rendered." 197 Cal. at page 692, 242 P. at page 703. The court rejected this contention and held that, in addition to the suggested method, the method followed by the trial judge was entirely proper. Any statement in that opinion implying that these two methods are exclusive, however, is dicta, since to decide the matter under consideration it was necessary for the court to hold only that the method there employed was proper or improper. Incidental statements of conclusions not necessary to the decision are not to be regarded as authority. People v. McAllister, 15 Cal.2d 519, 523, 102 P.2d 1072. Moreover, later cases lend support to the view that the procedure used by the trial judge in the present case is also proper. Dempsey v. Market Street R. Co., 23 Cal.2d 110, 142 P.2d 929; Cox v. Tyrone Power Enterprises, 49 Cal.App.2d 383, 121 P.2d 829; Gossman v. Gossman, 52 Cal. App.2d 184, 126 P.2d 178; Hackel v. Los Angeles Railway Corp., 31 Cal.App.2d 228, 88 P.2d 178. These cases hold that when the court orders the clerk to enter a minute order, the order so entered in the minutes is a written order of the court, and no formal writing signed by the court and filed with the clerk is necessary. Whether the orders of the court in those cases were delivered to the clerk in chambers or from the bench does not appear from the published opinions, but no significance should be attached to that circumstance. The crucial question in determining the proper procedure for rendition of an order that has been heard in open court,[3] is whether a written record of the disposition of the motion is made by the court. The act of instructing the clerk to enter the order in the minutes, whether in chambers or on the bench, followed by entry in the minutes is the equivalent of signing a formal order and filing it with the clerk. In Dempsey v. Market Street R. Co., 23 Cal.2d 110, 142 P.2d 929, we held that under section 657 of the Code of Civil Procedure a written entry in the minutes is sufficient when a new trial is granted on the ground of insufficiency of the evidence. We stated: "Section 657 is subject to the construction that there must be a separate, formal, written order, in addition to a minute entry * * * but it may also be construed as requiring merely that a written record of that ground must be made within the ten-day period. We feel the latter construction is preferable because it accomplishes the result intended by the Legislature and at the same time conforms to existing practice, retains simplicity and uniformity in procedure, and avoids the introduction of an additional and wholly unnecessary procedural requirement, the failure to observe which would render ineffectual the considered action of a court." 23 Cal.2d at page 114, 142 P.2d at page 930.

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[2] Formerly, appeal from such a judgment had to be taken within five days of entry of judgment and there was no requirement for notice of such entry. In 1951, the statute was amended to provide that an appeal may be taken "within 10 days of the mailing [to defendant] of notice of entry of judgment." Code Civ. Proc. § 117j.

Since the trial court did not exceed its jurisdiction in the present case and an appeal was available to petitioner, the order is affirmed.

GIBSON, C. J., and SPENCE, McCOMB and PETERS, JJ., concur.

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[3] Section 166 of the Code of Civil Procedure, which defines the powers of judges "in chambers," does not apply to the present case. The motion was brought on for hearing pursuant to due and sufficient notice thereof; the hearing on the motion was had in open court, both parties being present; opportunity was afforded for argument of the merits of the motion; and the matter was submitted to the court for determination. The only act done in chambers was the instruction by the judge to his clerk to enter in the minutes the final determination of the motion. It is conceded that a written order signed by the judge in chambers is valid.

SHENK, Justice (dissenting).

I dissent.

The denial of the relief sought by the petitioner in this case is neither required nor justified under the laws of this state. The order of the trial court was clearly in excess of jurisdiction and resulted in a palpable injustice to the petitioner for reasons for which he was in no way responsible.

It will be recalled that the petitioner sought to review and annul an order granting a motion to dismiss his complaint, that he had no notice of such order until the time for appeal therefrom had expired. In like circumstances appearing in other cases in this state certiorari has properly been held to lie as an exception to the strict application of the law in order to obtain the writ.

The court in this case condones the making of an order at chambers in an unauthorized manner. The trial judge, in chambers, orally instructed the clerk to enter the order without the formality of a writing signed by the judge. Section 166 of the Code of Civil Procedure provides for the manner of making orders at chambers as follows:

> "The judge or judges of the superior, municipal and justice courts may, at chambers, in the matters within the jurisdiction of their respective courts:
>
> "1. Grant all orders and writs which are usually granted in the first instance upon an ex parte application, and may, at chambers, hear and dispose of such orders and writs * * *.
>
> "2. Hear and determine all motions made pursuant to Sections 657 [new trial] or 663 [vacation and entry of other judgment] of this code;
>
> "3. Hear and determine all uncontested actions, proceedings, demurrers, motions, petitions, applications, and other matters pending before the court * * *."

The present order of dismissal is not authorized by any provision of section 166. It is not an order made on an ex parte application, as provided for in subsection 1, nor is it an uncontested action, as provided for in subsection 3. Subsection 2 deals with matters not here involved.

In United Railroads of San Francisco v. Superior Court, 1925, 197 Cal. 687, 242 P. 701, 703, the issue before the court was whether an order granting a new trial could be made outside of court. At that time section 166 did not provide, as it does now, for the making of such an order at chambers. The order involved in that case, unlike that here involved, was a formal written order duly signed and filed by the judge. In rejecting the contention that the judge could make an effective order only by a pronouncement from the bench in open court in the presence of the parties, and in holding that the judge had the authority to make an effective order in the absence of the parties or their counsel in the manner employed, the court stated: "We are of the opinion that, when all of the elements antecedent to such an order have been duly performed, and when the issue after a hearing thereon duly has been submitted to the court for its decision, the order of the court thereon may be rendered in either one of two ways: (1) By the pronouncement thereof in open court in the manner above suggested [an oral pronouncement from the bench]; or (2) by the filing with the clerk in the action of a written order of court signed by the judge. Of course, when the latter method is followed the signing of the order by the judge does not constitute its rendition * * *. It is the filing of the written order, authenticated by the signature of the judge, which constitutes the rendition thereof." See also Barnett Rosenburg, Inc. v. Superior Court, 93 Cal.App. 276, 269 P. 730.

After the decision in the United Railroads case section 166 was amended to make specific provision for the making of orders in chambers upon motions for a new trial. Stats.1929, p. 850. However, what the court there said as to the making of orders not provided for in section 166 would not appear to be affected by the statutory change. See Hackel v. Los Angeles Ry. Corp., 31 Cal.App.2d 228, 88 P.2d 178. The order was not made in either of the two modes authorized and was in excess of the court's jurisdiction and void.

The court holds that the United Railroads case is not controlling because subsequent decisions cited such as Dempsey v. Market Street R. Co., 23 Cal.2d 110, 142 P.2d 929, Gossman v. Gossman, 52 Cal.App.2d 184, 126 P.2d 178, Cox v. Tyrone Power Enterprises, 49 Cal.App.2d 383, 121 P.2d 829, and Hackel v. Los Angeles Railway Corp., supra, 31 Cal.App.2d 228, 88 P.2d 178, have assertedly overruled it. But such is not the case. It is contended that those cases hold that when the court orders the clerk to enter a minute order, the order so entered in the minutes is a written order of the court, and no formal writing signed by the judge and filed with the clerk is necessary. But those cases do not purport to pertain to orders made in chambers, as in the present case. Insofar as appears from the opinions in the Dempsey, Gossman and Cox cases, an order was made in the usual manner in open court granting a new trial on the ground of the insufficiency of the evidence, and the clerk entered the order in written form in the minute book. The question raised in each of these cases was whether such procedures satisfied the requirements of section 657 of the Code of Civil Procedure which states in part: "When a new trial is granted, on all or part of the issues, upon the ground of the insufficiency of the evidence to sustain the verdict or decision, the order shall so specify this in writing * * *." The court held in each case that the statute did not require a written order signed by the judge and filed with the clerk, but that the minute entry by the clerk was sufficient. Those cases are in no way inconsistent with the rule in the United Railroads case. That case conceded the validity of an oral pronouncement made in open court in the presence of counsel, and was concerned only with the manner of making an order at chambers.

The court's reliance on the Hackel case is even less justified. In that case an order granting a motion for a new trial made at chambers was affirmed on the ground that such an order was one authorized by section 166. In referring to the United Railroads case the court in the Hackel case [31 Cal.App.2d 178, 88 P.2d 180] stated: "Appellants contend that a decision on a motion for a new trial can be rendered in only one of two ways: (1) By audible pronouncement in open court; or (2) By the filing with the clerk in the action of a written order, signed by the judge. The case of United Railroads of San Francisco v. Superior Court, 197 Cal. 687, 242 P. 701, appears to be authority for the rule above stated. However, since the date of the rendition of the decision last cited, sections 166 and 167 of the Code of Civil Procedure have been amended * * *." to provide for the making of an order on a motion for a new trial at chambers. The reliance of the court on the cases above referred to cannot be justified.

From the foregoing it must be apparent that the order here was not authorized by section 166 as one which may be made at chambers. The court does not seek to justify the order under section 166, apparently conceding the lack of authority for the order under that section by the remark in the footnote that section 166 is inapplicable. However, it is apparent from the court's recital of facts that the order was made at chambers, and it therefore must be concluded that it is the court's present intention to provide by judicial legislation a further instance wherein a judge may make an order at chambers in addition to those instances set forth in section 166 and obviously intended by the Legislature to be exclusive.

Obviously the court acted in an unauthorized manner in making its order and that the order was therefore void. But the petitioner nevertheless has no right to appeal from the order, having lost it by the running of time in which to appeal. The petitioner's theory of his right to certiorari is that the respondent court "has exceeded the jurisdiction of such tribunal * * * and there is no appeal, nor * * * any plain, speedy and adequate remedy." Code Civ.Proc. § 1068. Having had an appeal available and lost it through the running of the time within which to appeal would appear, at first glance, to require that certiorari would not lie. It does not appear from the decided cases, however, that certiorari will be lost to the aggrieved party in all cases where he loses his right of appeal due to the lack of notice of entry of the judgment and the running of the time within which to appeal. In Elder v. Justice's Court, 1902, 136 Cal. 364, 68 P. 1022, the court had before it an application in certiorari wherein the act in excess of jurisdiction was a failure to give statutory notice of time and place of trial. Such a notice was held to be jurisdictional. That judgment was nevertheless appealable but no appeal was taken within time. Contrary to a general application of the statutory requirements for certiorari the court held that certiorari was a proper remedy. The circumstances of that case must be deemed to justify an exception to the rule that there be no appeal available before certiorari can be resorted to.

This exception was followed in Grinbaum v. Superior Court, 1923, 192 Cal. 528, 221 P. 635. The act in excess of jurisdiction which made the order or judgment void was a failure to give antecedent statutory notice of the proceedings to adjudge one to be an incompetent. The order so adjudging her was appealable but no appeal was taken. After the time for appeal had run certiorari was held to be a proper remedy.

In each of the foregoing cases there was no statutory requirement that notice of entry of the order or judgment be given and the time for appeal had run before the aggrieved party had notice of such entry. These cases recognized that the general rule is relaxed where the opportunity to appeal was lost by reason of lack of knowledge or notice of the void judgment or order, without fault on the part of the aggrieved party.

The exception applied in the Elder and Grinbaum cases has been applied in later and different situations. In Lee v. Small Claims Court, 34 Cal.App.2d 1, 92 P.2d 937, the defendant in a small claims court action had notice of the proceedings and appeared and defended. A judgment adverse to him was entered but he did not receive notice thereof until after time for appeal had expired. The court held that certiorari would lie. To the same effect see O'Kuna v. Small Claims Court, 81 Cal.App. 588, 254 P. 291, 292, wherein the court stated that "An exception to the rule that *certiorari* cannot be resorted to after time for appeal has expired may be found in instances where no notice of judgment has been had until after such time has elapsed." In both the Lee and O'Kuna cases the court relied on the Elder case. See also McCue v. Superior Court, 71 Cal. 545, 12 P. 615; Kimple v. Superior Court, 66 Cal. 136, 4 P. 1149; Reynolds v. Superior Court, 64 Cal. 372, 28 P. 121.

The majority evidently recognize that there is an exception to the strict application of section 1068, but they would not apply the exception in the present case because of purported distinctions from those cases where it has been applied. But it is not possible to distinguish the Lee and O'Kuna cases. In those cases, as in the present case, the aggrieved party had notice of the proceedings and of the fact that an order or judgment was forthcoming. Yet they made no inquiries when they received no notice of judgment until after time for appeal had expired. The fact that shorter periods of times were involved in which to take an appeal in those cases should have made them all the more vigilant and less entitled to certiorari than the petitioner in the present case.

The exception to the statutory requirement that there be no appeal available is founded on equitable principles. Certiorari is an ancient and extraordinary writ growing out of the English Court of Chancery where, in reflecting the conscience of the sovereign equitable principles were applied. (See Appellate Review in California with the Extraordinary Writs, 36 Cal.L.Rev. 75, 78.) It was brought into this state in the Constitution of 1849 by providing therein that the Supreme Court "shall have power to issue * * * all other writs * * necessary to the exercise of [its] appellate jurisdiction * * *." Const. art. 6, § 4. This power was made specific by amendment of the same section in 1862 and was incorporated in the same numbered section in the Constitution of 1879. The application of certiorari has often been tempered by equitable considerations. Smith v. Superior Court, 97 Cal. 348, 32 P. 322; In re Estate of Glassgold, 97 Cal.App.2d 859, 218 P.2d 1016; Swars v. Council of City of Vallejo, 64 Cal.App.2d 858, 149 P.2d 397.

In the present case the principles of justice and equity may best be served by bringing the petitioner within the exception to the general rule.

The order should be annulled.

SCHAUER, J., concurs.

Rehearing denied: SHENK and SCHAUER, JJ., dissented.

170 Cal.App.2d Supp. 836

LEEDS & NORTHRUP CO., a corporation, Plaintiff and Respondent,

v.

INTERKILN-SALGO ENGINEERING CO., a corporation, and Associated Indemnity Corporation, a corporation, Defendants and Appellants.

Civ. A. 2592.

Appellate Department, Superior Court,
San Francisco County, California.
May 6, 1959.

Action by company which furnished materials used in construction project, against surety company which issued surety bond on behalf of general contractor, inuring to benefit of owner and all persons entitled to protection under mechanics' lien laws. From a judgment adverse to the surety it appealed. The Superior Court, Shoemaker, J., held that for purposes of statute providing that in case surety on mechanic's lien bond has caused bond to be filed and recorded, no action may be maintained thereon unless there shall previously either have been filed mechanic's lien claim or unless written notice has previously been given to surety before expiration of time prescribed for filing lien to enforce claim, where bond stated that it was required that it be filed, owner's action in causing it to be filed and recorded warranted inference that, in so doing, it acted as agent of all parties to bond fulfilling requirements of statute so that surety was entitled to rely on defense of statute.

Reversed.

Mechanics' Liens 🔑317

For purposes of statute providing that in case surety on mechanic's lien bond has caused bond to be filed and recorded, no action may be maintained thereon unless there shall previously either have been filed mechanic's lien claim or unless written notice has previously been given to surety before expiration of time prescribed for filing lien to enforce claim, where bond stated that it was required that it be filed, owner's action in causing it to be filed and recorded warranted inference that, in so doing, it acted as agent of all parties to bond, fulfilling requirements of statute so that surety was entitled to rely on defense of statute in action on bond. West's Ann. Code Civ.Proc. §§ 1185.1, 1193.1, 1200.1.

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Bohnert & McCarthy, by Gerald R. Knecht, San Francisco, for defendant and appellant Associated Indem. Corp.

Bernard B. Stimmel, and Leonard S. Lurie, by Leonard S. Lurie, San Francisco, for plaintiff and respondent.

SHOEMAKER, Judge.

Agreed statement of facts:

1. Plaintiff and respondent furnished materials used in construction project on premises of owner, Port Costa Brick Works. Defendant and appellant (Surety Co.) issued a surety bond on behalf of general contractor which inures to the benefit of owner and all persons entitled to its protection under the mechanics' lien laws of California.

2. The bond was filed for record in the proper county prior to the completion of the work. (Bond filed by owner, Port Costa Brick Works.)

3. The project was completed and a proper Notice of Completion was filed on September 6, 1957, pursuant to C.C.P. sec. 1193.1.

4. Thirty-day period for filing a mechanic's lien elapsed. No mechanic's lien was ever filed, but plaintiff gave written notice to surety on October 23, 1957, more than thirty days subsequent to the filing of the Notice of Completion.

The following statement in large type appears on the face of the bond immediately below the signatures of the parties: "This bond must be recorded in the office of the Recorder of the county in which the contract is to be performed in order to fully comply with the statute and fully protect all parties as provided in said statute."

We are concerned here with section 1200.1 of the Code of Civil Procedure, and particularly subdivision "d" thereof, which reads in part as follows:

> "In case the *surety* or sureties on any bond given as in this chapter provided *shall have caused* said bond to be filed and recorded in the office of the county recorder of the county in which the property is situated before the work of improvement is completed, then no action may be maintained thereon unless there shall previously have either been filed a mechanic's lien claim as in this chapter provided or unless written notice shall previously have been given to the surety on said bond before the expiration of the time prescribed in this chapter for filing a lien to enforce such claim, which notice shall state that the person giving such notice has performed labor or furnished materials * * *. The filing of an action to foreclose such lien shall not be a condition precedent to a recovery on said bond. If said bond has been so filed as herein last provided, then any suit brought against such surety or sureties shall be filed within six months after completion of said structure or work of improvement, as 'completion' is defined in Article 3 of this chapter." (Emphasis added.)

The sole question on appeal is whether the bond was filed in compliance with the statute.

Respondent contends that the action may be maintained without the filing of a lien or the giving of timely notice, even though the bond is in fact recorded, stating that there is no testimony that Surety "caused" the bond to be filed and it is admitted Surety did not do so personally. The cases on which he relies to support this contention, starting with General Electric Co. v. American Bonding Co., 1919, 180 Cal. 675, 182 P. 444, were concerned with sections 1183 and 1187 of the Code of Civil Procedure, which were the early counterparts of C.C.P. §§ 1200.1 and 1193.1. At the time these cases were decided, C.C.P. § 1183 contained no specific provisions for the filing of a mechanic's lien or the giving of written notice, such as are now contained in sec. 1200.1(d).

Section 1200.1 C.C.P. requires that the bond must have been recorded in order for the surety to invoke a defense of failure to file a lien or give written notice.

Appellant contends that the surety "caused" the bond to be filed within the meaning of the statute when it was in fact filed by the owner (Port Costa Brick Works) pursuant to written notice placed by the surety on the bond that it must be recorded. He argues that the section does not require that an officer or employee of the surety itself file the bond for record; that the bond was in fact recorded, thus satisfying the obvious purpose of the section, which is simply to give notice; that the mechanics' lien law contemplates that recordation of surety bonds will be made by owners rather than by sureties, in order to limit their liability to the amount of the contract price as provided by C.C.P. § 1185.1; and, finally, that Port Costa (owner) can be considered the surety's agent for purposes of this recordation.

It will be noted that the clause in the bond does not directly order or direct the owner to file the bond; however, in our opinion, it constitutes such a notice that when acted upon, as it was here, warrants the inference that, acting as the agent of all parties to the bond, the owner attended to its recording, thereby fulfilling the requirement that the surety "shall have caused" the bond to be recorded. From which it follows that thereupon the surety has the right to assert the defense presented in this case.

Further, the early case of Tyler v. J. I. Mitrovich Bldg. Co., Inc., 47 Cal.App. 59, 190 P. 208, arising under old sec. 1183 C.C.P. and presenting an analogous situation held that the filing of the bond by the architect was compliance with the statute, and that the contention that the bond, in order to be effective, had to be personally filed by the owner or contractor, was untenable; the court stating that the statute does not require (as here) such personal filing.

For the foregoing reasons the judgment is reversed.

DEVINE, P. J., and MOLKENBUHR, J., concur.

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171 Cal.App.2d 713

Clyde O. DARLING, Plaintiff and Respondent,

v.

CATERPILLAR TRACTOR COMPANY, a corporation, Defendant and Appellant.

Civ. 22778.

District Court of Appeal, Second District, Division 3, California.

July 6, 1959.

Hearing Denied Aug. 31, 1959.

Action by operator of bulldozer against manufacturer for loss of right leg of operator when he stepped on an inspection cover on the deck plate and the hinge on the cover broke off and his right leg came in contact with unenclosed moving parts of clutch assembly. From adverse judgment of the Superior Court, Los Angeles County, McIntyre Faries, J., the manufacturer appealed. The District Court of Appeal, Shinn, P. J., held that evidence was sufficient to support findings that the inspection cover was not bent prior to the accident and that the fractured weld which broke was the original one made by the manufacturer and that manufacturer was negligent in the manufacture and design of the bulldozer.

Judgment affirmed.

1. Negligence ⟹27

Manufacturer of a chattel owes a duty of care toward a user, although there is no privity of contract between them, where article is inherently dangerous or where it is reasonably certain, if negligently manufactured, to place life and limb in peril, but manufacturer is not liable for user's injuries where they result from unforeseeable negligent use of chattel by a third party.

2. Appeal and Error ⟹989, 996

It is not function of reviewing court to reweigh evidence and to substitute other inferences for those reasonably drawn by trier of fact, and reviewing court is limited to determining whether there was any substantial evidence to support implied findings of jury.

3. Negligence ⚷134(4)

In action by operator of bulldozer against manufacturer for loss of right leg of operator when he stepped on an inspection cover on the deck plate and hinge on cover broke off and his right leg came in contact with unenclosed moving parts of clutch assembly, evidence was sufficient to support findings that inspection cover was not bent prior to the accident, that the fractured weld which broke was original one made by manufacturer and that manufacturer was negligent in manufacture of bulldozer.

4. Appeal and Error ⚷1002

Weight to be accorded to conflicting expert testimony is primarily a question for trier of fact.

5. Negligence ⚷136(25)

In action by operator of bulldozer against manufacturer for loss of right leg of operator when he stepped on inspection cover on deck plate and hinge on cover broke off and his right leg came in contact with unenclosed moving parts of clutch assembly, evidence was insufficient to establish as a matter of law that the chain of causation was broken through modification or repair of bulldozer or by passage of time between sale of vehicle in 1949 and failure of hinge in 1952.

6. Negligence ⚷27

Imminence of danger is not determinative of a manufacturer's liability for injuries sustained by user of manufacturer's products.

7. Negligence ⚷27

Where machine parts have failed and it is necessary to ascertain cause of failure to determine manufacturer's liability, important considerations may be length of time machine has been in use and nature of its use.

8. Negligence ⚷27

A manufacturer is not responsible for injuries sustained by a user of its product for failures of product due to ordinary wear and tear or misuse.

9. Negligence ⚷136(25)

In action by operator of bulldozer against manufacturer for loss of right leg of operator when he stepped on inspection cover on deck plate and hinge on cover broke off and his right leg came in contact with unenclosed moving parts of clutch assembly, it could not be said as a matter of law that accident was not proximately caused by negligence in design of bulldozer.

10. Negligence ⚷136(27)

In action by operator of bulldozer against manufacturer for loss of right leg of operator when he stepped on an inspection cover on deck plate and hinge on cover broke off and his right leg came in contact with unenclosed moving parts of clutch assembly, evidence presented question for jury whether a simple change in deck plate was required in reasonable anticipation of failure of weld for one cause or another.

11. Negligence ⚷140

In action by operator of bulldozer against manufacturer for loss of right leg of operator when he stepped on inspection cover on deck plate and hinge on cover broke off and his right leg came in contact with unenclosed moving parts of clutch assembly, instructions adequately covered subject of proximate cause and adequately presented manufacturer's theory that sole proximate cause of accident was the unforeseeable acts of employees of purchaser of bulldozer.

12. Negligence ⚷138(3)

In action by operator of bulldozer against manufacturer for loss of right leg of operator when he stepped on inspection cover on deck plate and hinge on cover broke off and his right leg came in contact with unenclosed moving parts of clutch assembly, court did not err in rejecting proposed instruction by manufacturer that in event of certain acts or omissions by operator's employer operator would have a cause of action under Labor Code against employer for serious and willful misconduct and that employer could not insure against liability for the same. West's Ann.Labor Code, § 1 et seq.

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Chase, Rotchford, Downen & Drukker, Donn B. Downen, Jr., Louis Lee Abbott, Los Angeles, for appellant.

Rose, Klein & Marias, Los Angeles, for respondent.

SHINN, Presiding Justice.

In a jury trial, Clyde O. Darling was awarded damages in the amount of $100,000 for personal injuries upon his complaint charging defendant with negligence in the manufacture of a bulldozer. Defendant made a motion for new trial, which was ordered granted unless plaintiff agreed to remit $20,000 and ordered denied if plaintiff filed the remission. Plaintiff filed a remission of the judgment in that amount. Defendant appeals.

Plaintiff was an experienced tractor operator, employed by the firm of Morrison-Knudson in the construction of a Marine Corps base at Twenty-Nine Palms. For five or six weeks prior to his accident, he had been operating a bulldozer designed and manufactured by defendant, pushing dirt and other materials into a hopper and removing materials from underneath certain bunkers.

Between the hood at the front of the bulldozer and the driver's seat at the rear extended a flat metal sheet, called the deck plate, which provided plaintiff with a level walking area 4 feet wide and 17 inches deep. A smaller sheet of metal, called the inspection cover, fit into an 8⅝ inch by 10½ inch aperture in the deck plate; underneath the aperture was the clutch assembly, which was unguarded; the inspection cover could be raised by turning a latch on the rear edge; when the latch was shut, the cover was flush with the surface of the deck plate. The inspection cover was attached to the deck plate by means of a hinge welded to the underside of both sheets of metal on the side opposite the latch. It received additional support from a ledge or lip of the deck plate beneath the rear edge of the cover which extended one inch into the aperture along eight inches of the underside of the deck plate for about four inches to the left of the latch and four to the right. Both sheets were designed and manufactured by defendant; the hinge was manufactured by another company according to defendant's specifications and was welded to the sheets in defendant's factory.

December 16, 1952, plaintiff prepared to remove some dirt from beneath a bunker at the job site. Before doing so, he had to disconnect the exhaust pipe of his bulldozer, which extended vertically above the hood. Darling stopped the tractor and left the motor idling, as was his usual practice. He stepped across the deck plate and removed the exhaust pipe, then turned and stepped back toward the driver's seat. As he stepped on the inspection cover, which was latched shut, the hinge broke off and both the cover and his right leg slipped downward through the aperture and came in contact with the unenclosed moving parts of the clutch assembly. Plaintiff's leg was badly mangled, requiring amputation above the knee. It was established that the hinge gave way because of a failure of the weld connecting it to the inspection cover and the deck plate.

One question in the case was whether, as plaintiff contended, the defective weld was the original one put on by defendant's employes, or whether, as defendant contended, the weld which failed was a later weld made by employes of Morrison-Knudson. As we shall see, expert testimony was introduced in support of each of these irreconcilable theories. A second question which was also the subject of expert testimony was whether defendant was negligent in designing the deck plate. The jury found that defendant was guilty of negligence which was the proximate cause of the accident. The finding may have been predicated upon negligence in the manufacture of the bulldozer or in its design or both.

All the points on the appeal may be summarized under the following headings: (1) Defendant's negligence, if any, in the manufacture of the bulldozer was not a proximate cause of plaintiff's injuries; (2) Defendant's negligence, if any, in the design of the bulldozer was not a proximate cause of plaintiff's injuries; (3) The court committed error in giving an instruction which permitted the jury to find against defendant under either a theory of negligent manufacture or negligent design; (4) The court erred in its instructions on proximate cause; (5) The court should have instructed the jury as to the possible liability of Morrison-Knudson for additional workmen's compensation on account of possible serious and wilful misconduct.

There was evidence of the following facts. The bulldozer was manufactured in 1949. May 31, 1949, it was delivered to Morrison-Knudson de Sonora, a Mexican affiliate of plaintiff's employer. From January 21, 1950, until March 1954 the tractor was in use at various points in the United States. While in Mexico, it was operated and repaired by a crew of relatively unskilled Mexican laborers. After 292 hours of use, report was made to the dealer that the clutch was defective and required repair. In the course of repair and at other times prior to January 1950, the deck plate was removed; this was accomplished by unscrewing the bolts, lifting the plate over the control rods and throwing it onto the ground. Deck plates removed in this manner are sometimes damaged through being run over or struck by falling objects while on the ground.

The deck plate and inspection cover which were on the bulldozer at the time of the accident were received in evidence. They are before us as exhibits. Darling testified that the cover was flush with the surface of the deck plate before the accident occurred. According to Towne, a mechanic who started the bulldozer that morning, the inspection cover was intact, and Douglas, the service foreman, testified that he opened the inspection cover and greased the clutch on the morning of the accident, then closed and locked the cover; if anything had been out of order, he would have reported it to the master mechanic.

Both exhibits are now seriously deformed and bent and were in that condition at the time of the trial. As mentioned earlier, the inspection cover was designed to rest on the lip of the deck plate when the latch is closed. However, the segment of lip to the right of the latch is now bent and curves upward at the end. And the wing of the inspection cover which was meant to rest on the segment of lip to the left of the latch bends downward at an angle of 70 degrees with the plane of the remainder of its surface. Two of plaintiff's fellow workmen testified that the cover was bent in this fashion immediately after the accident; when they first observed it, the cover was inside the aperture housing the clutch assembly and it was resting against the fly wheel. A photograph of the underside of the deck plate, taken by plaintiff six weeks after the accident, was received in evidence as an exhibit. In the opinion of defendant's photographic expert, one Thomas, the lip of the deck plate cast a curved shadow on the photograph which was caused by a bend in the plate. However, it was plaintiff's best recollection that there was no bend in the plate when he took the picture.

In a further effort to prove that the inspection cover was bent prior to the accident, defendant called as expert witnesses two qualified engineers, Shields and Snyder; Snyder stated his opinion that the deformation was caused by at least fifty separate blows from a ball peen hammer or similar instrument; the cover was in a vertical position while being hammered. Shields gave his opinion that due to the bend in the deck plate lip, the cover could not have been latched shut unless it, too, were bent out of shape; bending the cover would have permitted the latch to be closed. Both witnesses stated their opinion that some of the energy from the hammer blows would have been transmitted through the inspection cover to the hinge and this would have resulted in damage to the weld connecting the hinge to the cover and deck plate. It was also their opinion that the cover could not have been bent through contact with the clutch mechanism because the rotating clutch fingers would have broken off and the marks on the bent wing of the inspection cover would have been uniform in direction rather than random.

It is undisputed that the fractured weld did not comply with defendant's factory specifications. Dr. Morrelli, a qualified mechanical engineer, testified on behalf of plaintiff that the weld was one-eighth inch shorter than required by the specifications and its side dimensions were also substandard; the fracture occurred at the point of junction of the weld and the parent metal of the hinge. In his opinion, the weld broke because there was not a full "eighth-inch fillet weld, there is less than a sixteenth." Morrelli's testimony was corroborated by a Mr. Pellett, an expert metallurgist, who stated that the weld broke because of the poor contour of the weld and an insufficiency of weld material at the point of stress. In Pellett's opinion, the weld did not fail suddenly, but failed gradually over a considerable period of time. Morrelli testified that if the weld had conformed to defendant's specifications it would have been 100% more weight-bearing.

The weld was examined both visually and microscopically by Mr. Pellett and Dr. Morrelli. The latter took a cross-section of the weld and the adjacent area of the hinge and subjected it to analysis under the microscope. He took only one specimen of the weld because, as he stated, a number of cross-sections taken from different places across the weld would "eliminate all of the evidence." In his opinion, the defective weld was the original weld made by defendant.

Edward Fess, a qualified metallurgist, testified on behalf of defendant that he was able to identify two runs of welding in his microscopic analysis of a second cross-section. He observed a portion of a prior weld and a ⅛ inch chisel mark made during the removal of a prior weld. The fracture line ran through the weld itself rather than through the fusion zone between the weld and the parent metal. In the opinion of the witness, the weld he studied was not the weld put on at defendant's factory. Furthermore, while defendant used open arc electric welds, the deck plate showed discoloration characteristic of oxygen-acetylene welding.

However, the cross-section taken by Fess was also examined by plaintiff's expert, Pellett. Pellett testified that he saw no indications either of additional welding or of the removal of weld material. He stated that if the original weld had been removed and replaced by a new weld, chisel marks made in removing the prior weld would have been eliminated in the course of rewelding.

Defendant also offered in evidence the results of a spectrographic analysis purporting to show that the fractured weld contained .10% tin and .38% silicon. A similar analysis of the materials used in the welding rods utilized by defendant from 1946 to 1951 purported to show that the tin content varied from nil to an infinitesimal quantity; between 1947 and 1949 the silicon content varied from .10% to .20%. The welding rods were purchased by defendant from the manufacturer and a number were subjected to chemical tests upon receipt. Plaintiff's expert, Pellett, stated that the normal limit of tin content of American wire used in the manufacture of welding rods varies from nil to .01% and that he knew of no electrodes made for the general American market containing more than .05% tin. The expert witnesses were in general agreement that tin content as high as .10% would affect welds adversely by making them more brittle.

As to the design of the inspection cover and its appurtenances, Dr. Morrelli stated his opinion that the "accepted procedure" is to eliminate stress on the hinge by extending the deck plate lip either all the way around the cover or along the full length of the side opposite the hinge. Otherwise, if the hinge broke due to a failure of the weld, the latch would not remain locked, but would slide out. We mentioned earlier that the clutch mechanism was unenclosed. Jass, a designer in defendant's engineering department, testified that the tractors manufactured since 1952 were equipped with an enclosure over the clutch to protect it from dust and dirt and that had the clutch in the bulldozer been similarly guarded, plaintiff's leg would not have come in contact with the moving parts of the clutch assembly.

The first point to be considered is that, as a matter of law, the accident was not proximately caused by negligence in the manufacture of the bulldozer.

[1] There is no dispute as to the applicable legal principles. The manufacturer of a chattel owes a duty of care toward a user, although there is no privity of contract between them, where the article is inherently dangerous, or where it is reasonably certain, if negligently manufactured, to place life and limb in peril. 35 Cal. Jur.2d 596–598. However, he is not liable for the user's injuries where they result from the unforeseeable negligent use of the chattel by a third party. Waterman v. Liederman, 16 Cal.App.2d 483, 60 P.2d 881, 62 P.2d 142.

Defendant argues that it was not responsible for the defective weld; that the hinge was probably rewelded by the unskilled employes of Morrison-Knudson's Mexican affiliate in order to rectify damage to the original weld resulting from mishandling of the deck plate and inspection cover in the field; and that the causal chain between the manufacture of the bulldozer and the injury to plaintiff was broken, as a matter of law, either by the unforeseeable modification of the machine through the bending of the metal plates and the rewelding of the hinge or by the passage of time. We are not persuaded by these arguments.

[2–4] Defendant's attorneys know full well that it is not our function as a reviewing court to re-weigh the evidence and to substitute other inferences for those reasonably drawn by the triers of fact and that we are limited to determining whether there was any substantial evidence to support implied findings of the jury. In our opinion the evidence was ample to support findings that the inspection cover was not bent prior to the accident and that the fractured weld was the original one. The argument that there was no substantial evidence of these facts is unavailing. The jury could reasonably have believed the testimony of Darling and his fellow employes that the inspection cover was flush with the surface of the deck plate on the day of the accident and that neither the cover nor the deck plate was deformed at that time. The jury could also have believed the testimony of the expert witnesses called on behalf of plaintiff that the admittedly defective weld was the weld placed on the hinge at defendant's factory in the process of manufacturing the bulldozer. Of course, a diametrically opposite conclusion would have found support in the testimony of the experts called by the defense. But the weight to be accorded to conflicting expert testimony is primarily a question for the trier of fact. 19 Cal. Jur.2d 39–40.

Defendant seeks to transform this question into one of law by emphasizing the evidence that the tin and silicon content of the fractured weld were greatly in excess of the amounts contained in the welding rods used by defendant and in other welding rods manufactured in the United States. It is true that the laboratory technician, Barben, who analyzed the material in the weld, testified that he found that it contained .10% tin and that none of plaintiff's experts analyzed it for tin content. If the jury had given full credit to the opinion of Barben it could with good reason have concluded that the weld was not one made with American-made rod. But the testimony of the technician did not stand uncontradicted. It was opposed by the positive opinions of plaintiff's experts, Pellett and Morrelli, that the weld was the original one. The jury presumably gave greater credit to the opinions of these experts than to the testimony of Barben. The evidence that all American-made welding rod contains not more than .05% of tin and that defendant uses only American-made rod does not overcome, as a matter of law, the expert testimony that only one weld had been made. If there was only one weld, responsibility for its failure rested upon defendant regardless of its tin content. We cannot re-weigh the conflicting testimony of these witnesses and hold that the jury could not reasonably have relied upon the testimony of plaintiff's experts. Their testimony was that there was nothing which indicated removal of the original weld. It is evident that the jurors were convinced of that fact and that they had sufficient reason for their conclusion.

[5–8] As we say, the jury could reasonably have determined that defendant was guilty of negligence in the manufacture of the bulldozer. Since the jury was not required to accept defendant's hypothesis that the deck plate and inspection cover were bent by employes of Morrison-Knudson, there is clearly no merit in the contention that the chain of causation was broken as a matter of law through modification or repair of the machine. Nor is there any merit in the contention that the causal chain was broken by the passage of time between the sale of the vehicle in 1949 and the failure of the hinge in 1952. Defendant relies upon a number of cases from other jurisdictions which hold that after the lapse of a certain interval of time, a chattel cannot be called imminently dangerous and no liability can be imposed upon the manufacturer for negligence. But the imminence of the danger is not determinative of a manufacturer's liability under the law of this state. Hale v. Depaoli, 33 Cal.2d 228, 232, 201 P.2d 1, 13 A.L.R.2d 183, and cases cited. Where machine parts have failed and it is necessary to ascertain the cause of the failure important considerations may be the length of time the machine has been in use and the nature of its use. Earth-moving machines are not built to last indefinitely. The manufacturer is not responsible for failures due to ordinary wear and tear or misuse. There is merit in the argument that the longer a machine has been in use before it fails the more unlikely it is that the failure was due to defective construction or design. Parts that have served through their expected life cannot be regarded as defective because they eventually give out. But these obvious facts do not apply to the present case. The hinge in question was not a moving part that was subject to wear and strain while the machine was in operation. It was not a hinge that had been properly and efficiently welded to the deck plate and the inspection cover which gave way as a result of long continued use; it was a part that was defective in construction and which gave way as a result of use which would not have caused it to fail if it had been properly and efficiently constructed.

[9] The second point is that, as a matter of law, the accident was not proximately caused by negligence in the design of the bulldozer.

[10] Defendant says in its brief: "Plaintiff, through his expert witnesses, and in argument, asserted that the weld which failed could have withstood the load precipitating such failure had that weld complied with the specifications of the Caterpillar Tractor Company. Hence the design defects asserted by plaintiff—and denied by defendant—would be immaterial since there would be no proximate cause between such defects, if any there were, and the failure of a weld which would have held had it complied with the very design which plaintiff criticizes." The argument is untenable. It misses the point. It assumes that the weld conformed to defendant's specifications. It evades the fact that the asserted defect in design relied upon by plaintiff to establish design negligence consisted of the inadequacy of the deck plate lip. Defendant has not set out in its briefs the evidence relating to the design of the bulldozer and no contention is made that the jury could not reasonably have found that in the exercise of ordinary care the lip should have been extended all the way around the cover. If the jury found that the fractured weld was the original factory

weld, then it could also have found that the accident resulted from two related acts of negligence on the part of defendant, namely, negligence in designing the deck plate and negligence in the welding of the hinge, for it was a reasonable inference from the testimony of Dr. Morrelli that the inspection cover would not have fallen into the aperture upon the failure of the hinge if the deck plate had been properly designed. As designed, the inspection cover could have fallen and did fall upon failure of the hinge. It would not have fallen if it had rested upon a lip upon the hinge side. Defendant chose to rely solely upon the adequacy of the welding of the hinge to the deck plate. It was a question for the jury whether a simple change in the deck plate was required in reasonable anticipation of the failure of the weld for one cause or another. The fact that it did fail shows that failure was not out of reason, but whether failure should have been anticipated was a proper factual question. Mosley v. Arden Farms Co., 26 Cal. 2d 213, 157 P.2d 372, 158 A.L.R. 872; Jones v. City of South San Francisco, 96 Cal.App.2d 427, 216 P.2d 25; De Mirjian v. Ideal Heating Corp., 129 Cal.App.2d 758, 278 P.2d 114.

The next point to be considered is that the court committed error in defining the duties of defendant with respect to both the design and manufacture of its product in a single instruction. It is unnecessary to quote the instruction since it is not challenged as a misleading or inaccurate statement of those duties. Defendant argues that since, as a matter of law, a verdict upon either of plaintiff's two theories of liability would have been without support in the evidence, the instruction should not have been given. A sufficient answer to this contention is that we cannot say, as a matter of law, that there was no substantial basis in the evidence for a finding of negligence in the manufacture of the bulldozer or negligence in its design, or negligence in both respects.

[11] The fourth point is that the court committed error in instructing the jury on the subject of proximate cause. Defendant criticizes four instructions which were given and urges that the court should have given three additional instructions at its request. It is not contended that any of the instructions stated the law incorrectly but only that it would have been stated better in defendant's instructions that were refused.

We think that the challenged instructions were sufficient and that the proposed instructions were properly refused. At the request of both parties, the court gave a standard instruction defining proximate cause. At plaintiff's request, the court gave two instructions on concurring negligence. At the request of defendant, the court gave a standard instruction on intervening cause. We have set out instructions 1–4 in the margin.[1]

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[1] 1. The proximate cause of an injury is that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. It is the efficient cause—the one that necessarily sets in operation the factors that accomplish the injury. It may operate directly or through intermediate agencies or through conditions created by such agencies.

2. When the negligent acts or omissions of two or more persons, whether committed independently or in the course of jointly directed conduct, contribute concurrently and as proximate causes to the injury of another, each of such persons is liable in the absence of contributory negligence. This is true regardless of the relative degree of the contribution. It is no defense for one of such persons that some other person, not joined as a defendant in the action, participated in causing the injury even if it should appear to you that the negligence of that other person was greater in either its wrongful nature or its effect.

3. If you should find that the defendant was negligent and that such negligence was a proximate cause of the injury of which the plaintiff complains, then it is no defense for the defendant that some other third person not joined as a defendant in the action was also negligent in causing the injury, even if it should appear that the negligence of that other

It is earnestly contended that these instructions misled the jury to defendant's prejudice by failing adequately to present its theory that the sole proximate cause of the accident was the unforeseeable acts of employes of Morrison-Knudson and that three additional instructions (5–7), which we have likewise set out in the margin, should also have been given.[2]

We find no merit in either contention. The instructions that were given adequately stated the law applicable to the admittedly

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person was greater in either its wrongful nature or its effect.

4. When it appears that the conduct of two or more persons, acting independently and at different times, created or contributed to the circumstances out of which injury resulted, the question of proximate or remote cause requires the jury to consider thoughtfully the relationship between the conduct of one person, whom, for convenience, I shall call the original actor; the conduct of another, whom I shall call the secondary actor; and the sequence of events leading to the injury.

Of course, the first question to be answered is whether either of the parties was negligent. If either party was not negligent, then he is not legally responsible for the accident even if his conduct was a proximate cause thereof. If the original actor was not negligent, but a secondary actor was, the question narrows down to whether that secondary conduct was a proximate cause of injury. If the original actor was negligent, then you must consider what effect, if any, the secondary conduct had in relating that earlier conduct to the accident in question.

In that connection, the question to be answered is this: Did the original actor foresee, or by exercising ordinary care would he have foreseen, the probability of the conduct of the secondary actor and the probability that the original conduct plus the secondary conduct would result in injury to a third person? If the answer to that question is "yes", then the negligence of the original actor was a proximate cause of the injury; if the answer is "no", then the original actor is not liable for the injury. If the secondary actor was negligent, and his negligence was a proximate cause of the injury, then, as between him and the earlier actor, the secondary conduct was either a concurring or the sole proximate cause, depending on how you answered the foregoing question.

[2] 5. You are instructed that if you find that the weld in question in this case was not the weld of the Caterpillar Tractor Company but the weld of some other person, whomsoever such person might be, Caterpillar Tractor Company is not responsible for such weld and its consequences if any.

6. You are instructed that if you should find that the particular deck plate involved in this accident and/or the particular inspection plate were in such a condition at the time of the accident that the same could not be held down by the latch attached to the deck plate and further that such condition arose some time after the Caterpillar Tractor in question left the factory and after delivery of it was accepted by a third person, then in that event, the chain of causation has as a matter of law been severed and the Caterpillar Tractor Company is entitled to your judgment in its favor.

7. One who supplies (an) (instrument) (or) (appliance) (or) (a machine) (or) (a chattel of other kind) to another person (, or delivers it into the possession of that other person,) for the latter's use will be called a supplier in the instruction to follow. The person who is to use the item so supplied will be called the user.

The duty of the supplier is to exercise ordinary care in relation to such a transaction and in regard to the safety of the user (and of any person who may be within the area of danger from the use of the supplied property and whose presence there comes within a range of probability foreseen by the supplier or that would be foreseen by him in the exercise of ordinary care).

The amount of caution that is involved in the exercise of such care will vary according to the circumstances and will be affected, for example, by the supplier's knowledge, and what he would know in the exercise of ordinary care, about such factors as these: whether or not the (appliance) (instrument) (machine) (chattel) or its use is fraught with any danger; the circumstances and manner of its proposed or probable use; the experience or inexperience of the user, his age, judgment, or other attributes that might reasonably be expected to affect his use of the chattel; the user's knowledge of such (a) (an) (appliance) (instrument) (machine) (chattel) and whether or not reasonable prudence would require the giving of any instructions or warning to him; whethcomplex question of causation to be resolved by the jury. If there is reason for criticism of the instruction on proximate cause, defendant, having requested the instruction, is in no position to criticize it. As to the proposed instructions, it appears from the record that the instruction respecting the duties of a supplier of chattels was withdrawn by defendant following a conference in chambers. The other two instructions could well have been refused upon the ground that they were argumentative and sufficiently covered by other instructions. But even if the requested instructions would have clarified the issue it is inconceivable that during the trial of many weeks' duration the jury could have failed to understand that the manufacturer was relying upon the defense that it did not make the defective weld, that the deck plate and inspection cover were deformed prior to the accident. Furthermore, defendant requested and obtained an instruction which informed the jury that if the accident was solely and proximately caused by some other person, it would have no responsibility for the other's acts and would be entitled to a verdict in its favor.

[12] The court instructed the jury that plaintiff had received workmen's compensation benefits from his employer's workmen's compensation insurance carrier. The final point on the appeal is that the court erred in rejecting an additional instruction proposed by defendant that "in the event of certain acts or omissions by his employer," Darling would have had a cause of action under the Labor Code against Morrison-Knudson for serious and wilful misconduct and that his employer could not insure against liability for the same.

Defendant argues that the instruction should have been given because several of plaintiff's fellow employes testified favorably to him and the jury should have been advised of their interest or bias arising out of possible uninsured demands against their employer. It is a far-fetched theory. Defendant has not made any showing in its briefs that these witnesses were aware of any acts of their employer constituting serious and wilful misconduct, or, if they were, that they knew additional liability for those acts could have been imposed upon Morrison-Knudson. If defendant had thought it worthwhile to question the witnesses for possible bias it could have done so in their cross-examination. It cannot be assumed now that their answers would have shown that they may have been biased because of possible liability of their employer for wilful misconduct. However, we do not imply that any instruction on the employer's liability for workmen's compensation was necessary or proper. The failure to give the instruction furnishes no ground for a reversal of the judgment.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

171 Cal.App.2d 452

In the Matter of the ESTATE of Steve G. BARBIKAS, Deceased.

VYTINA SOCIETY, Objector and Appellant,
v.
Bessie Barbikas PHILLIPS and Pearl Economy Jackson, as executrices, etc., Respondents.

No. 18021.

District Court of Appeal, First District, Division 2, California.

June 23, 1959.

Proceeding in the matter of the estate of the deceased. From an order of the Superior Court, County of Contra Costa,

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er the nature or condition of the chattel is such as to require for its safe use diligent or regular inspection or repair, and what has been done in those respects.

Ben V. Curler, J., denying objections to the final accounting of the executrices of the estate, the objector appeals. The District Court of Appeal, Dooling, J., held that the executrices were not liable for loss sustained by the estate due to the alleged embezzlement of attorney; that they were not chargeable for claimed loss in delaying the sale of the property, and that charging all the expenses of administration against the corpus of the estate was proper.

Order affirmed.

1. Executors and Administrators ⚷91

An executor and an administrator must act with that degree of prudence and diligence which a man of ordinary judgment would be expected to bestow upon his own affairs of a like nature. West's Ann.Prob. Code, § 920.

2. Attorney and Client ⚷102

Where an executor or an administrator has exercised that degree of care in the selection of his attorney that a reasonable person would exercise under similar circumstances, no liability attaches to him for loss due to misappropriation of the funds by the attorney.

3. Attorney and Client ⚷102

Executors who are not themselves lawyers would be derelict in their duty to the estate and to those interested therein if they did not employ the services of an attorney, and if they exercise due care in his selection, they should not be absolutely bound by his derelictions but should only act with that degree of prudence which a man of ordinary judgment would bestow upon his own affairs of a like nature.

4. Executors and Administrators ⚷91

Executrices as lay persons had the right to rely upon advice and counsel of their attorneys.

5. Executors and Administrators ⚷117

Where court authorized executrices to sell the business of the deceased and the escrow funds were deposited in a trustee account maintained by attorney for executrices and were subsequently allegedly embezzled, accounts of executrices were not surchargeable on ground that they were negligent in permitting attorney to act as escrow holder nor in permitting six months to elapse without insisting on closing of the escrow and the payment of money and in taking no legal action against the attorney or the purchaser of the business where they exercised the prudence and diligence which a man of ordinary judgment would bestow upon his own affairs. West's Ann. Prob.Code, § 920.

6. Executors and Administrators ⚷103

Executrices were not chargeable with a claimed loss in delaying the sale of estate property where there was testimony that the values had not changed between the time of the testator's death and the sale of property and no affirmative evidence of any decrease in value was produced.

7. Executors and Administrators ⚷506(3)

Fact that property of estate was originally appraised at a higher value was not conclusive but only prima facie evidence of its then value when executrices were sought to be charged with a claimed loss in delaying sale of the property.

8. Appeal and Error ⚷499(1)

In the absence of a showing that objection sought to be raised on appeal was made in the lower court, it is too late to raise the objection on appeal.

9. Trusts ⚷274(1)

Whether expenses are chargeable to corpus or income of an estate depends largely on the condition of the property when the executrices received it.

10. Trusts ⚷272(1)

On accounting by executrices of the estate of deceased establishing a trust, charging all expenses of administration against the corpus of the estate without making an allocation between principal and income following the statutory formula was not improper, since necessary probate proceedings leading to distribution of the estate to the trustees were not "expenses incurred in connection with a trust estate or with its administration and management" within the statute. West's Ann.Civ.Code, § 730.15.

See publication Words and Phrases, for other judicial constructions and definitions of "Expenses Incurred in Connection with a Trust Estate".

11. Trusts ⚷272(1)

Except where otherwise provided expressly or by necessary implication in the will, the expenses of administration prior to the establishment of the trust by the will are chargeable, in so far as it is adequate to meet them, to the corpus of the estate which is ultimately to form the trust and not to the income accruing thereon during the period of probate administration. West's Ann.Civ.Code, § 730.15.

12. Appeal and Error ⚷171(1)

A party may not ordinarily adopt one theory in the trial court and change to another theory upon appeal.

13. Executors and Administrators ⚷510(8)

On accounting by executrices, any error in refusing to admit a letter dealing with delay in selling the bar and restaurant business of the testator was harmless where the appellate court affirmed the probate court's finding that the estate suffered no loss thereby.

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Tinning & DeLap, Robert Eshleman, Francis A. Watson, Jr., Richmond, for appellant.

Robert H. Kroninger, Oakland, for respondent Bessie Barbikas Phillips.

J. W. O'Neill, Oakland, for respondent Pearl Economy Jackson.

DOOLING, Justice.

This is an appeal by the residuary legatee, Vytina Society, from an order of the trial court denying objections to the final accounting of the executrices of the estate of Steve G. Barbikas.

Barbikas died on December 5, 1951, leaving a will and a codicil nominating six beneficiaries as joint executors. When the will was admitted to probate, on February 1, 1952, respondents Bessie Phillips and Pearl Jackson were appointed executrices thereof, the other named executors declining to act. The will provided for several specific bequests and the residue of the estate was left in trust to pay the income for twenty years to the named beneficiaries. At the end of the twenty-year period the remaining trust estate was to go to appellant for the purpose of establishing a school in Greece.

Included in the residue was certain real property containing a bar and restaurant business with liquor licenses which had been held by decedent. This business was continued in operation by the executrices and on December 5, 1952, the court made an order authorizing the executrices to continue to operate the business and to expend not to exceed $5,100 for equipment.

On April 6, 1953, respondent Phillips filed a petition for instructions directing that the business be sold and respondent Jackson and other beneficiaries then filed a petition for an order that the business be retained. In June 1953 the court ordered the sale of the business and respondent Jackson with two other beneficiaries filed a notice of appeal from the order. On March 18, 1954, the parties stipulated that the appeal be dismissed and sale of the business was then directed by the court.

On November 22, 1954, the business was sold to George Azevedo for $54,459.95. It was agreed by respondents and Azevedo that respondent Phillips' attorney, Judson, should act as escrow agent for the sale. There was testimony that title companies and banks do not commonly handle escrows involving liquor licenses and that it was common practice for the attorney for the seller or buyer to act as the escrow agent. There was also testimony that Judson regularly acted as escrow agent in matters of that kind. Judson was a respected attorney, was highly recommended to Mrs. Phillips and had been City Attorney of Pittsburg. Azevedo testified that he had every trust and confidence in Judson.

The escrow funds in this transaction were deposited in a trustee account maintained by Judson. A deed to the real property was executed by respondents and was recorded March 16, 1955, but a bill of sale for the personal property was not received by Azevedo until June of 1955. During this period respondent Jackson's attorney, O'Neill, made many inquiries of Judson as to the bill of sale and was led to believe that the delay was caused by Mrs. Phillips' (then residing in Connecticut) neglect in not signing the bill of sale. O'Neill testified that he had prepared a petition for removal of Mrs. Phillips as executrix but after an independent investigation he discovered that Mrs. Phillips was not responsible for the delay.

After learning this, on June 7, 1955, O'Neill by letter requested that the escrow money be turned over to the estate. A second request was made on June 16, 1955, and O'Neill was informed that Judson was out of the city and would return on July 6. O'Neill went to Judson's office on July 6 and at that time learned from Judson that in early January 1955 he had embezzled the escrow funds and that he had attempted to delay the completion of the sale in the hope that he could make reimbursement.

It was decided by respondents with the concurrence of O'Neill that if a criminal complaint were filed against Judson all hope of recouping the money would be lost. The embezzlement was reported to the district attorney who stated that his office would do nothing unless and until formal proof was offered and a complaint was requested.

Judson presented to respondents and their attorneys a statement of his assets and liabilities and copies of his income tax returns. In addition a check was made of the records in the offices of the County Tax Collector and County Assessor. Mr. O'Neill, as attorney, was satisfied that the only source of funds sufficient to recoup the loss was from Judson's prospective fees to be obtained from pending personal injury damage suits and other court matters. Judson stated that he could pay at least $5,000 by September 1955 and the balance by the end of the year. The $5,000 was not paid by September 1, 1955, and when contacted Judson stated that there had been dilatory tactics by an insurance adjuster, that an important case had been taken off calendar because of his absence in another court, and that expected settlements had not materialized.

Two payments of $2,000 each were made on September 20 and September 30, but when further payments were not made the matter of the embezzlement was presented to a judge of the superior court of Contra Costa County. A citation was issued to the executrices requiring them to appear on December 5, 1955, to show cause why an accounting had not been made.

Prior to the date fixed for the hearing the respondents' attorneys and Judson met in the judge's chambers and it was decided that if the money was not repaid by December 19, 1955, the court would order a final account and the respondents would consent to an order removing them as executrices. However, shortly after this meeting a criminal complaint was filed against Judson, an information was filed, he pleaded guilty and was sentenced to prison. The executrices were removed and the Public Administrator was appointed.

The executrices' accounting was filed on June 13, 1956, and the Amended Objections to Accounting was filed July 20, 1956.

The probate court made the following finding:

"In connection with the embezzlement by Attorney Judson, the Court finds that there was no misconduct, or negligence, or misfeasance on the part of the executrices in employing him, and that in his choice they exercised due prudence and were guilty of no negligence; and, further, that there was no negligence on their part for failure to act by which the estate was injured after his embezzlement was brought to light."

Following this finding the probate court refused to surcharge the executrices with the sum lost by Judson's embezzlement.

Appellant here argues:

1. That the liability of the executrices for the embezzlement of their attorney is absolute;

2. That in any event they failed to exercise ordinary care and prudence in their management of the estate;

3. Since the money was embezzled before the escrow holder delivered the deed and bill of sale the loss fell on the purchaser Azevedo and the executrices were derelict in not instituting action against him.

[1] The general measure of the duty of an executor or administrator has been stated in a number of decisions to be that he act "* * * with that degree of prudence and diligence which a man of ordinary judgment would be expected to bestow upon his own affairs of a like nature." In re Moore, 96 Cal. 522, 525, 31 P. 584, 585; In re Estate of Burke, 198 Cal. 163, 166, 244 P. 340, 44 A.L.R. 1341; In re Estate of Robl, 163 Cal. 801, 802, 127 P. 55; In re Estate of Buchman, 123 Cal.App.2d 546, 556, 267 P.2d 73, 47 A.L.R.2d 291. Probate Code, section 920 states substantially the same measure in providing that an executor or administrator "shall not * * * suffer loss by the decrease or destruction *without his fault,* of any part of the estate." (Emphasis ours.)

Appellant however contends that this rule does not apply to loss due to misconduct of the executor's attorney, in which case it is claimed the liability is absolute. It is true that in the case of In re Ogier's Estate, 101 Cal. 381, 385, 35 P. 900, 901, the statement is found that "if the attorney employed should be derelict in his duty, and should receive and misappropriate funds of the estate, the executor would be liable therefor to the legatees under the will," and a substantially similar statement is found in Highfield v. Bozio, 188 Cal. 727, 729, 207 P. 242. We do not regard these statements as binding authority for the reason that the question of the executor's liability for the misconduct of his attorney was not before the court in either of those cases and the statements therefore are only dicta. In Ogier no authority for the quoted statement is cited and in Highfield the only authority cited is Ogier. The question actually before the court in both cases was whether a testator could impose the legal duty upon an executor to employ an attorney designated in the will and the statement quoted from Ogier and the like statement in Highfield, citing only Ogier, were made *arguendo* and without the citation of any authority.

[2] The generally accepted rule is thus stated in a note in 144 A.L.R., page 881, supported by the citation of authorities: "However, where an executor or administrator was found to have exercised the care, diligence, and prudence in the selection of his attorney, or in his activities with him in regard to the estate, that a reasonable person would have exercised under similar circumstances, it has been held * * * that no liability attached to such executor or administrator * * * for loss due to the misappropriation of funds or other misconduct by, or the negligence, lack of skill, or insolvency of his attorney." The same rule is announced in 33 C.J.S. Executors and Administrators § 248, pp. 1256, 1257 and in the 1958 Cumulative Supplement to 21 American Jurisprudence, Executors and Administrators, new section 254.1, pages 40–41.

This rule was approved and applied by the court in Re Estate of Barreiro, 125 Cal. App. 752, 772, 14 P.2d 786, 794, where the rule is stated, citing 24 C.J. 126, and In re Estate of Taylor, 52 Cal. 477, "that where the executor exercises its best judgment and due care and prudence in the selection of an agent or attorney who is well recommended, it is not liable for money lost by the insolvency of the agent unless the executor was negligent and careless in its dealings with him." See also 33 C.J.S. Executors and Administrators § 248. In re Estate of Taylor, 52 Cal. 477, cited in Barreiro, similarly held that where the executors in good faith and without negligence employed an agent to collect a debt in another state they were not liable for the loss of the money through his misconduct and insolvency.

[3] Executors, who are not themselves lawyers, would normally be derelict in their duty to the estate and to those interested in it if they did not employ the services of an attorney and if they exercise due care in the selection of an attorney they should not be absolutely bound by his derelictions but should only be required to "act * * * with that degree of prudence and diligence which a man of ordinary judgment would be expected to bestow upon his own affairs of a like nature." In re Moore, supra, 96 Cal. 522, 525, 31 P. 584, 585. Indeed if their liability for the derelictions of their attorneys was absolute, even though they were personally blameless, few individuals would be willing to assume the duties of an executor or administrator.

Appellant's claim that the executrices were negligent in their handling of the sale rests upon the contentions: 1. that the executrices were negligent in permitting Judson to act as escrow holder; 2. that they were negligent in permitting six months to elapse without insisting on the closing of the escrow and the payment of the money; and 3. that after the discovery of the embezzlement they were negligent in taking no legal action against Judson or Azevedo.

[4] Throughout the executrices had the advice and counsel of their attorneys, upon which, as lay persons unfamiliar with the law, they had the right to rely unless the situation was such that a lay person exercising common prudence would do otherwise. The statement of the New Jersey court in In re Sharp's Estate, 61 N.J.Eq. 601, 48 A. 327, 329, is here pertinent:

"In the selection and employment of successive counsel in the endeavor to collect the claim in question, it is impossible to deny that the administrator had done what a man of sense and intelligence would have done in respect to his own private affairs. To find him lacking in duty because he accepted the advice of the counsel whom he had employed would require him to be charged, not with his own negligence, but with the negligence of others. Administrators are necessarily compelled at times to employ legal advisers, and commit to their wisdom and intelligence the conduct of litigation. When they have made the selection in good faith and with reasonable prudence, they are not to be charged with the errors or mistakes of those whom they have employed."

[5] When Judson suggested that he would act as escrow holder he was acting as Mrs. Phillips' attorney and O'Neill, who was Mrs. Jackson's attorney, was present and not only acquiesced but actively concurred. The probate judge was well within his discretion in determining that in thus following the advice of their attorneys the executrices acted with the necessary prudence. Indeed the facts would hardly support a finding that in following the advice of their attorneys that Judson should so act they were not exercising the "prudence and diligence which a man of ordinary judgment would be expected to bestow upon his own affairs of a like nature."

After Judson's delay in closing the transaction became apparent Mrs. Jackson was constantly making inquiries of O'Neill, her attorney, about the delay and he in turn testified that he telephoned to Judson approximately fifty times and Judson continually replied that the delay was because his client, Mrs. Phillips, who had gone to live in Connecticut, had not executed and returned first the deed and then the bill of sale. O'Neill in May, still believing Judson's statements, prepared a petition for the removal of Mrs. Phillips as executrix but before filing it had inquiries made of Mrs. Phillips by an officer of appellant who lived near Mrs. Phillips in Connecticut. After these inquiries developed that Mrs. Phillips had never received a bill of sale for execution as Judson had frequently stated, O'Neill confronted Judson and the disclosure of the embezzlement was made. In the meantime Mrs. Phillips in Connecticut who had extensive correspondence with her attorney, Judson, also made telephone calls to him and to a sister, residing in California, in an attempt to discover what was delaying the closing of the sale. She testified that she had no information which led her to believe that Judson would not act "truly and faithfully as the escrow agent" until she was informed of his embezzlement. On these facts a finding that the executrices were not guilty of negligence is amply supported.

After the embezzlement was discovered Mrs. Jackson went immediately to the district attorney and disclosed the facts. Of this interview Mrs. Jackson testified: "we talked it over, and we decided the best thing to do is give Mr. Judson a chance to pay back the money," and again: "he [the District Attorney] said, 'Oh, well, I will be watching him. What do you want us to do?' * * * I don't know who said it, but the idea, the conclusion we came to, is give the man the chance to pay the money back."

Mrs. Jackson immediately thereafter consulted her attorney, O'Neill, and after talking to Judson and making an investigation which satisfied him that Judson had no assets subject to execution, O'Neill also concluded that the only chance to recover the money was to give Judson the opportunity to pay it from expected fees. In the meantime Mrs. Phillips telephoned to an attorney, Papas, in Stockton, who had represented her in personal affairs and advised him of the embezzlement. She was also in touch with Mrs. Jackson and was kept fully advised that with the active cooperation of Mrs. Jackson's attorney, O'Neill, they were attempting to collect from Judson out of anticipated fees, which appeared to them to offer the only possibility of recovering the money. The court said in In re Moore, supra, 96 Cal. 522, 525, 31 P. 584, 585: "It frequently happens that indulgence to a debtor is a matter of prudence on the part of the creditor," and the executrices certainly cannot be held guilty of negligence as a matter of law in putting the matter in the hands of other attorneys and following their advice as to the best method of procedure under the unfortunate circumstances which had arisen.

To the claim that the executrices should have proceeded against Azevedo (Todd v. Vestermark, 145 Cal.App.2d 374, 302 P.2d 347) there are at least two answers: 1. There is no evidence that their attorneys ever advised them that such a remedy might be available and not being lawyers they could not be expected without legal advice to know of this possibility; and 2. since the statute of limitations had not run when they were removed as executrices and the Public Administrator substituted in their place, that remedy was still open. "[A]n action against a representative to recover the value of real property on the ground of his having neglected to bring an action for its recovery cannot be maintained where the right of entry is not barred." 20 Cal. Jur.2d, Executors and Administrators, § 239, p. 368.

[6, 7] Appellant also seeks to charge the executrices with a claimed loss in delaying the sale of this property. While the property was originally appraised at a higher value, such appraisal is not conclusive, but only prima facie, evidence of its then value. In re Estate of Carver, 123 Cal. 102, 106, 55 P. 770. An expert testified that the values had not changed between the time of the testator's death and the sale of this property and no affirmative evidence of any decrease in value was produced. The finding that no loss occurred by the fact that the property was not sold earlier is supported by the record.

[8, 9] Appellant objects to an item of $500 paid for restaurant equipment in the bar and restaurant property afterwards sold, which was charged to principal. The case which they cite, In re Estate of Roberts, 27 Cal.2d 70, at page 80, 162 P.2d 461, 467, has this to say: "Whether these expenses were chargeable to the corpus or income of the estate depends largely on the condition of the property when the executrices received it. 'The cost of putting into tenantable repair premises which were not

in such repair when received by the trustee * * * is payable out of principal; but the cost of thereafter keeping the premises in repair is payable out of income.' "

Appellant objected to this item in its written objections but no reference to it in the reporter's transcript is given by appellant and the trial court's order settling the account also makes no reference to it although the order recites: "the Court will here state the order which is sought by the Objectors," and thereafter cites and disposes of all of the other objections here urged on appeal. We must assume in the face of this record that this particular objection was not urged upon the court. In the absence of some showing in the record that it was, it is too late to raise this question on appeal, especially in view of the fact that the record is completely silent as to the facts necessary to be shown under the quoted rule of In re Estate of Roberts, supra, to properly determine whether the charge should be made against principal or income. No showing was made, one way or the other, as to whether this expenditure was necessary to put the restaurant into "tenantable condition." If the objection had been presented at the hearing we may reasonably assume that evidence on this question would have been produced.

[10, 11] Appellant also objects to the charging of all the expenses of administration against the corpus of the estate, claiming that an allocation should be made between principal and income following the formula set out in Civil Code, section 730.-15, the Principal and Income Law. The portion of that section relied upon by appellant reads as follows:

"All ordinary expenses incurred in connection with the trust estate or with its administration and management, including regularly recurring taxes assessed against any portion of the principal, water rates, premiums on insurance taken upon the estates of both tenant and remainderman, * * * compensation of assistants and court costs on regular accountings, except attorneys' fees and trustees' compensation, shall be paid out of income * * * Attorneys' fees for ordinary or current services and trustees' compensation for both ordinary and extraordinary services, exclusive of compensation for acceptance or distribution, shall be paid one-half out of income, one-half out of principal, or in such other proportion as the court may direct; except that in the case of testamentary trusts where on any current trustees' accounting there are found to be insufficient principal moneys available for the payment of trustees' compensation, the court may direct that for such period the whole or any part of such compensation shall be paid out of any income available, subject to such conditions, if any, relative to reimbursement out of principal as the court may direct * * *"

Following the provisions of this section appellant argued in its opening brief that all of the expenses of administration except attorneys' and executrices' fees should have been charged against income and that one-half of the latter fees should have been charged against income and the other one-half against principal. So calculating the fees it sets out a table on page 21 of the opening brief under which of the total expenses of administration $7,556.05 would be charged against income and $2,910.18 against principal. That this was also appellant's position before the probate court appears clear from the following quotation from the order of the probate judge herein appealed from:

"Concerning the fourth objection to the account, to the effect that all except $2,910.-18 of the $10,466.23, costs of administration, should be allocated to income, the Court is unable to agree."

The question as thus broadly presented was correctly decided by the probate court. The necessary probate proceedings leading to the distribution of an estate to trustees pursuant to a will establishing a trust are not "expenses incurred in connection with a trust estate or with its administration and management" within the meaning of Civil Code, section 730.15. Every estate of a testator must go through the regular course of administration and distribution whether or not one or more trusts may be established by the will of the testator. The costs of such proceedings are costs of the probate of decedent's will and the administration of his estate, and not costs of the "administration and management" of the trust. Except where otherwise provided, expressly or by necessary implication, in the testator's will "the expenses of administration prior to the establishment of the trust are chargeable, insofar as it is adequate to meet them, to the corpus of the estate which is ultimately to form the trust and not to the income accruing thereon during the period of probate administration." (In re Estate of Schiffmann, 86 Cal.App.2d 638, 647, 195 P.2d 484, 490 and cases there cited.)

[12] In its closing brief appellant attempts somewhat to alter its position, claiming that because the distribution of the estate was unreasonably delayed and the executrices, who are also trustees under the will and beneficiaries of the income, elected to carry on the bar and restaurant business to enhance their income from the trust, at least those expenses so incurred should be allocated according to Civil Code, section 730.15. The record fails to show that any such contention was made before the probate court and no such contention was made in appellant's opening brief. A party is not ordinarily permitted to adopt one theory in the trial court and change to another theory on appeal (Ernst v. Searle, 218 Cal. 233, 240–241, 22 P.2d 715; Gibson Properties Co. v. City of Oakland, 12 Cal.2d 291, 299, 83 P.2d 942) nor to raise a new question for the first time in the closing brief (Utz v. Aureguy, 109 Cal.App.2d 803, 808, 241 P.2d 639).

[13] Complaint is made of the refusal to admit a letter into evidence. The record fails to show any offer of the letter, as pointed out in respondents' brief. The reply brief is silent on the subject and on the record the question is not properly before us. In any event the letter dealt with the delay in selling the bar and restaurant and since we have affirmed the probate court's finding that the estate suffered no loss thereby the cause of the delay becomes unimportant.

Order affirmed.

KAUFMAN, P. J., and DRAPER, J., concur.

171 Cal.App.2d 796

CALIFORNIA–WESTERN STATES LIFE INSURANCE COMPANY, a California corporation, Petitioner and Respondent,

v.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD, Michael B. Kunz, Chairman, Glenn V. Walls, Member, Arnold L. Morse, Member, and H. W. Stewart, Director of Employment of the State of California, Respondents and Appellants.

Civ. 9511.

District Court of Appeal, Third District, California.

July 8, 1959.

Proceeding by State Disability Unemployment Compensation Fund against compensation carrier under approved voluntary plan to obtain determination of coverage as between fund and carrier under the Unemployment Insurance Code. The California Unemployment Insurance Appeals Board determined that the unemployment compensation benefits were compensation carrier's sole obligation, and compensation carrier sought mandate review. The Superior Court, Sacramento County, Gordon A. Fleury, J., entered judgment ordering that a peremptory writ of mandate issue requiring appeals board to annul and reverse its decision, and board and State Director of Employment appealed. The District Court of Appeal, Van Dyke, P. J., held that, where claimant's disability began while he was covered by the fund, but claimant was subsequently employed by a voluntary plan employer, District Court of Appeal would have to accept board's specific finding that, for period of disability involved, claimant was covered by both the fund and the voluntary plan, and, therefore, liability for payment of disability benefits would have to be apportioned equally between fund and compensation carrier under the involuntary plan.

Judgment affirmed.

1. Social Security and Public Welfare ⚷242

Where claimant's disability began while he was covered by State Disability Unemployment Compensation Fund, and that disability caused entire loss of wages upon which his claim was based, fund would be responsible for payment of benefits unless claimant's work for a voluntary plan employer resulted in a shifting of the liability either wholly or partly to such employer. West's Ann.Unempl.Ins.Code, §§ 3252, 3253.

2. Social Security and Public Welfare ⚷242

As used in the insurance field, term "simultaneous coverage" means a situation in which two or more insurers are on the same risk. West's Ann.Unempl.Ins.Code, §§ 3252, 3253.

See publication Words and Phrases, for other judicial constructions and definitions of "Simultaneous Coverage".

3. Social Security and Public Welfare ⚷242

Where claimant's disability began while he was covered by State Disability Unemployment Compensation Fund, but claimant was subsequently employed by a voluntary plan employer, District Court of Appeal would have to accept unemployment insurance appeal board's specific finding that, for period of disability involved, claimant was covered for unemployment compensation disability benefits by both the fund and the voluntary plan, and, therefore, there was "simultaneous coverable liability"; and liability for payment of disability benefits would have to be apportioned equally between fund and the compensation carrier under the voluntary plan. West's Ann.Unempl.Ins.Code, §§ 3252, 3253.

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The Atty. Gen., by Irving H. Perluss, Asst. Atty. Gen., and Vincent P. Lafferty, Deputy Atty. Gen., for appellant.

Downey, Brand, Seymour & Rohwer, Howard L. Jeske, George Basye, Sacramento, for respondent.

VAN DYKE, Presiding Justice.

This is an appeal by the Unemployment Insurance Appeals Board and the State Director of Employment from a judgment ordering that a peremptory writ of mandate issue requiring the appeals board to annul and reverse its decision Number 612.

On September 14, 1956, one Tommie Griffin, the claimant for benefits herein, placed himself under the care of a physician for a back injury which he had received about two years before. While under the care of his physician he reported to his union for work and was dispatched to an employer for whom he worked one and one-half days. He was laid off because he was not able to perform the work. He again got work and succeeded in working three and one-half days but again was forced to leave due to his disability. It was found and determined by the administrative agencies involved that his disability commenced September 14, 1956 and was continuous throughout the period with which we are here concerned. When that disability began, Griffin was covered by the State Disability Unemployment Compensation Fund (hereinafter called the Fund) and was entitled to appropriate compensation. The employer for whom he worked one and one-half days and the employer for whom he worked when his disability began were both covered by the Fund. The employer for whom he worked three and one-half days was covered by an approved voluntary plan issued by respondent, California-Western States Life Insurance Company. On October 24, 1956, Griffin filed his claim for disability compensation and the Fund began payments but referred the claim to respondent, requesting that it accept coverage. Respondent offered to accept coverage on a simultaneous coverage basis, benefits to be paid one-half by it and one-half by the Fund. The Fund thereupon sought determination of coverage under the Unemployment Insurance Code, with the result that it was determined that benefits were the sole obligation of respondent. Respondent sought mandate review with the result above stated and this appeal followed.

[1] It is obvious that, Griffin's disability having begun while he was covered by the Fund, and that disability having caused the entire loss of wages upon which his claim is based, the Fund is responsible for the payment of benefits unless Griffin's work for the voluntary plan employer has resulted in a shifting of the liability either wholly or partly to respondent. Respondent contends the risk here involved was simultaneously covered by its policy and the Fund's statutory plan.

There is no statutory definition of simultaneous coverage in that part of the Unemployment Insurance Code devoted to disability benefits. The only reference to it is found in section 3253 of the code, reading as follows:

> "Except as provided in this article, an employee covered by an approved voluntary plan shall not be entitled to benefits from the Disability Fund for a disability which commenced while he is covered by the voluntary plan. Authorized regulations shall be prescribed to allow benefits to individuals *simultaneously covered* by one or more approved voluntary plans and the Disability Fund." (Italics added.)

Where simultaneous coverage exists the burden of making compensations is by Regulation 3253–1 (22 Calif.Adm.Code sec. 3253–1) divided equally among those covering the risk. The trial court took the view that coverage was simultaneous by the Fund and by respondent; that therefore the burden of making payments was to be equally divided between them.

[2] Section 3253, supra, contains a statutory authorization for regulations governing the allowance of benefits to individuals simultaneously covered by more than one approved voluntary plan, or by the Fund and one or more such plan or plans. Regulation 3253–1 was adopted pursuant to that authorization, but the regulation does not define the term "simultaneous coverage." We think it needs no definition. The Legislature recognized that simultaneous coverage may exist in certain instances, as for example where one individual works for several employers during a day and they are covered by two or more insurers, including perhaps the Fund. Simultaneous coverage is a term well known and widely used in the field of insurance. Loss by unemployment through disability has been long the subject of insurance. California's statutory plan for compensating employees for such loss is based on insurance principles and is financed by contributions from all eligible employees whose contributions are pooled for common benefit. The statutes also provide that coverage may be furnished by approved voluntary plans. We think the Legislature saw no need for statutory definition of the term "simultaneous coverage". As used in the field of insurance it means a situation where two or more insurers are on the same risk. But upon what basis loss in such cases should be allocated was a proper subject for regulations, and regulations to that end were authorized. Regulation 3253–1, so far as here pertinent, provides as follows:

> "Simultaneous coverage is deemed to exist when an individual is covered by and entitled to benefits from more than one plan (including one or more voluntary plans and the Disability Fund). Benefits shall be paid from the Disability Fund to individuals who are simultaneously covered by one or more voluntary plans and the Disability Fund, if they are otherwise eligible, in an amount equal to the quotient obtained by dividing the daily sum of the basic

> and additional unemployment compensation disability benefits to which the individual would be entitled if no part of his base period wages had been exempt from contributions under section 3252 of the code and if he were covered only by the Disability Fund, by the number of plans (including voluntary plans and the Disability Fund) under which he is simultaneously entitled to benefits. * * *"

Appellants argue that the first sentence of Regulation 3253–1 defines and limits the application of the statutory term "simultaneously covered". We think it is merely introductory, states the obvious, and regulates nothing. The regulation follows thereafter and in essence provides a simple and equal allocation of the burden of paying benefits among the simultaneous insurers, including the Disability Fund, on a numerical basis. In view of the vast number of claims for benefits to be processed, of the generally small amounts of money involved, and of the immense administrative difficulty of apportioning losses on any more complicated basis, the regulation is sound.

Appellants refuse to accept the foregoing interpretation of the statute and of the regulation and insist that the regulation both defines the statutory term "simultaneously covered" and limits the application of the term as so defined. Appellants say: "That the claimant was 'covered' by the state fund is admitted in the decision of the appellant Board as follows: 'The facts clearly establish that the claimant was disabled from performing his regular and customary work beginning September 14, 1956, and that such disability continued through both periods of employment involved herein. Therefore, the claimant was covered for unemployment compensation disability benefits by both the Disability Fund and the voluntary plan policy.'" Continuing, appellants say: "But, mere 'coverage' by the disability fund and a voluntary plan is, pursuant to the regulation which interprets the statute, insufficient to establish 'simultaneous coverage.' For such to exist the individual must be 'covered by *and entitled to benefits from*' more than one plan." From this starting point appellants engage in a complicated rationalization which we think it unnecessary to follow. As we read the regulation, the phrase "covered by and entitled to benefits from" means nothing more than would be meant by the phrase "covered by" or the phrase "entitled to benefits from" used singly. When an employee is covered by a plan he is also entitled to benefits arising thereunder.

[3] We must accept here the specific finding of appellant Appeals Board that, for the period of disability here involved, the claimant was covered for unemployment compensation disability benefits by both the Fund and the voluntary plan. That being so there was simultaneous coverable liability and the liability for payment of disability benefits must be apportioned equally between the Fund and respondent herein.

The judgment appealed from is affirmed.

SCHOTTKY, J., concurs.

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171 Cal.App.2d 699

Merle W. ANDERSON et al., Petitioners and Respondents,

v.

CITY OF LONG BEACH, a municipal corporation, et al., Defendants and Appellants.

Civ. 23317.

District Court of Appeal, Second District,
Division 1, California.
July 6, 1959.

Action by retired firemen and policemen or widows or dependents of such for amount allegedly due as pension. The Superior Court of Los Angeles County, George Francis, J., rendered judgment for plaintiffs, and city appealed. The District Court of Appeal, White, P. J., held that where ordinance provided that city should reimburse firemen and policemen for furnishing and maintaining uniforms with total payments to not exceed $180 per year, and payment under ordinance was made on basis of on-duty days without respect to actual cost of clothing or uniform worn, although ordinance was not designated a pay ordinance its effect was to add $180 per year to pay of each employee who worked full time, and employees who had retired before ordinance went into effect and who were entitled to receive a percentage of compensation paid to others rendering same services which retired employees had performed were entitled to percentage of the $180 per year for period during which ordinance was in effect but that plaintiffs were not entitled to prejudgment interest.

Judgment modified by striking awards for prejudgment interest and in all other respects affirmed.

1. Municipal Corporations ⟹187(7)

Where ordinance provided that city should reimburse firemen and policemen for furnishing and maintaining uniforms with total payments to not exceed $180 per year, and payment under ordinance was made on basis of on-duty days without respect to actual cost of clothing or uniform worn, although ordinance was not designated a pay ordinance its effect was to add $180 per year to pay of each employee who worked full time, and employees who had retired before ordinance went into effect and who were entitled to receive a percentage of compensation paid to others rendering same services which retired employees had performed were entitled to percentage of the $180 per year for period during which ordinance was in effect.

2. Municipal Corporations ⟹187(9, 10)

In action by retired policemen and firemen for percentage of sum paid to active members as uniform allowance on ground that such allowance amounted to pay and that they were entitled to percentage of compensation paid to active members, evidence sustained finding that additional payments were actually treated as part of salary of active employees, and finding that council, in passing ordinance creating such allowance, intended that allowance be treated as it was, was immaterial, and even if finding were without evidentiary support and therefore erroneous, it was not prejudicial to city.

3. Municipal Corporations ⟹1002

Municipal corporation was not a "political subdivision" within statute providing for recovery of interest on damages from political subdivision of state; and policemen and firemen who received judgment against city for pension payments due them were not entitled to prejudgment interest. West's Ann.Civ.Code, § 3287.

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Walhfred Jacobson, City Atty., Clifford E. Hayes, Deputy City Atty., Long Beach, for appellants.

Kenneth Sperry, Long Beach, for respondents.

WHITE, Presiding Justice.

The City of Long Beach appeals from the judgment which granted a peremptory writ of mandate requiring it "to adjust the pension account of each petitioner herein so as to include therein credit for the entire amount of pension payments to which each is and was legally entitled, based upon the applicable percentage of the entire amount of compensation that was actually provided for and paid to active members of equal rank throughout the period from October 1, 1954 to October 1, 1956, including the additional sum of $180.00 per annum, which was actually paid to each active member of the Police and Fire Department of the City of Long Beach pursuant to Ordinance No. C-3420 and the administrative regulations issued in connection therewith" and to pay to each petitioner the additional amount due him together with interest thereon at 7% per annum.

Prior to October 1, 1954, each of the petitioners had retired from the Police or Fire Department of the City (or was a widow or other dependent of a deceased policeman or fireman) and had been granted and paid a pension pursuant to the provisions of Section 187 of the City Charter, in monthly payments equal to the applicable percentage of the current salary provided for the position upon which such pension is based. Prior to October 1, 1954, each policeman or fireman had furnished his own uniforms as required by the City, receiving no reimbursement whatever for the amounts spent by them therefor.

Ordinance No. C–3420 became effective on October 1, 1954 and was repealed effective October 1, 1956. Section 3 thereof is as follows:

"The City of Long Beach shall reimburse said employees of the Police and Fire Departments for furnishing and maintaining such uniforms and accessories thereto in an amount to be determined by the City Manager, providing, however, that the total payment to each employee shall not exceed One Hundred Eighty Dollars ($180.00) per year."

It was stipulated by the parties hereto that "no changes were made in the type of uniform or the regulations with respect to the wearing of such uniforms in the calendar years 1954, 1955, or 1956, and that no affidavit or showing of any kind was required to be made by the various members of the Police and Fire Departments with respect to the use of such funds as they were paid by the City of Long Beach pursuant to the provisions of said ordinance No. C–3420 or with respect to the actual costs of any clothing or uniforms which were worn by them throughout the period from October 1, 1954 to October 1, 1956."

It was further stipulated that quarterly payments were made by the City to the active members of the Police and Fire Departments in accordance with an administrative regulation to the effect that the Police and Fire Departments shall furnish the accounting department with time sheets showing the number of "on duty days" worked by their members, who shall be paid a uniform allowance based upon a schedule specifying the amounts due for "on duty days" ranging from 52 cents for one to $47.72 for 92 "on duty days" in any quarter, but not to exceed $180 in any year.

Respondents urged in the court below, and it was there determined, that the uniform allowance was in fact an increase in the "salary attached to the rank or position" held by respondents prior to their retirement.

The fact that the so-called "uniform allowance" is not provided in the salary ordinance, but a separate one, that none of the respondents had "on duty days" or was required to maintain uniforms and accessories during the time within which said Ordinance No. C–3420 was in effect are claimed by appellant to require reversal of the judgment for the reason that it "is contrary to the law and the facts". This contention is based upon cases cited to the effect that the motive for enactment of a law is not a proper subject of judicial inquiry (Butterworth v. Boyd, 12 Cal.2d 140, 146, 82 P.2d 434, 126 A.L.R. 838); that the courts must interpret statutes and ordinances in accordance with the intention of the legislative body as shown by "the plain and unambiguous language used" (In re Estate of Carter, 9 Cal.App.2d 714, 718, 50 P.2d 1057, 1059; Vaughn v. Vaughn, 62 Cal.App.2d 260, 262, 144 P.2d 658; Caminetti v. Pacific Mutual Life Ins. Co., 22 Cal.2d 344, 352, 139 P.2d 908; People v. Pacific Guano Co., 55 Cal.App.2d 845, 847, 132 P.2d 254), and that the court has no power to determine the wisdom of any economic policy (Max Factor & Co. v. Kunsman, 5 Cal.2d 446, 454, 55 P.2d 177).

Each of the cited decisions involved facts easily distinguishable from those in the instant action, and it would serve no useful purpose to discuss them at greater length.

[1] The fact that respondent pensioners did not furnish uniforms or serve during "on duty days" between October 1, 1954 and October 1, 1956, is not relevant to the

determination of the amount of their pensions. Their pensions are based upon their contracts (already fully performed by them) relative to active service rendered by them, for which they were to and did receive certain compensation at the time, and also for which the City promised they would, after retirement, receive certain percentages of the amounts paid by the City to others from time to time rendering the same services.

The actual effect, not the wording, of the ordinance determines whether it is added remuneration for services rendered. Under the facts of the instant action $180 per year was added to the pay for work done by each employee who worked full time. Therefore, the court correctly determined that the pensions of petitioner-respondents should be based upon such increased compensation being paid to others later rendering the same services.

[2] Appellant's second ground for reversal is that "certain findings of the trial court are without evidentiary support". The finding claimed to be without evidentiary support is "that though said additional payments were referred to in said ordinance as a clothing or 'uniform allowance', the same was actually treated and intended as a part of the salary of each active employee who held one of the aforesaid positions". The stipulated facts hereinbefore epitomized are sufficient to support the finding as to how the "uniform allowance" was computed and paid, or "treated". Whether the council "intended" that such allowance be treated as it was is immaterial and the finding to that effect, assuming it to be without evidentiary support and therefore erroneous, could not have been prejudicial to the City under the facts and circumstances of the instant action.

[3] Appellant's third specification of error urged as requiring reversal of the judgment against them is that "the court erroneously allowed the respondent interest on the amount due". In support of said third point, they cite and rely upon the recent decision in Abbott v. City of Los Angeles, 50 Cal.2d 438, 466 et seq., 326 P.2d 484, 501, wherein it was decided that pre-judgment interest cannot be collected from a city under the provisions of Section 3287 of the Civil Code, for the reason that a city is not a "political subdivision of the State" within the meaning of that section. For that reason, the provision for pre-judgment interest should be stricken from the judgment.

The judgment is modified by striking therefrom that portion which awards respondents interest at the rate of 7% per annum dating from September 7, 1955 on the unpaid balance then due each and also on such additional unpaid amounts as have accrued thereafter from the date of each accrual until said amounts are paid in full; in all other respects the judgment is affirmed. Respondents to recover costs on appeal.

FOURT and LILLIE, JJ., concur.

171 Cal.App.2d 772

Glenn E. RUST, Jacquelyn Rust Kelley, Clyde W. Rust, Claudia Nadine Green, Clyde W. Rust, Jr., William D. Rust, Barbara Ann Rust, Mary Catherine Rust, a minor, by William D. Rust, her guardian ad litem, and Emma P. Dixon, Petitioners,

v.

Honorable Robert E. ROBERTS, as Judge of the Superior Court of the State of California, in and for the County of El Dorado, Respondent,

People of the State of California, Real Party in Interest.

Civ. 9768.

District Court of Appeal, Third District, California.

July 7, 1959.

Original proceeding in mandate seeking to obtain a peremptory order ordering the respondent court to set aside and reverse its orders with respect to interrogatories in a condemnation action. The District Court of Appeal, Van Dyke, P. J., held that an interrogatory seeking knowledge as to whether acreage state had acquired for similar purposes within the general area within which lands being taken were situated and that the state gives the names and addresses of persons from whom such acreage had been acquired etc., were proper and that other interrogatories were improper and need not be answered.

Order in accordance with the opinion.

1. Discovery ⚷41

In a condemnation action, where the owner served upon the state certain interrogatories, those interrogatories concerning a survey of the property involved a moot issue where it appeared that no survey was made.

2. Mandamus ⚷16(1)

Mandate will not issue where its issuance will serve no useful purpose.

3. Discovery ⚷41

In a condemnation action where description used in complaint was a metes and bounds description and the property condemned was a single body of land owned by the owners for approximately 20 years, interrogatories concerning the acreage being condemned were improper as trivial.

4. Discovery ⚷74

In condemnation action, interrogatories dealing with appraisals of property which have been made by the state, request for the names and addresses of the appraisers and the contents of the appraisers' reports were improper on the ground that the matters were privileged under the attorney client privilege of the statute. West's Ann. Code Civ.Proc. § 2016(b).

5. Discovery ⚷41

Interrogatories in condemnation action inquiring as to amount paid the appraisers by the state, what financial arrangement for payments had been made were improper though it was contended that answers would prove or disprove value which by the pretrial order had been stated to be the only issue to be tried.

6. Discovery ⚷41

In condemnation action interrogatories to obtain information upon which to cross-examine a party or a witness were properly denied as relating to collateral matter.

7. Discovery ⚷41

Interrogatories in condemnation action seeking information as to the highest and best use of the land and as to the facts upon which such contention was based were properly denied as not relevant to the issue of value but merely arguments and theories that the state might advance through its witnesses on value.

8. Discovery ⚷41

Interrogatories in a condemnation action requesting that the state inform petitioners what use it contended was the highest and best use of the land and as to the facts upon which such contention was based were not proper upon the ground that interrogatories might serve to narrow the issues at trial.

9. Discovery ⚷41

Interrogatory in condemnation action seeking facts relevant to the issues and resting within the knowledge of the state, such as what acreages state had acquired for similar purposes within the general area in which the lands being taken were situated and requesting the names and addresses of persons from whom such acreages had been acquired etc., were proper.

10. Discovery ⚷44

Interrogatories in a condemnation action are not to be denied on the ground that the petitioners could work out the answers by searching the records of the county in which the lands were situated and the records of other agencies.

11. Discovery ⚷41

Interrogatories in a condemnation action asking for contentions of the state concerning acreage already acquired and seeking the state's opinions concerning comparative values of the lands acquired and lands here sought to be condemned were properly denied.

Downey, Brand, Seymour & Rohwer, Frank Finnegan, Sacramento, for petitioners.

Stanley Mosk, Atty. Gen., by John Morris and Marcus Vanderlaan, Deputies Atty. Gen., Sacramento, for respondent (real party in interest)

VAN DYKE, Presiding Justice.

There is pending in the Superior Court for El Dorado County an action in condemnation brought by the State to condemn a body of land belonging to petitioners. Petitioners have answered the complaint and a pretrial order has been made. Petitioners served upon the State certain interrogatories. The State noticed a hearing of objections to the interrogatories and of a motion to strike the same. A hearing was held. The respondent court sustained the objections to the interrogatories, and granted the motion to strike. Thereupon petitioners began this proceeding in mandate, seeking to obtain a peremptory writ ordering the respondent court to set aside and reverse its orders. This court issued its alternative writ, the matter has been heard upon the petition and the return and has been submitted.

These are the interrogatories:

"1. Has the State caused a survey to be made of the acreage herein sought to be condemned?

"2. What was the name and address of the person in charge of making said survey?

"3. When was it made?

"4. What is the amount of the acreage the State seeks to condemn by this proceeding?

"5. How is this acreage arrived at?

"6. Has the State made or caused to be made appraisals of the market value of the property herein sought to be condemned?

"7. What are the names and addresses of each of the appraisers who have made such appraisals for or on behalf of the State of said property?

"8. What was the total amount declared by each such appraiser to be the fair market value of the property herein sought to be condemned?

"9. What values per acre were used in arriving at the appraisal figure in each instance?

"10. When were the appraisals made and as of what date do they declare the fair market value of said property?

"11. How much was each appraiser paid by the State to make such appraisal and report?

"12. What are the financial arrangements for the payment of fees by the State with the appraisers selected by them in connection with the testimony to be given by each of them in this action?

"13. What does the State contend to be the highest and best use of the property herein sought to be condemned?

"14. Upon what facts is such contention made by the State?

"15. Upon what facts is it contended by the State that the highest and best use of the subject property is not for residential subdivision purposes?

"16. Does the State contend that the acreage in question is not suitable for residential subdivision purposes?

"17. Does the State contend that any part of the acreage in question is not suitable for residential subdivision purposes? If so, what part?

"18. If the answer to the two preceding questions is yes, upon what facts does the State contend that such acreage, or any part thereof, is unsuitable for residential subdivision purposes?

"19. If the State contends that the acreage in question has any qualities or location that limits or restricts the value of said acreage, or any part thereof, for residential subdivision purposes, what does the State contend those limiting or restrictive qualities or locations are?

"20. What other acreages has the State acquired for the same or similar purposes within the area on or near Folsom Lake? Please give the names and addresses of the person or persons from whom the acreages were acquired, the dates of said transactions, the location of said acreages with respect to the acreage which is the subject of this lawsuit, the amount of the acreage acquired in each instance and the amount paid by the State for such acreage in each instance?

"21. Does the State contend that any of the acreages acquired by it as a result of those transactions contained within the preceding paragraph are not comparable property as compared to the subject property? If so, designate which acreages and transactions are not comparable and why the State contends they are not comparable.

"22. Does the State contend that any of the acquisitions of property described in the two preceding paragraphs were other than free and voluntary acquisitions from the standpoint of the State and the person or persons from whom acquired? If so, designate which ones were other than free and voluntary and state the reasons for such contention."

The question before this court is whether the trial court abused its discretion in ruling as it did. American Federation of Musicians v. Superior Court, 150 Cal.App.2d 165, 309 P.2d 874; Heffron v. Los Angeles Transit Lines, 170 Cal.App.2d 709, 339 P.2d 567.

[1] The first three interrogatories concern a survey of the property. Since it has been made to appear in these proceedings that no survey was made the issues as to these interrogatories have become moot.

[2, 3] Interrogatories 4 and 5 concern the acreage being condemned. It appears that the description used in the complaint is a metes and bounds description and that the property being condemned is a single body of land which has been owned by petitioners for approximately 20 years. It may safely be assumed that they are familiar with the property and its extent. The interrogatories are trivial. Mandate will not issue where its issuance will serve no useful purpose. Hutchison v. Reclamation District No. 1619, 81 Cal.App. 427, 432–434, 254 P. 606.

[4] Interrogatories 6 to 10 deal with appraisals of the property which have been made by the State, request the names and addresses of the appraisers, and the contents of the appraisers' reports. It appears by affidavits presented to the trial court that the attorneys for the State requested the State to employ appraisers to go upon the property to investigate its nature and uses, to appraise its value, and to report. It also appears that these things were done and that the State communicated the matters reported and delivered the reports to its attorneys in confidence. The State has claimed that these matters are privileged under the attorney-client privilege declared by statute. The claim is good. Code of Civil Procedure Section 2016, Subdivision (b), provides:

> "* * * All matters which are privileged against disclosure upon the trial under the law of this State are privileged against disclosure through any discovery procedure. * * *"

The general principle involved in the attorney-client privilege has been stated in this way in 8 Wigmore on Evidence, Third Edition, Section 2292:

> "Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected

> from disclosure by himself or by the legal adviser, except the protection be waived."

Interrogatories 6 to 10 inclusive are covered by the privilege. Holm v. Superior Court, 42 Cal.2d 500, 267 P.2d 1025, 268 P.2d 722; City and County of San Francisco v. Superior Court, 37 Cal.2d 227, 231 P.2d 26, 25 A.L.R.2d 1418.

[5, 6] Interrogatories 11 and 12 inquire as to the amount paid the appraisers by the State or, alternately, what financial arrangement for payments have been made. It is not contended that answers to these questions would directly prove or disprove value which by the pretrial order has been stated to be the only issue to be tried. But it is argued that the answers might be valuable for impeachment purposes. Assuming this to be true, we think, as was said in a similar situation in Lynch v. Henry Pollak, Inc., D.C., 1 F.R.D. 120, 121, that, "While examinations under the new rules may be had for the purpose of obtaining information upon which to cross-examine a party or witness * * * such examination must be had on matter relevant to the subject matter involved in the pending action. We do not think that this examination on collateral matters comes within the scope of the rules."

[7, 8] Interrogatories 13 through 19 request that the State inform petitioners what use it contends is the highest and best use of the land and as to the facts upon which such contention is based. Such matters are not relevant to the issue of value, being merely arguments and theories that the State may advance through its witnesses on value. Indeed, the State may well want to use a witness with whose theories as to use of the property the State does not agree. The State's contentions cannot be put in evidence even though its expert witnesses will, in all probability, when testifying on value, testify also as to what is the highest and best use of the property. They will probably also testify as to the various uses to which the property can be put. But the State's contentions pro or con upon the subject matter of the interrogatories are not proper subjects of discovery. Petitioners argue that answering these interrogatories might serve to narrow the issues at trial. See Territory of Alaska v. The Arctic Maid, D.C., 135 F.Supp. 164. We think not. Evidence may be given by either party as to the uses to which the property may be put and answers to the interrogatories would neither confine petitioners in the scope of their proof nor prevent the State's witnesses from testifying as to a use which in their opinion is the highest and best use of the property. We see no useful purpose to be served by these interrogatories.

[9, 10] Interrogatory 20 asks for facts relevant to the issues and resting within the knowledge of the State. The interrogators want to know what acreages the State has acquired for the same or similar purposes within the general area in which the lands being taken are situated. It is requested that the State give the names and addresses of persons from whom such acreages have been acquired, the dates of the transactions, the locations of the acreages acquired with respect to that which is being taken, the amount of land acquired and the amount paid by the State therefor. The matters here inquired into are relevant to the issues and the answers to the questions may lead to further discovery. The argument of the respondent is that the answers to these questions can be obtained by other means than interrogatories addressed to the State. That answer is not sufficient. It is apparent that since the State has acquired the lands concerning which the questions are asked it has at hand the information requested. It is not sufficient to say that petitioners could work out the answers to the questions by searching the records of the county in which these lands are situated and the records of the superior court of that county and by examining the public records of the State agencies involved. This is not a case where the petitioners are attempting to compel the State to perform their work for them. It is a case where they ask for relevant factu-

al information readily to be supplied by the State. The interrogatory must be answered.

[11] Interrogatories 21 and 22 again ask for contentions of the State, this time concerning these acreages already acquired. The petitioners want to know what the State's opinions are concerning the comparative values of the lands acquired and the lands here sought to be condemned. What we have heretofore said concerning interrogatories asking for such information applies here.

Let a peremptory writ issue requiring only that respondent court set aside its order relative to Interrogatory No. 20 and to enter an order directing that answer thereto be made.

SCHOTTKY, J., and WARNE, J. pro tem., concur.

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171 Cal.App.2d 801

CALIFORNIA-WESTERN STATES LIFE INSURANCE COMPANY, a Corporation, Plaintiff and Respondent,

v.

STATE BOARD OF EQUALIZATION of the State of California, George R. Reilly, James H. Quinn, Robert McDavid, Paul R. Leake and Robert C. Kirkwood, members thereof, Defendants and Appellants.

Civ. 9537.

District Court of Appeal, Third District, California.

July 8, 1959.

Rehearing Denied July 29, 1959.
Hearing Denied Aug. 31, 1959.

Action to recover taxes paid under protest. From a judgment of the Superior Court, Sacramento County, James H. Oakley, J., the Board of Equalization and others appealed. The District Court of Appeal, Schottky, J., held that where insurance company moved its principal office in December, 1952, it could deduct real estate taxes for 1952–1953 paid against its own property and its 1953 return of taxes paid on new home office for 1952–1953, in its 1954 return.

Judgment affirmed.

1. Statutes 🔑245

Tax statutes must be construed strictly against the taxing power.

2. Statutes 🔑245

Interpretation or construction of statutory language in a taxing statute will not be indulged merely to make the tax law more logical or symmetrical.

3. Insurance 🔑7

Under constitutional amendment authorizing an insurer to deduct from annual tax imposed thereby amount of real estate taxes paid by it in that year before, or within 30 days after, becoming delinquent, on real property owned by it at the time of payment, an insurance company which moved its principal office December 1, 1952, could deduct from its annual tax real estate taxes for 1952–1953 which were paid against its old property in its 1953 return, and taxes paid on the new home office for 1952–1953 in its 1954 return, where the payment on January 5, 1953, was within 30 days of the time the taxes became delinquent. West's Ann.Rev. & Tax.Code, § 2617; West's Ann.Const. art. 13, § 14⅘ and (e, f).

◆

The Attorney General, by Harold B. Haas, Deputy Atty. Gen., for appellants.

Downey, Brand, Seymour & Rohwer, Sacramento, for respondent.

SCHOTTKY, Justice.

The Board of Equalization of the State of California and the individual members thereof appeal from a judgment in favor of the California-Western States Life Insurance Company by which the latter recovered the sum of $15,718.42, representing taxes paid under protest.

By the terms of article XIII, section 14⅘, of the California Constitution an annual tax is imposed on each insurer doing business in this state. In the case of an insurer who does not transact title insurance business in California the basis of the annual tax is the amount of gross premiums less return premiums received by the insurer on its business done, other than premiums received for reinsurance and ocean marine insurance.

Subsection (e) of section 14⅘ provides:

> "Each insurer shall have the right to deduct from the annual tax imposed by this section upon such insurer in respect to a particular year the amount of real estate taxes paid by it, in that year, before, or within 30 days after, becoming delinquent, on real property owned by it at the time of payment, and in which was located, in that year, its home office or principal office in this State. * * *"

On December 1, 1952, the insurance company moved its home office from its building located at the corner of 10th and J Streets, in Sacramento, to a new building located at 21st and L Streets, in Sacramento. In its 1953 return (based on the 1952 premiums) the insurance company claimed as a deduction the real estate taxes paid on its old home office. In its 1954 return the insurance company claimed the taxes paid for the 1952–53 real estate tax year on its new home office on January 5, 1953, in the amount of $15,718.42, and the first installment of the 1953–54 real estate taxes paid in November, 1953, in the amount of $27,712.18. The State Board of Equalization in 1955 decided that the company improperly deducted the $15,718.42 because according to the board this resulted in the company taking deductions of real estate taxes for the real estate tax year 1952–53 on both the old and new home offices. Accordingly, the sum of $15,718.42 was added to the 1955 assessment and this amount was paid under protest. The insurance company then brought this suit to recover the amount additionally assessed and paid under protest and recovered judgment in the superior court. The board has appealed.

The question presented is whether or not an insurance company which moved its principal office in December, 1952, may deduct real estate taxes for the year 1952–53, which were paid against its old property, in its 1953 return and taxes paid on the new home office for the year 1952–53 in its 1954 return.

The first installment of real estate taxes becomes delinquent on December 10th at 5 p. m. Rev. & Tax. Code, sec. 2617. The payment on January 5, 1953, therefore was within 30 days of the time the taxes became delinquent. The Constitution states that the "insurer shall have the right to deduct from the annual tax imposed by this section * * * the amount of real estate taxes paid by it, in that year, before, or within 30 days after, becoming delinquent, on real property owned by it at the time of payment, and in which was located, in that year, its home office or principal office in this State."

In the calendar year 1953 the insurance company paid the taxes on the new home office within 30 days of becoming delinquent for the real estate year 1952–53 and paid the real estate taxes on the new home office for the year 1953–54.

According to the literal wording of the Constitution (art. XIII, sec. 14⅘) respondent insurance company had the right to deduct real estate taxes on its new home office paid within 30 days of becoming delinquent and the trial court so held. Appellant board contends that this allowed respondent insurance company to deduct real estate taxes on two principal offices in the same real estate tax year, which appellant board contends violates the Constitution.

It is the board's contention that the provision in the Constitution was meant to apply to a single principal office and that since the provision is silent as to the situation where there is more than one principal office during a year interpretation is required.

We believe that the trial court in its memorandum opinion correctly determined the issue involved in the instant case, and we quote therefrom as follows:

> "According to the literal wording of the Constitution (Article XIII, section 14⅘) an insurance company is entitled to each of those deductions. However, the State takes the position the company may take one such deduction but not both in any one year, that the Constitution never contemplated that a company might obtain two deductions in the same year merely because of the removal of its home office location.
>
> "Some support for this position may seem to exist in the fact that the Constitution particularly takes care of the situation where a consolidation or merger takes place as a consequence of which the company otherwise might claim there is more than one home office; and it prevents any double deduction in that situation by requiring the company to 'designate' one home office. From this it might be argued with some justification that it was the purpose and design of the law to limit each company to one deduction. On the other hand, the fact that that contingency has been provided against may on the well established principle of exclusion be considered as the only instance in which two deductions are prohibited.
>
> "The history of the constitutional provision is set forth in the Attorney General's brief, but we find that history at best equivocal as far as it concerns the issue here. While that history explains the reasons for the 1942 changes and the overall purpose to be achieved, it is difficult to see in what way it sheds any light upon our problem.
>
> [1] "To be noted is the fact that this is not an exemption that is being claimed, but a right to a deduction from the annual tax as an offset, which tax is by subdivision (f) of Section 14⅘ labeled an 'in lieu tax.' This is important because it means, as counsel have pointed out, that it is not a case of construing an exemption strictly against the taxpayer, but rather the determination of a tax which is *in invitum,* and the law must be construed strictly in accord with the governing statute against the taxing power unless the language clearly authorizes the imposition.
>
> "The difficulty with defendant's position, as we see it, is that the right to deduct is squarely given by subdivision (e) of Section 14⅘; that there is no express language nor does there seem to be any necessarily implied limitation to one such deduction in any taxable year; that all that is required is that the tax to be deducted be upon real estate owned by the company 'in that year', on which real estate is located 'its home office or principal office in this State'; all of which is to be determined as of 'the time of payment.'
>
> [2] "It might have been more logical and more consistent had the Constitution provided for such a contingency as here occurred; and it might have been more logical to squarely limit each company to deduction for only one home office in any one year. However, the fact is that the taxing provision did not do so, and it is not for the courts to readjust the plain language of the law. In a proper case it is of course conceded that courts will so construe taxing statutes as to prevent evasion and abuse, but there is no suggestion here that the change of the home office was not a bona fide one. Interpretation or construction of statutory language will not be indulged merely to make the tax law more logical or symmetrical. Unless we are permitted to read into the Constitution something that is not clearly expressed therein, the taxpayer is entitled to recover in this action. We have been able to find no necessary implication of such a restriction. It is believed the plain language here governs and no

construction is necessary or permissible."

[3] We agree with this analysis. We are here considering a constitutional amendment that was submitted to the people and approved by them. The language of the constitutional amendment is clear and states explicitly that an insurance company may "deduct from the annual tax imposed by this section upon such insurer in respect to a particular year the amount of real estate taxes paid by it, in that year, before, or within 30 days after, becoming delinquent, on real property owned by it at the time of payment, and in which was located, in that year, its home office or principal office in this State." Unless we are permitted to read into the Constitution something other than what is clearly expressed therein the judgment in favor of respondent must be affirmed.

The judgment is affirmed.

VAN DYKE, P. J., and WARNE, J. pro tem., concur.

Hearing denied; PETERS, J., dissenting.

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171 Cal.App.2d 728

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Federico GUTIERREZ, Jr., Defendant and Appellant.

Cr. 6591.

District Court of Appeal, Second District, Division 3, California.

July 6, 1959.

Defendant was convicted of possessing heroin and from a judgment and order of the Superior Court of Los Angeles County, William E. Fox, J., the defendant appealed. The District Court of Appeal, Shinn, P. J., held that where the only information upon which officers could have made a valid arrest and search had been stricken, judgment must be reversed.

Judgment and order reversed.

1. Witnesses 🔑216

Where prosecution seeks to show probable cause for arrest and search by testimony as to communications from an informer, his identity must be disclosed when defendant seeks disclosure, or such testimony must be stricken on proper motion of the defense but disclosure may not be required where there is probable cause apart from the informer's communication.

2. Criminal Law 🔑1186(1)

In prosecution for possession of heroin where when testimony was stricken upon stipulation there remained no evidence tending to prove that arresting officer had reasonable grounds for arrest and search, but prosecutor in argument relied in part upon evidence that had been stricken and the prosecutor mistakenly asserted in argument that wife of defendant told officers that guns found in her house belonged to the defendant and the officers observed no suspicious conduct by the defendant prior to his arrest, conviction must be reversed.

Joseph T. Forno, Los Angeles, for appellant.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., Marvin L. Part, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

Federico Gutierrez, Jr. was charged by information with possessing heroin. It was also alleged that he had suffered a prior felony conviction for a violation of Penal Code § 273d. Gutierrez pleaded not guilty and denied the prior conviction. In a court trial, he was found guilty of possessing heroin and although no evidence was introduced as to the alleged prior conviction the court found the prior to be true. Gutierrez appeals from the judgment and the denial of his motion for a new trial.

It is not contended on the appeal that the evidence was insufficient to support the conviction. Gutierrez did not testify. His contentions are that the court should have ordered disclosure by the arresting officer of the sources of confidential information relied upon to establish probable cause for his arrest and that the heroin was obtained as the result of an unlawful search and seizure.

The evidence consisted of that received at the preliminary hearing and additional evidence introduced at the trial. Officer Fesler testified that he received information from a reliable confidential informant that a large heavy-set Mexican, approximately 35 to 40 years of age, was selling narcotics near a liquor store on Castelar Street in Los Angeles. The following week, Colwell, a police lieutenant, passed on to Fesler information received from the Sheriff's Department to the effect that a large heavy-set Mexican known as Kiko was living on Hill Street between Sunset and Alpine and that Kiko always had heroin in his possession and could deliver up to seven grams without advance notice. Fesler also learned from Colwell that Kiko capped the heroin at the home of his unsuspecting sister or sister-in-law, who lived across the street, and he obtained from the lieutenant a telephone number used to facilitate narcotic purchases from Kiko.

Fesler checked the telephone number and found that it was listed to a person named Gutierrez, living at 723 North Hill Street. A search of police files revealed that "Kiko" is a nickname for Federico and that a paroled narcotics offender named Federico Gutierrez was living at 746 North Hill. On the afternoon prior to the arrest Officer Fesler drove past the latter address in a police car. Four or five men standing in front of the house scrutinized him carefully as he drove by. He returned in the evening and a similar incident occurred.

The following morning, Fesler and three other officers went to 723 North Hill. They were admitted by a Josephine Gutierrez who told them that she had a brother-in-law named Kiko who came around nearly every day. The officers searched the house with her permission and found two guns and two boxes of gelatin capsules. Mrs. Gutierrez denied owning the capsules. Several children entered the house and when asked by the officers where Uncle Kiko was, they pointed to 746 North Hill.

Fesler went to the front of 746 and another officer went to the rear. The front door was ajar; Fesler knocked but received no response. He entered the living room and saw appellant going into the kitchen. Fesler identified himself and told Gutierrez not to move as he was under arrest. Appellant ran toward the bedroom where he was overpowered by Fesler and his fellow officer after a lengthy struggle and a plastic bag containing a narcotics kit and a quantity of heroin was removed from his pocket. Gutierrez told the officers that the heroin was his.

On cross-examination, Fesler admitted that he had neither a warrant for the search of the premises at 746 North Hill nor a warrant for appellant's arrest. When asked to reveal the source of the information he received about the man selling narcotics on Castelar Street, he refused to answer upon the ground that the name of his informant was privileged. Appellant's counsel then moved to strike Fesler's testimony regarding the communication and the motion was granted by the court. Upon being asked to reveal the source of his information concerning Kiko, Fesler replied that he received the information from Lieutenant Colwell and Officer Drees. Gutierrez sought and obtained a continuance in order to subpoena the two officers.

When trial resumed, Colwell was called as a defense witness but Drees did not appear. Upon being asked the source of the information he gave to Fesler, Colwell replied that he obtained it from a Captain Madden. Appellant then sought a second continuance in order to secure the appearance of Madden and Drees. He also offered to stipulate that all the testimony of the officers respecting information they received prior to Fesler's actual investigation be stricken; the stipulation was accepted by the deputy district attorney; the court said "Very well"; both sides rested. This stipulation related to information received from Colwell. Evidence of information received from the unnamed informant had previously been stricken. Appellant then objected to the introduction in evidence of the heroin and made a motion to suppress the evidence upon the ground that it had been obtained by means of an illegal search and seizure. The objection was overruled by the court and the motion to suppress was denied.

[1] Where the prosecution seeks to show probable cause for an arrest and search by testimony as to communications from an informer, the identity of the informer must be disclosed when the defendant seeks disclosure or such testimony must be stricken on proper motion of the defense. Priestly v. Superior Court, 50 Cal.2d 812, 819, 330 P.2d 39. But disclosure may not be required where there was probable cause apart from the informer's communications. People v. Williams, 51 Cal.2d 355, 333 P.2d 19.

[2] This case has its peculiar aspects. The deputy district attorney had the option either to reveal the identity of the anonymous informer or to suffer the testimony of Fesler concerning information received from the informer to be stricken. The deputy chose the latter alternative. But there still remained the testimony of Fesler as to information received from Drees and Colwell and Colwell's testimony as to information received from Madden. When this was stricken upon stipulation there remained no evidence tending to prove that Fesler had reasonable grounds for an arrest and search. Nevertheless, the deputy in argument relied in part upon evidence that had been stricken, namely, the telephone number and the identification of "Kiko" as a seller of narcotics. It is obvious that without the nickname and the telephone number Fesler would not have known of Mrs. Gutierrez, would not have gone to her house and would not have discovered the guns and gelatine capsules. And the deputy also mistakenly asserted in argument that Mrs. Gutierrez told the officers that the guns found in her house belonged to appellant. There was no such testimony. The officers observed no suspicious conduct on the part of Gutierrez prior to his arrest. The only information upon which they could have made a valid arrest and search having been stricken, the objection to the introduction in evidence of the heroin should have been sustained and the cause dismissed. The People could not consent to the striking out of the evidence and yet rely upon it as justification for the arrest and search. There was no reason shown for striking out the testimony of the officers respecting information received from each other. A reversal will set the cause at large for a retrial.

The judgment and order appealed from are reversed.

PARKER WOOD and VALLÉE, JJ., concur.

171 Cal.App.2d 671

PEOPLE of the State of California, Plaintiff and Respondent,
v.
Eddie TIMS, Defendant and Appellant.
Cr. 3579.

District Court of Appeal, First District,
Division 1, California.
July 2, 1959.

Defendant was convicted in Superior Court, City and County of San Francisco, Gerald S. Levin, J., of burglary with explosives, and he appealed. The District Court of Appeal, Wagler, J. pro tem., held that evidence of disarray of office and disappearance of various articles therefrom together with removal of safe to ground floor, damage inflicted on safe by burning off hinges and burning of part of contents of safe, and disappearance of cash drawer and its contents from safe was sufficient foundation for admission of evidence of defendant's later possession of portion of property missing from office and of defendant's conflicting statements in relation to how he obtained possession thereof.

Affirmed.

1. Burglary ⚷38

In prosecution for burglary with explosives, proof of corpus delicti was prerequisite to admission of evidence of defendant's later possession of portion of property missing from burglarized office and defendant's conflicting statements in relation to how he obtained such possession. West's Ann.Pen.Code, § 464.

2. Burglary ⚷9(3)

Entry with requisite intent is sufficient for commission of crime of burglary, and breaking is not one of essential ingredients of the crime. West's Ann.Pen.Code, § 464.

3. Burglary ⚷41(4)

In prosecution for burglary with explosives, element of entry was not required to be proved by direct, positive evidence, but could be proved by circumstantial evidence and reasonable inferences to be drawn therefrom. West's Ann.Pen.Code, § 464.

4. Burglary ⚷41(2)

Identity of perpetrator of crime of burglary with explosives was not part of corpus delicti. West's Ann.Pen.Code, § 464.

5. Burglary ⚷38

In prosecution for burglary with explosives, evidence of disarray of office and disappearance of various articles therefrom, together with removal of safe to ground floor, damage inflicted on safe by burning off hinges and burning of part of contents of safe, and disappearance of cash drawer and its contents from safe was sufficient foundation for admission of evidence of defendant's later possession of portion of property missing from office and of defendant's conflicting statements in relation to how he acquired the possession. West's Ann.Pen.Code, § 464.

6. Criminal Law ⚷1159(5)

Where record showed that all of usual and necessary cautionary instructions on circumstantial evidence were given, implied finding of jury that corpus delicti of crime of burglary with explosives was sufficiently proved was required to be accepted by reviewing court. West's Ann.Pen.Code, § 464.

7. Burglary ⚷42(1)

Possession of stolen property, considered alone, is not enough to justify conviction for burglary with explosives, but is circumstance to be considered in connection with all other evidence in determining question of guilt or innocence.

8. Burglary ⚷42(3)

Evidence that defendant was arrested when in possession of movie projector which had been taken from office from which safe, whose hinges had been burnt off with acetylene torch, had been taken, corroborated by conflicting statements of defendant as to how he had acquired possession of projector, would support conviction for burglary with explosives. West's Ann.Pen.Code, § 464.

9. Criminal Law ⚷808½

Single instruction which consisted of reading of statute defining crime of burglary with explosives was sufficient. West's Ann. Pen.Code, § 464.

10. Criminal Law ⚷811(2)

In prosecution for burglary with explosives, instructions dealing with impeachment and credibility of witnesses and instruction which was favorable to defendant, which explained limited purpose for which extrajudicial statements of defendant might be considered, and which referred to felony conviction only in language of Code section, were not objectionable on theory that they placed undue stress on fact that defendant had prior felony conviction.

West's Ann.Code Civ.Proc. §§ 2051, 2052; West's Ann.Pen.Code, § 464.

11. Criminal Law ⚷805(3)

In prosecution for burglary with explosives, repetition of word "guilty" 28 times and word "innocence" 6 times in instructions did not adversely affect defendant's right to fair trial. West's Ann. Pen.Code, § 464.

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William B. Emmal, San Francisco, for appellant.

Stanley Mosk, Atty. Gen., Clarence A. Linn, Chief Asst. Atty. Gen., Edward P. O'Brien, Deputy Atty. Gen., for respondent.

WAGLER, Justice pro tem.

Defendant was convicted by a jury of a violation of Penal Code, section 464—burglary with explosives. This section so far as pertinent provides that "Any person who, with intent to commit crime, enters * * * any building * * * and opens or attempts to open any * * * safe * * * by use of acetylene torch * * * is guilty of burglary with explosives."

Defendant contends: (1) that the trial court erred in the admission in evidence of certain extrajudicial statements made by him at the time of and subsequent to his arrest; (2) that the evidence was insufficient to sustain his conviction; and (3) that the trial court committed reversible error in instructing the jury.

The first witness for the People was one Harold R. Jarvis, president of Transportation Guarantee Co., which operates a truck repair business at 1835 Folsom Street, San Francisco. He testified that on Saturday, March 29, 1958, he left his place of business about 2 p. m.; that at that time the offices which were on the mezzanine floor were in proper order; that when he returned the following Monday morning the bookkeeper's office was "turned around, desks were moved, and the safe was missing." Also missing was a "Kodascope 1620" motion picture projector and numerous other items of personal property.

The safe which weighed between four and six hundred pounds was later found on the ground floor, inside a newly painted furniture trailer. Near the safe were two complete acetylene torch units. Mr. Jarvis described the condition of the safe as follows: "The hinges and the door were burned off, and all the records inside were partially burned and charred. The cash drawer [containing about $230] had disappeared altogether." Photographs of the safe were introduced in evidence and certain discolored areas shown were described by the witness as acetylene burns.

The foregoing is all of the evidence offered to establish the corpus delicti and defendant contends that on this state of the record it was error to receive evidence of his later possession of a portion of the missing property and of his conflicting statements made in relation thereto.

[1] Proof of the corpus delicti was of course prerequisite to the admission of the evidence in question. Defendant concedes that all of the elements of the offense charged were adequately established except the element of entry. His argument on this point, however, appears to be based entirely upon the erroneous assumption that to establish an entry one must also prove a "breaking." Defendant cites many cases which factually describe an actual breaking. In each case, however, the "breaking" was only incidental to the entry.

[2] At common law and in some jurisdictions a breaking is still one of the essential ingredients of the crime of burglary, but this rule does not prevail in California. In this state entry with the requisite intent is sufficient. People v. Barry, 94 Cal. 481, 29 P. 1026; People v. Brittain, 142 Cal. 8, 75 P. 314; People v. Ferns, 27 Cal. App. 285, 149 P. 802; People v. Descheneau, 51 Cal.App. 437, 197 P. 126; People v. Sparks, 44 Cal.App.2d 748, 112 P.2d 974; People v. Corral, 60 Cal.App.2d 66, 140 P. 2d 172; People v. Jollet, 60 Cal.App.2d

245, 140 P.2d 479; People v. Vitos, 62 Cal. App.2d 157, 144 P.2d 393; People v. Garrow, 130 Cal.App.2d 75, 278 P.2d 475.

[3] The element of entry, like any other element of the corpus delicti, need not be proved by direct, positive evidence, but may be proved by circumstantial evidence and reasonable inferences to be drawn therefrom. People v. Sparks, 82 Cal.App.2d 145, 185 P.2d 652. The circumstantial evidence here consisted in the disarray of the office and the disappearance of various articles therefrom, together with the removal of the safe to the ground floor; the damage inflicted thereon and the disappearance of the cash drawer and its contents.

The case of People v. Smith, 145 Cal. App.2d 149, 302 P.2d 63, 64, relied upon by defendant does not support his contention. The circumstantial evidence in the Smith case was much weaker than in the instant case. In Smith, the record showed that Smith was arrested with certain articles of property of one McCurdy in his possession. McCurdy testified that the articles were in his wallet which was in his trousers which he placed on a night stand in his room when he retired; upon arising the next morning he found his trousers outside the house; the wallet and the contents were missing. Smith was shown to have made conflicting claims as to how he came into possession of the articles in question. He contended on appeal, as does the appellant herein, that the missing articles could have been removed by someone who made a lawful rather than an unlawful entry. It was held, however, that "* * * it was for the jury to determine the nature of the entry made when the articles were taken and the intent with which it was made." The same holds true here.

[4, 5] Since the identity of the perpetrator of the crime charged is not a part of the corpus delicti (People v. Tarbox, 115 Cal. 57, 46 P. 896; People v. Day, 71 Cal. App.2d 1, 161 P.2d 803), we must conclude that the foundation for the admission of the evidence in question was adequate. See People v. Selby, 198 Cal. 426, 245 P. 426; People v. Mason, 37 Cal.App.2d 407, 99 P.2d 567.

[6] The record shows that all of the usual and necessary cautionary instructions on circumstantial evidence were given; the implied finding of the jury that the corpus delicti was sufficiently proved must therefore be accepted. People v. Smith, 145 Cal.App.2d 149, 302 P.2d 63, supra; People v. Dodson, 77 Cal.App.2d 389, 175 P.2d 59.

The evidence relied upon to connect the defendant with the offense in question was substantially as follows: On April 4, Inspector Merrill of the Pawn Shop Detail of the San Francisco Police Department saw the defendant carry the projector described in the previous testimony from an automobile into a pawn shop on Market Street. The inspector entered a few minutes later and asked the defendant to produce identification. Defendant thereupon presented a bank book, a social security card and a union ticket, each bearing the name of one Rudolph Berry of Martinez, California. When asked about the projector, defendant first denied having any knowledge concerning it. Later he stated that as he was passing the pawn shop on foot the proprietor thereof asked him to carry it in from the latter's car which was parked at the curb. When questioned further he stated that he had borrowed the projector at an unidentified place from a person whom he refused to name.

On April 7, defendant was interviewed in the city prison by Inspector Keyworth. He at that time repeated substantially the same account of his contact with the projector as first given on April 4.

On April 15, defendant was again interviewed by Inspector Keyworth at which time he gave still another version, to wit: that at the request of the pawnbroker he had accompanied the latter to an address on 14th Street; that he was there given the projector and had just been driven back to the shop when he was arrested. (This version was repeated by the defendant at the trial.)

The pawnbroker testified that prior to April 4, defendant had on pledge in his shop a tape recorder; that on the date in question defendant had asked permission to substitute in its place a movie projector because the recorder was not paid for and had to be returned. The pawnbroker agreed to the exchange and because defendant had no means of getting the projector he had driven defendant to an address designated by defendant in the 900 block on Hayes Street to pick it up. (When sworn as a witness at the trial defendant gave his address as 980 Hayes Street.)

In view of the inconsistent and contradictory statements made by defendant prior to the trial it is not surprising that the jury chose to believe the testimony of the pawnbroker.

[7, 8] While possession of stolen property, considered alone, is not sufficient to justify a conviction, it is a circumstance to be considered in connection with all other evidence in determining the question of guilt or innocence. While in addition to proof of such possession, corroborating circumstances tending of themselves to establish guilt must be proven, it has consistently been held that such corroborating circumstances may consist of conduct and false and conflicting statements of the type disclosed by the record in this case. People v. Buratti, 96 Cal.App.2d 417, 215 P.2d 500; People v. Conrad, 125 Cal.App.2d 184, 270 P.2d 31; People v. Gregor, 141 Cal.App.2d 711, 297 P.2d 734; People v. Jackson, 146 Cal.App.2d 553, 303 P.2d 767; People v. Conerly, 168 Cal.App.2d 151, 335 P.2d 518.

We conclude that defendant's conviction is supported by ample evidence, properly admitted.

[9] Defendant's contention that the trial court erred in instructing the jury is also without merit. His first attack on the instructions is addressed to the fact that the only instruction defining the crime with which he was charged consisted in a reading of the statute in question. This court has repeatedly held this to be sufficient. See People v. Martin, 44 Cal.App. 45, 185 P. 1003; People v. Bratton, 125 Cal. App. 337, 14 P.2d 125; People v. Hedspeth, 39 Cal.App.2d 300, 102 P.2d 1088.

[10] The trial court gave the customary instructions dealing with the impeachment and credibility of witnesses based upon Code of Civil Procedure, sections 2051 and 2052. These were followed by CALJIC 54A which explains the limited purpose for which extrajudicial statements may be considered. Defendant complains that the effect of these instructions was to unduly stress the fact of his prior felony conviction and alleged contradictory statements. This complaint is entirely unwarranted. The only reference to a felony conviction was in the language of the code section and instruction 54A was favorable to the defendant. To refuse it when requested by a defendant is reversible error. See People v. Orcalles, 32 Cal.2d 562, 197 P.2d 26.

[11] Finally, defendant argues that because the instructions repeated the term "guilty" twenty-eight times and mentioned the word "innocence" but six times that such "slanted" instructions adversely affected his right to a fair trial. The argument is specious. It is most deceptive since it quotes the term "guilty" out of context without attempting to state the manner in which it was used. In many instances the court utilized the term in cautionary instructions for safeguarding the defendant's rights. Considered as a whole we find the instructions to have been eminently fair.

Judgment affirmed.

BRAY, P. J., and TOBRINER, J., concur.

171 Cal.App.2d 732

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a National Banking Association, Plaintiff,

v.

Renee K. ARAKELIAN, aka Mrs. K. Arakelian; Oliver Lyons; Armenian American Citizens Club, a corporation; California Home for the Aged, Defendants.

CALIFORNIA HOME FOR THE AGED, INC., a corporation, Cross-Complainant and Appellant,

v.

Renee K. ARAKELIAN, aka Mrs. K. Arakelian, and Oliver Lyons, Cross-Defendants and Respondents.

Civ. 9530.

District Court of Appeal, **Third District,** California.

July 6, 1959.

Interpleader action. From a judgment of the Superior Court, Madera County, Gregory P. Maushart, J., the cross-complainant appeals. The District Court of Appeal, Van Dyke, P. J., held that the judgment was not invalid as in conflict with the finding that the chapel must be nondenominational and that the dedication of the chapel to the memory of a priest of a particular denomination did not violate the free enjoyment of religious worship.

Judgment affirmed.

Charities 🔑36

Constitutional Law 🔑84

A judgment declaring restrictions applicable to a charitable trust for a home for the aged that the donations were the sole property of the home and that the chapel should bear the inscription over the main entrance: "In Memory of Reverend Vartan Arslanian and all of the Armenian martyrs of 1915, a gift of K. Arakelian and Renee Arakelian" was not invalid on the ground that the dedication of the chapel to a priest of a particular denomination was in conflict with the finding that the chapel should be nondenominational and that there was a violation of the constitutional provision guaranteeing free exercise and enjoyment of religious worship. West's Ann.Const. art. 1, § 4.

◆

Mason A. Bailey, Madera, for appellant.

Ardy V. Barton, Santa Barbara, for respondents.

VAN DYKE, Presiding Justice.

This is an appeal from a judgment declaring conditions and restrictions applicable to a charitable trust. During the year 1950, K. Arakelian and Renee, his wife, donated the sum of $64,000 to California Home for the Aged, Inc., a corporation. The money was deposited in the Bank of America National Trust and Savings Association, plaintiff herein, and thereafter questions arose as to the proper use of the funds and as to who had control thereof. In view of the dispute the bank interpleaded the contestants, California Home for the Aged, Inc., one Oliver Lyons, and Renee K. Arakelian. The cause was tried and from the judgment rendered an appeal was taken to this court. See Bank of America National Trust & Savings Ass'n, v. Arakelian, 149 Cal.App.2d 11, 307 P.2d 746. The judgment was reversed for procedural error in the exclusion of evidence. Upon the retrial the court made the following findings upon disputed issues: The first sum donated amounting to $20,000 was given by means of a check from K. Arakelian drawn on his personal account. A second sum for $44,000, though likewise given through the medium of a check drawn by K. Arakelian on his personal bank account, was nevertheless derived from income which was the property of both K. Arakelian and his wife, Renee. Both donors intended that the sums given were for the limited purpose of erecting a chapel to be situated on the grounds of the California Home for the Aged in Fresno County, California, the chapel to be open to the public, to be non-denominational, and to be in memory of Mrs. Arakelian's father, Reverend Vartan Arslanian, and all the Armenian martyrs of 1915. It was the intention of the donors that the chapel, when erected, should bear an inscription over the main entrance declaring such chapel to be their gift in memory of said Reverend Vartan Arslanian and all the Armenian martyrs of 1915. The judgment declared that the donations were the sole property of the California Home for the Aged, Inc.; that the money should be used for the use and benefit of the said home but only for the limited purposes declared in the findings and subject to the condition that the chapel "shall forever bear the following inscription over the main entrance: 'In Memory of Reverend Vartan Arslanian and all of the Armenian martyrs of 1915, a gift of K. Arakelian and Renee Arakelian.'" The judgment further declared that the board of directors of the home should have and exercise the control, direction, and manner of use and operation of said chapel. The Home has appealed from this judgment.

In support of its appeal the Home, in its opening brief, argued the evidence was insufficient to support the finding that the chapel should be open to the public and was also insufficient to support the finding that the chapel should bear the stated inscription. However, subsequent proceedings herein by way of augmentation of the record have disposed of the first contention.

In support of its remaining contention appellant now argues that the imposition of a permanent dedication of the chapel to a priest of a particular denomination is in conflict with the finding that the chapel must be non-denominational; that the issue as to the inscription is in the nature of an internal ecclesiastical matter over which the court has no power or jurisdiction and that what appellant calls the forcible dedication of the chapel to the memory of a priest of a particular denomination is in violation of Article I, Section 4, of the California Constitution, guaranteeing free exercise and enjoyment of religious profession and worship.

There is no conflict in the findings. The dedication in no way interferes with non-denominational use of the chapel by the members of the public who wish to worship there, even though it may sometimes happen that some, by reason of religious differences, may prefer not to worship where such a dedicatory inscription appears.

The remaining issues are not presented on this record. The trial court was concerned under the pleadings only with the issues raised as to the conditions and restrictions which the donors placed upon the use of the funds they gave to the Home. The Home could reject the gift or it could accept it with the conditions and restrictions imposed thereon by the donors. The court has now declared and defined those conditions and if the donated funds are to be used those conditions and restrictions must be observed.

The judgment appealed from is affirmed.

SCHOTTKY, J., concurs.

171 Cal.App.2d 342

ROMER, O'CONNOR & CO., Inc.,
Plaintiff and Appellant,
v.
J. F. HUFFMAN, also known as Forbes Huffman, also known as J. Forbes Huffman, Defendants and Respondents.
Civ. 18161.

District Court of Appeal, First District,
Division 1, California.
June 16, 1959.

Proceeding on motion to set aside entry of default by clerk and default judgment entered thereon by court. The Superior Court, City and County of San Francisco, John B. Molinari, J., entered order setting aside entry of default and the default judgment and plaintiff appealed. The

District Court of Appeal, Hanson, J. pro tem, held that facts stated in affidavit of defendant's counsel which disclosed protracted negotiations and numerous stipulations for extension of time in which to appear and answer were sufficient to show reasonable grounds for setting aside default judgment, and notwithstanding the fact that defendant's motion did not mention default entered by clerk, trial court's order setting aside not only the default judgment but also default entered by clerk was not in excess of relief prayed for.

Order affirmed.

1. Judgment ⚷139

Granting or denying of motion to set aside default judgment is within the sound discretion of the trial court. West's Ann. Code Civ.Proc. § 473.

2. Judgment ⚷136

Since statute authorizing motion to set aside default judgment is a remedial measure, it is to be liberally construed and any doubts existing as to propriety of trial court's action will be resolved in favor of a hearing on the merits. West's Ann. Code Civ.Proc. § 473.

3. Appeal and Error ⚷1024(4)

Trial court's determination of facts as found from affidavits of parties on motion to set aside default judgment will be conclusive upon the appellate court, but if facts as stated in moving party's affidavit do not constitute valid grounds for relief sought, trial court's action in setting aside default will be reversed. West's Ann.Code Civ.Proc. § 473.

4. Judgment ⚷143(17)

In proceeding on motion to set aside default judgment, facts as stated in defendant's counsel's affidavit which showed extensive negotiations and numerous stipulations for extension of time in which to appear and answer were sufficient to show reasonable ground for setting aside default judgment and it could not be said that trial court had abused its discretion in granting motion. West's Ann.Code Civ.Proc. § 473.

5. Judgment ⚷153(1)

Although excuse for failing to answer and appear within time allowed by law might be legitimate, if party after discovery of default should fail to act promptly in filing moving papers to set aside default he may be precluded from any relief.

6. Judgment ⚷153(1)

In proceeding on motion to set aside default judgment where affidavit of moving party's counsel stated that the month and a half delay between discovery of entry of default judgment and filing of motion to set the same aside was caused by futile negotiations with opposing attorney and attempts to reach client who was traveling on business in foreign countries, it could not be said that trial court had abused its discretion in vacating default judgment. West's Ann.Code Civ.Proc. § 473.

7. Appeal and Error ⚷935(2)

Any doubts as to whether trial court properly exercised discretion in entering order setting aside default judgment as against opposing party's contention that moving party had waited too long from discovery of default judgment until filing of motion to set the same aside should be resolved in favor of action taken by trial court.

8. Judgment ⚷164

Where defendant in moving to set aside default judgment called attention merely to the default judgment in motion but plaintiff's answer mentioned both default judgment and default entered by clerk, trial court in entering order setting aside not only default judgment but default entered by clerk did not act in excess of and beyond relief prayed for since it must be presumed that if defendant sought any relief he was seeking full relief, and it could not be said that plaintiff was in fact surprised since plaintiff had mentioned both the default and the default judgment in his affidavit.

9. Appeal and Error ⚷900

It would not be presumed that trial court intended to do an idle act.

10. Appeal and Error ⚷935(2)

It should be presumed that if trial court intended any relief to defendant seeking to set aside default judgment, it intended to grant him full relief from his default.

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Romer & Brown, San Francisco, for appellant.

Jay Pfotenhauer, San Francisco, for respondent.

HANSON, Justice pro tem.

This is an appeal by the plaintiff from an order which set aside the entry of a default by the clerk and a default judgment entered thereon by the court. It is urged that the trial court abused its discretion in granting such relief under the provisions of section 473 of the Code of Civil Procedure.

At the outset the plaintiff-appellant contends that the motion of the defendant as filed on April 12, 1957, sought only that the default judgment be set aside and not the default which had been entered by the clerk and, hence, the court erred and abused its discretion in setting aside the clerk's entry of default along with the default judgment and in granting leave to file the answer which was tendered. Moreover, the plaintiff contends it was error to do so in view of the further fact that the court had denied a supplemental motion filed by defendant on May 28, 1957, to amend the original motion, so as to include therein *nunc pro tunc* that the entry of default be likewise set aside, as well as the default judgment.

We proceed now to state the salient facts which gave rise to the controversy before us.

It appears that the plaintiff's assignor under a written contract with the defendant consigned goods to the defendant for resale pursuant to certain restrictions and conditions set forth in the written contract. On January 21, 1955, an action was filed to recover the sum of $19,362.71, on a book account, and for alleged breach of that contract; an amended complaint was duly filed on November 30, 1955; on January 17, 1956, the plaintiff filed a bill of particulars; on March 8, 1956, the trial court denied a motion of a third party who entered the case as an intervenor. The defendant never filed an answer and this apparently was due in part to the fact that four different written stipulations, and several oral stipulations extending the time to answer, were entered into by the counsel for plaintiff and by the counsel for the defendant. Moreover, during the summer of 1956, the parties' counsel entered into extensive negotiations with a view to settlement. In the month of July 1956, counsel for defendant prepared an answer for filing, but further negotiations were carried on with the result that the answer was not filed. After August 4, 1956, no further negotiations were had.

On October 15, 1956, the clerk entered a default, and on October 16, 1956, the court signed and filed a default judgment for the amount prayed for in the amended complaint, notwithstanding that Miller, counsel for plaintiff, had conceded in the course of the negotiations that certain credits were due to the defendant that would reduce the demand of appellant. These proceedings were not discovered by counsel for defendant until February 26, 1957, whereupon he immediately communicated with Miller, a member of the Romer law firm with whom he had dealt exclusively, requesting a stipulation to set aside the default judgment. Miller stated he was not in a position to enter into such a stipulation, that he had been removed from the active handling of the file in September, and that the "file had been undertaken" by another member of the Romer firm who was accountable for the action taken. Thereupon counsel for defendant informed Miller that the defendant was in Europe and the Middle East on business and that he, counsel, was having difficulty in communicating with him, but that he would make further efforts to do so shortly. Nevertheless, as defendant's counsel had not heard from defendant in response to letters and cables sent to him, he filed the motion on April 12, 1957, to set aside the default judgment and supported it with his own affidavit, accompanied by the answer which had been signed by the defendant in July 1956. Five days after the motion was filed, counsel for defendant received a letter from defendant dated April 14 advising him to go ahead and file the motion, and also explaining the reason why affiant had not been able to communicate with him; i. e., that defendant had been travelling about on business in many countries in *Europe and the Middle East and affiant's communications had reached him only with difficulty.* According to the supplemental affidavit of defendant's counsel he had an oral stipulation with Miller that no judgment or action would be taken against the defendant without prior notice to counsel for defendant and in sufficient time to enable affiant to file an appearance.

The foregoing facts, gleaned from the affidavits of counsel for defendant which the court was entitled to believe, were not contradicted in the affidavit of Miller except that he stated in his own affidavit that during the summer of 1956 he made several oral requests to counsel for defendant that he file an answer and appear in the case and that the response to these requests was that it would be attended to shortly. Likewise Miller in his affidavit stated that he was "removed from active handling of this file [the case] some time in September 1956 * * *."

The time elapsing between the entry of default and the filing of defendant's moving papers was five months and twenty-six days.

On May 28, 1957, defendant filed a motion to amend his first motion (of April 12, 1957) so that the original motion would provide nunc pro tunc for the setting aside of not only the default judgment (October 16, 1956) but also the setting aside and vacating of the default (entered by the superior court clerk on October 15, 1956).

Upon the records, files, and affidavits of the parties, and upon the argument of counsel, the court ordered on September 18, 1957, that both the default and the default judgment entered in favor of the plaintiff be set aside and granted the defendant leave to file the answer that had been submitted with the original motion. The court further ordered that the defendant's motion of May 28, 1957, for an amendment nunc pro tunc of his original motion be denied.

Appellant's first contention is that the trial court abused its discretion in setting aside the default judgment of October 16, 1957.

[1, 2] The granting or denying of a motion to set aside a default judgment is within the sound discretion of the trial court (see, e. g., Gore v. Witt, 149 Cal.App.2d 681, 308 P.2d 770), and generally, since the code section allowing such a motion, Code of Civil Procedure, section 473, is a remedial measure and to be liberally construed (Waybright v. Anderson, 200 Cal. 374, 377, 253 P. 148; In re Estate of Strobeck, 111 Cal.App.2d 853, 858, 245 P.2d 317), any doubts existing as to the propriety of the trial court's action will be resolved in favor of a hearing on the merits. Beckley v. Reclamation Board, 48 Cal.2d 710, 718, 312 P.2d 1098; Benjamin v. Dalmo Mfg. Co., 31 Cal.2d 523, 525–526, 190 P.2d 593; Nomellini Construction Co. v. Deane, 160 Cal.App.2d 57, 59, 324 P.2d 654; Yarbrough v. Yarbrough, 144 Cal.App.2d 610, 614, 301 P.2d 426.

[3] Further, as in any other case, the trial court's determination of the facts as found from the affidavits of the parties will be conclusive upon the appellate court (Nomellini Construction Co. v. Deane, 160 Cal.App.2d 57, 59, 324 P.2d 654), but if the facts as stated in the moving party's affidavit do not constitute valid grounds for the relief sought, the trial court's action in setting aside the default will be reversed (Benjamin v. Dalmo Mfg. Co., 31 Cal.2d 523, 190 P.2d 593; Yarbrough v. Yarbrough, 144 Cal.App.2d 610, 301 P.2d 426). Hence the question narrows to whether or

not the facts stated in the affidavit of defendant's counsel show reasonable grounds for setting aside the default judgment.

[4] In substance the affidavit alleges that after the original complaint and the filing of the amended complaint the defendant's counsel and the plaintiff's counsel were engaged in rather extensive negotiations in an effort to settle the case; that numerous stipulations, both written and oral, for the extension of time in which to appear and answer were entered into. Thereafter, without the knowledge of the defendant's counsel and without his having received notice or a demand to file an answer, one of the counsel for the plaintiff, other than the counsel with whom defendant's counsel had been negotiating, sought and obtained the entry of a default judgment. That these allegations are sufficient is seen from the following language by this court in the Yarbrough case: "There can be no doubt that a trial court may find excusable neglect or surprise where settlement negotiations are being had between counsel, and where there is an oral or implied understanding that no default will be taken without notice, and counsel takes such a default without notice. [Citations.]" 144 Cal.App.2d at page 616, 301 P.2d at page 430.

In Beard v. Beard, 16 Cal.2d 645, 648, 107 P.2d 385, 387, the court said: "In the present case the trial court found that there was a sufficiently reasonable excuse to justify the setting aside of the default judgment, apparently on the basis of respondent's allegation that the continued negotiations * * * had lulled the respondent's attorney into a sense of security. This exercise of discretion presents no apparent abuse to justify interference by this court."

So too in this case it cannot be said that the trial court abused its discretion in granting the relief sought under the allegations of counsel for defendant. After a long period of negotiation, along with numerous oral and written stipulations for extensions of time, defendant's counsel might well have been lulled into a sense of security, and, in any event, could have at least expected some notice upon the part of plaintiff's counsel before a default was entered.

The next contention of the appellant is that the trial court abused its discretion in vacating the default judgment because the defendant waited too long from the discovery of the default judgment until filing his motion to set it aside.

[5] Although the excuse for failing to answer and appear within the time allowed by law might be legitimate, if a party after discovery of the default should fail to act promptly in filing moving papers to set aside the default, he may be precluded from any relief. Thus, in Benjamin v. Dalmo Mfg. Co., 31 Cal.2d 523, 190 P.2d 593, the party against whom the default was taken had what would seem to be a reasonable excuse for failing to answer and appear. However, after discovering the default nothing was done for a period of more than three months. The court held that *without some explanation for this delay*, no relief could be given under Code of Civil Procedure, section 473. The court, however, was explicit in stating that the delay in filing the motion could be explained. Many cases were cited in which the explanation of the delay was held to be sufficient. These cases were distinguished from the fact situation presented to the court, viz., where the defaulting party had given no explanation for the delay, but they were not disapproved. 31 Cal.2d at pages 530–531, 190 P.2d at page 597.

[6] In the instant case the defendant alleges in his affidavit that he discovered the entry of the default on February 26, 1957. The record shows that he did not file his notice of motion to set aside the default judgment until April 12, 1957. However, in the defendant's supplemental affidavit in support of the motion, counsel for defendant gives an explanation why he had not acted more promptly upon learning of the delay. After having learned of the default, defendant's counsel

immediately attempted to communicate, and did communicate with counsel for plaintiff, and sought to obtain a stipulation setting aside the default. After plaintiff's counsel indicated that such a stipulation could not be entered into by himself (Miller), defendant's counsel informed him that he would attempt to contact his client, defendant in the matter. Attempts were then made by him to contact the client, but to no immediate avail since defendant was on business in Europe and travelling about in many countries. Finally, on April 12, 1957, defendant's counsel went ahead on his own initiative and filed the notice of motion, which action was ratified five days later by letter then received from the defendant.

[7] In view of the strong policy to allow cases to be heard on the merits (Jones v. Title Guaranty & Trust Co., 178 Cal. 375, 376–377, 173 P. 586), it would seem that this explanation is adequate. If there are any doubts they should be resolved in favor of the action taken by the trial court: "If it be doubted whether the excuse offered is sufficient or not, or whether the defense set up is with or without merit *in foro legis*, when examined under those rules of law by which Judges are guided to a conclusion, the judgment of the Court below will not be disturbed." Benjamin v. Dalmo Mfg. Co., 31 Cal.2d at page 526, 190 P.2d at page 594, quoting from Bailey v. Taaffe, 29 Cal. 422, 424.

[8] The next contention is that the court erred in granting full relief from both the default and the default judgment.

Appellant claims the trial court particularly erred in ordering set aside not only the *default judgment*, but also the *default* entered by the clerk. The defendant's notice of motion referred only to the *default judgment* in the title thereof, and also in the body of the notice. The defendant's counsel's first affidavit refers only to the default judgment taken against the defendant. The plaintiff's affidavit in opposition, however, refers to both the default and the default judgment: "* * * default and default judgment of defendant Huffman was entered on October 16, 1956 * * *." Defendant's supplemental affidavit refers to both the default and the default judgment. Defendant on May 28, 1957, noticed a motion to amend nunc pro tunc his original motion to include the clerk's default entered against him. The court, however, denied this latter motion on September 18, 1957, but worded its order to include not only the default judgment but also the default. It does not appear that plaintiff-appellant made any argument to the trial court with respect to its contention that the trial court's including the default was error.

There is much authority to the effect that an order setting aside a default judgment has the effect of also setting aside the clerk's default absent circumstances showing specifically that it was not the trial court's intention to set aside both. This division of the court in an opinion by Justice Knight in Weck v. Sucher, 1929, 96 Cal.App. 422, 274 P. 579, 581, hearing denied by Supreme Court said: "Further contention is made that the moving papers and the order based thereon relate exclusively to the matter of vacating the judgment rendered by the court and consequently do not affect the default entered by the clerk. Plaintiff did not question the scope of the motion at the time it was presented and determined; the bill of exceptions reciting merely that he appeared and opposed the granting of the motion upon the grounds of an insufficient showing under section 473 of the Code of Civil Procedure. However, even assuming that he may do so now, we find no merit in the point because the terms of said motion and the contents of the documents attached thereto adequately apprised plaintiff that defendants were seeking to obtain complete relief * * * and in our opinion the order subsequently made by the court pursuant to said motion is legally sufficient, in form and substance, to grant such relief."

This court in Airline Transport Carriers v. Batchelor, 102 Cal.App.2d 241, 227 P.2d 480, reaffirmed the Weck case. It was held that the granting of a motion to set aside a default judgment together with an order to compel defendant to file a bond signified on the part of the trial court an intention to grant the defendant a complete relief from his default, and that therefore the order was to be construed as also setting aside the clerk's default, even though specific mention of the latter was made neither in the defendant's motion nor in the minute order granting the motion. See also Brockman v. Wagenbach, 152 Cal.App.2d 603, 313 P.2d 659.

In the Weck and the Batchelor cases it is seen that the court held the default entered by the clerk was deemed set aside by the order setting aside the default judgment even though no mention was made to the default itself in either the order or the defendant's moving papers. In this case, no such implication need be made since the trial court expressly ordered the default be set aside. In this respect Tapscott v. Tapscott, 149 Cal.App.2d 379, 308 P.2d 399, is helpful:

> "On this appeal from the judgment plaintiff claims that the court erred in vacating and setting aside the *default* where no motion was made to set it aside, as distinguished from the default judgment; that although the title indicated it was a motion to set aside the default, the body of the motion was directed toward the *default judgment;* that the nature and character of a pleading is to be determined * * * by its contents rather than a selected designation; that accordingly the court was without jurisdiction to set aside the default [citations].
>
> "We see no merit to this argument, under the circumstances here related." [Citing and quoting at length from Weck v. Sucher, 96 Cal.App. 422, 426, 274 P. 579.] 149 Cal.App.2d at page 381, 308 P.2d at page 400.

The court granted complete relief, notwithstanding relief from the default was not mentioned in the body of the moving papers.

There are cases, which appellant vigorously contends are controlling, which hold that there is a distinction between the default entered by the clerk, and the judgment entered pursuant to a default.

[9, 10] These cases and similar ones are distinguished in Airline Transport Carriers v. Batchelor, 102 Cal.App.2d 241, 244–246, 227 P.2d 480, in that in each the entry of the default was a substantial time before the entry of the default judgment, or that in the Capritti case, infra, the entry of the default was ruled upon by the trial court prior to its issuing a judgment on the default and denying the setting aside of that judgment. It is thus seen, that where the default and the default judgment are clearly two distinctive acts and are viewed in that fashion by the trial court, and appear that way factually in the record, that relief granted or denied as to one will not affect the other. However, where it is not clear that the trial court treated the default and default judgment separately and granted relief as to the default judgment, it is presumed under the Weck case that the trial court intended to grant complete relief, both as to the default and as to the default judgment. This presumption seems valid and reasonable even under the cases cited by appellant. It should not be presumed that the trial court intended to do an idle act (see Brooks v. Nelson, 1928, 95 Cal.App. 144, 272 P. 610; Howard Greer Custom Originals, Inc. v. Capritti, 1950, 35 Cal.2d 886, 221 P.2d 937), and it should be presumed that if the trial court intended any relief to the defendant it intended to grant him full relief from his default. Here, there is no necessity to employ such a presumption since the trial court in fact did expressly give the defendant complete relief. Further, it is difficult to see how plaintiff may complain of the relief given, since, by the same reasoning which upholds complete relief where the trial court does not mention both the default and the default judgment, it may be presumed that the defendant in asking for relief from a default judgment, is seeking complete relief. The plaintiff did not argue in his affidavit in opposition to the defendant's motion that the defendant was not so

doing; but, in fact, recited the fact in his affidavit that both a default and a default judgment had been entered. The principal opposition, of course, was that the defendant had not brought himself within the provisions of section 473 of the Code of Civil Procedure. The argument that the plaintiff was surprised by the trial court's order because of the fact that the defendant's motion did not specifically refer to the default is answered in two ways. First, by the presumption mentioned earlier, that if the defendant seeks any relief it must be assumed that he is seeking full relief. Secondly, it cannot be said that the plaintiff was in fact surprised because of the fact that plaintiff in his affidavit mentioned both the default and the default judgment. It should also be noted that the defendant's second notice of motion to amend nunc pro tunc his first to include the default (filed May 28, 1957), would be enough factually to apprise the plaintiff that the defendant was seeking full relief and not requesting the court to do an idle act. The order of the court was not made until September 18, 1957; it certainly must be the fact that the plaintiff had defendant's notice of May 28, 1957, in hand at the time of argument on both the defendant's motions.

The appellant's second argument would thus seem to place more emphasis on form than substance. "The practice of the law should not be considered a game or a mere battle of wits but should be regarded as a means to promote justice," as was said by this court in relation to the plaintiff's contention that the trial court did not rule upon the default but only upon the default judgment. Airline Transport Carriers v. Batchelor, 102 Cal.App.2d 241, 246–247, 227 P.2d 480, 483.

Thus, the contention of the appellant that the trial court's order "was in excess [of] and beyond the relief prayed for by respondents" we regard as being without merit.

Order affirmed.

BRAY, P. J., and FRED B. WOOD, J., concur.

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171 Cal.App.2d 779

John Andrew TURNBULL, as Executor of the Will of Frank Turnbull, Deceased, Plaintiff and Appellant,

v.

Helen THOMSEN, Defendant and Respondent.

Civ. 5878.

District Court of Appeal, Fourth District, California.

July 7, 1959.

Rehearing Denied July 29, 1959.
Hearing Denied Aug. 31, 1959.

Action by executor of estate of deceased to impress trust upon proceeds of check, which was endorsed by him and given to woman and the proceeds of which were thereafter placed in joint tenancy. The Superior Court, San Diego County, C. M. Monroe, J., rendered judgment for woman, and executor appealed. The District Court of Appeal, Mussell, J., held that by endorsing check and handing it to woman, decedent completed a presently effective gift and a delivery amounting to a present transfer of title.

Affirmed.

1. Gifts ⚷50

Whether a gift is complete and effectual is a question of fact to be determined from all the evidence.

2. Appeal and Error ⚷1071(6)

A judgment will not be set aside on appeal because of failure to make a specific finding upon an issue, if a finding thereon, consistent with the judgment, results by necessary implication from express findings which are made.

3. Gifts ⚷52

Where trial court did not specifically find that defendant accepted gift, but found that check and proceeds thereof were a valid gift, it would be implied therefrom that check and its proceeds were delivered to and accepted by defendant.

4. Gifts ⚷1

A "gift" is a transfer of personal property, made voluntarily and without consideration.

See publication Words and Phrases, for other judicial constructions and definitions of "Gift".

5. Gifts ⚷4

The essential elements of a valid and enforceable gift are a donative intent by the donor, an effectual transfer of title and delivery, during donor's lifetime, an actual or imputed acceptance by the donee, and it is sufficient if donor uses words clearly importing an intention to give. West's Ann.Civ.Code, § 1146.

6. Gifts ⚷32(1)

Where decedent endorsed and manually delivered check representing proceeds of his real estate to woman and decedent reserved no dominion or control over gift, decedent completed a presently effective gift and a delivery amounting to a present transfer of title and woman was entitled to proceeds which had been placed in joint bank account with decedent.

7. Witnesses ⚷282½

In action by executor of estate of deceased to impress trust upon proceeds of check which had been endorsed by deceased and delivered to defendant, sustaining of objection to inquiry as to defendant's net income for certain year was not improper where record showed that defendant had previously testified on cross-examination concerning her gross income and both parties were accorded a fair and impartial trial with adequate latitude in respect to all relevant evidentiary matters.

8. Gifts ⚷49(2)

In action by executor of deceased to impress trust upon proceeds of check which had been endorsed by deceased and delivered to defendant, evidence sustained finding that deceased had had mental capacity to make gift.

9. Gifts ⚷49(2)

Testimony of donee alone, if satisfactory and believed by trial court, may sufficiently meet burden of donee to prove that donor had mental capacity to make gift.

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Edgar G. Langford and J. Perry Langford, San Diego, for appellant.

Sullivan & Sullivan, San Diego, for respondent.

MUSSELL, Justice.

This is an action by John Andrew Turnbull as executor of the estate of Frank Turnbull, deceased, to impress a trust upon the proceeds of a check in the amount of $22,217.98 which was received by the decedent on or about February 25, 1957, as the net proceeds of the sale of real estate, endorsed by him and delivered to the defendant Helen Thomsen. It is alleged in the complaint, in substance, that the proceeds of the check were placed in a joint bank account for convenience and were actually the property of the decedent and held for him; that the defendant obtained possession of the check by fraud and undue influence and that a relationship of trust and confidence existed between the decedent and defendant. Defendant alleges that the check was endorsed and delivered to her as a gift and is her property. Judgment was rendered for defendant and plaintiff appeals therefrom.

Decedent, Frank Turnbull, at the time of his death on March 11, 1957, was approximately 74 years of age and for many years had been an alcoholic. In 1949 he was residing in La Jolla, California, and had a small business next door to the Valencia Hotel. He spent considerable time in the coffee shop of this hotel and there became acquainted with defendant Helen Thomsen, who was employed at the hotel. In 1950 Turnbull commenced drinking again and from that time until 1955 was confined to his home much of the time. He also spent some time in a rest home and at the Patton State Hospital. During these years Miss Thomsen loaned him money when he needed it, saw that he had groceries in his home, had prepared food delivered to him, visited him frequently when he was in the state hospital, and looked after small business matters for him. In 1953, Turnbull's larynx was removed and shortly thereafter he broke his hip. In October, 1955, he entered the Naval hospital in San Diego and remained there until January, 1957. During the time he was in the Naval hospital Miss Thomsen visited him almost daily, took care of his affairs for him, brought him food, made purchases for him, and he depended almost entirely upon her for assistance. In January, 1957, he was removed to the Golden Hill Hospital in San Diego, where he remained until he died and again Miss Thomsen was in constant attendance upon him, visited him almost every day and frequently several times a day, brought him his mail from La Jolla, the daily newspaper, magazines, medication, prepared food which he requested, and in every way saw that he wanted for nothing.

Many months prior to the transaction in question Turnbull had announced that he was going to give the real property (which he later sold and for which he received the check involved) to the defendant, or was going to give her the proceeds of the property upon its sale. These statements were repeated several times. Upon the completion of the sale of the property and receipt of the check involved for the net proceeds, Turnbull endorsed it to Miss Thomsen, delivered it to her, announced that it was a gift and voluntarily called in one of the nurses in the hospital and announced in her presence that he had made a gift of the check to Miss Thomsen. She was reluctant to accept the gift because of the fact it constituted practically the entire assets of the decedent. He insisted upon her taking it and finally suggested that she consult with a Mr. Arthur Welles of the San Diego Trust and Savings Bank. This was done and Mr. Welles suggested that in order that the proceeds of the check be readily available in case Miss Thomsen wished to protect Turnbull in the event of need, that it be placed in a joint account. Welles and Miss Thomsen visited Turnbull and discussed this subject with him. They were told by Turnbull that it was agreeable, whereupon he signed joint tenancy bank account cards, which were delivered to Welles. The joint account was thereafter established in accordance with this agreement.

The trial court found, inter alia, that the endorsement and delivery to defendant of the check involved constituted a valid gift of said check and the proceeds thereof; that at the time of the transaction a fiduciary relationship existed between the parties in that defendant stood in a position of trust and confidence to decedent; that defendant fully sustained the burden of establishing that the transactions concerning the gift of the check were in all respects fair and without undue influence or fraud; that the decedent understood the transaction and intended to make the gift; that the gift of the check and its proceeds was a voluntary gift; that the decedent understood the nature of the transactions and desired to make the gift, and that the gift was not the result of any fraud, undue influence or overreaching on the part of the defendant; that it was conceded by the parties upon the trial that the mental capacity of the decedent to be able and competent to make a gift was an issue of the case; that the burden of establishing want of capacity generally was upon the plaintiff and that the plaintiff failed to meet such burden; that the decedent did have mental capacity to make the gift and was competent and capable to understand the transaction and the nature thereof.

Judgment was rendered in favor of defendant and the court decreed that the gift of the check and the proceeds thereof on February 25, 1957, constituted a valid gift and represented the voluntary and intelligent desire of decedent; that plaintiff is entitled to recover nothing by reason of his complaint. The court also dissolved the preliminary injunction theretofore granted restraining defendant from disbursing, making any disposition or transfer of the funds in the joint bank account.

Appellant does not challenge the sufficiency of the evidence to sustain the findings. He contends, however, that the defendant's uncontradicted evidence establishes that she did not accept the gift. In support of this contention appellant states that it is clear from respondent's testimony that it was her intention that the money should remain under the dominion and control of decedent and that she would not exercise control over it; that such a position is inconsistent with the acceptance of a gift; that such evidence would not support a finding of acceptance and that the trial court made no such finding; and that in the absence of such a finding and evidence to support it, the judgment is unsupported by the findings and must be reversed. We are not in accord with this contention.

[1] Whether a gift is complete and effectual is a question of fact to be determined from all the evidence (24 Cal.Jur.2d, sec. 17, p. 32). The evidence is sufficient to support the finding of the court that a valid gift was effected. Manual delivery of the check, accompanied by the words of donation, sufficiently support the finding. The inferences drawn from the statements and acts of the parties were reasonable and logical and cannot be disturbed. Klindera v. Smith, 15 Cal.App.2d 115, 59 P.2d 156.

[2] A judgment will not be set aside on appeal because of a failure to make a specific finding upon an issue if a finding thereon, consistent with the judgment, results by necessary implication from the express findings which are made. Richter v. Walker, 36 Cal.2d 634, 640, 226 P.2d 593, 48 Cal. Jur.2d, sec. 288, p. 290.

[3] While the trial court did not specifically find that respondent "accepted" the gift, it did find that the check and proceeds thereof was a valid gift and it may be implied therefrom that the check and its proceeds were delivered to and accepted by respondent.

[4, 5] A gift is a transfer of personal property, made voluntarily and without consideration. Civ.Code, sec. 1146; 24 Cal. Jur.2d, sec. 2, p. 5. In order for a gift to be valid, there must be a complete delivery and transfer of dominion within the donor's lifetime. 24 Cal.Jur.2d, sec. 5, p. 10. Acceptance by the donee is an essential element of a completed gift. 24 Cal.Jur.2d, sec. 31, p. 57. The essential elements of a valid and enforceable gift are a donative intent by the donor, an effectual transfer of title and delivery, and an actual or imputed acceptance by the donee. 24 Cal. Jur.2d, sec. 17, p. 31. A clear intention on the part of the donor to make a gift is an essential element of a valid gift and it is sufficient if the donor uses words clearly importing an intention to give. In Re Estate of Miller, 143 Cal.App.2d 544, 549, 299 P.2d 1005, 1008, it is said:

> "The essentials of a valid gift, inter vivos, are: '(1) Competency of the donor to contract; (2) a voluntary intent on the part of the donor to make the gift; (3) delivery, either actual or symbolical, amounting to transfer of titles; (4) acceptance, actual or imputed; (5) complete divestment of all control by the donor; and (6) a lack of consideration in return for the gift.' "

[6] In the instant case the gift of the check was complete by actual delivery and without power of revocation; decedent reserved no dominion or control over the gift until his death. By endorsing the check and handing it to respondent, decedent completed a presently effective gift and a delivery amounting to a present transfer of title. Blonde v. Jenkins' Estate, 131 Cal.App.2d 682, 685, 281 P.2d 14.

[7] Appellant next contends that the trial court erred in excluding evidence of defendant's net income. During cross-examination of respondent, appellant sought to inquire as to her net income for the year 1956. Objection was made on the ground that the evidence was immaterial to the issues and the court sustained the objection. Appellant contends that this ruling was erroneous and highly prejudicial since he was attempting to make an offer of proof which would have established false and fraudu-

lent statements made by appellant to decedent. At the time counsel for defendant made the objection no assertion was made by plaintiff's counsel that the purpose of the question was to show fraudulent misrepresentation by defendant. Plaintiff's attorney stated that he was interested in establishing what defendant's business operations had been for several years and now argues that if plaintiff had been permitted to establish that Miss Thomsen's representation that she could not afford a house was false, he would have made out a ground for setting aside the gift. However, the record shows that Miss Thomsen had previously testified on cross-examination concerning her gross income and it does not appear that there was prejudicial error in sustaining the objection to the offered evidence where, as here, both parties were accorded a fair and impartial trial with adequate latitude in respect to all relevant evidentiary matters. Tonnesen v. Tonnesen, 126 Cal.App.2d 132, 136, 271 P.2d 534.

[8, 9] Appellant's final contention is that the trial court erred in placing upon plaintiff the burden of proving Frank Turnbull's mental incapacity to make the alleged gift. However, the record shows that the trial court did not impose such burden upon appellant but on the contrary found that a fiduciary relationship existed between the parties; that the decedent did have mental capacity to make the gift and was competent and capable to understand the transaction and nature thereof, thereby implying that the donee (Miss Thomsen) had met the burden of establishing the capacity of the decedent to make the gift. These findings are supported by substantial evidence. The testimony of the donee alone, if satisfactory and believed by the trial court, may sufficiently meet the burden thus cast upon her. Axell v. Axell, 114 Cal.App.2d 248, 250 P.2d 182; In re Estate of Raphael, 115 Cal.App.2d 525, 252 P.2d 979.

Judgment affirmed.

GRIFFIN, P. J., and SHEPARD, J., concur.

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171 Cal.App.2d 703

Esther CLARK, Plaintiff and Respondent,
v.
Jessie B. PULLINS, Defendant and Appellant.
Civ. 23641.

District Court of Appeal, Second District,
Division 1, California.
July 6, 1959.
Rehearing Denied Aug. 3, 1959.
Hearing Denied Aug. 31, 1959.

Action wherein the Superior Court of Los Angeles County, Lloyd S. Nix, J., declared defendant to be constructive trustee of property for benefit of plaintiff, and defendant appealed. The District Court of Appeal, Lillie, J., held that where all of evidence submitted, in suit for cancellation of deed, pertained to alleged use of undue influence and duress in procuring execution of deed, and evidence offered was thus entirely compatible with, and in no way contrary to, that which would have to be proved for imposition of constructive trust, there was neither an abuse of discretion nor resulting prejudice to defendant when trial court permitted plaintiff to amend, even though, technically, a new cause of action, for imposition of constructive trust, was created by amendment.

Affirmed.

1. Appeal and Error
🔑989, 994(3), 1011(1), 1012(1)

Power of appellate review begins and ends with the determination of whether there is any substantial evidence, contradicted or uncontradicted, which will support conclusion reached by trier of fact, and evaluation of conflicting evidence does not come within province of reviewing court, which will not disturb decision of trier on matters of fact, determine credibility of witnesses or reweigh evidence.

2. Trusts 🔑110

Evidence would sustain finding of undue influence and duress on defendant's part, and conclusion that his conduct created constructive trust. West's Ann.Civ. Code, § 2224.

3. Trusts ⚷91

A constructive trust is a remedial device, primarily created to prevent unjust enrichment, and is imposed not because of intention of parties but because person holding property would profit by his own wrong. West's Ann.Civ.Code, § 2224.

4. Witnesses ⚷337(6)

Trier of fact properly considered defendant's manslaughter conviction in determining truth and veracity of his testimony in suit to have him declared constructive trustee of property for benefit of plaintiff. West's Ann.Civ.Code, §§ 2217, 2224.

5. Pleading ⚷238(1)

Where there was no condition that amendment be filed by specified date, it was not an abuse of discretion to permit amendment of plaintiff's pleading after two week period.

6. Appeal and Error ⚷959(3), 1041(2)
Pleading ⚷236(7)

Where all of evidence submitted, in suit for cancellation of deed, pertained to alleged use of undue influence and duress in procuring execution of deed, and evidence offered was thus entirely compatible with, and in no way contrary to, that which would have to be proved for imposition of constructive trust, there was neither an abuse of discretion nor resulting prejudice to defendant when trial court permitted plaintiff to amend, even though, technically, a new cause of action, for imposition of constructive trust, was created by amendment. West's Ann.Civ.Code, § 2224.

◆

David Silverton, Silverton & Silverton, Los Angeles, for appellant.

William Ross, Compton, for respondent.

LILLIE, Justice.

The instant case, based upon a complaint for cancellation of a deed on the ground of undue influence and fraud, assault and battery, and conversion, was tried before the court sitting without a jury. At the conclusion of the trial, plaintiff was granted leave to amend her complaint to conform to the proof to allege in her first cause of action a constructive trust and ask for an accounting. The lower court entered judgment for plaintiff thereon and found for defendant on the second and third cause of action. His motion for a new trial was denied and defendant appeals from that portion of the judgment ordering him to transfer to plaintiff title to certain real property and pay her the sum of $2,914.66.

The trial court found that at the time she executed the deed to the property, plaintiff was acting under the undue influence and duress of defendant Pullins and declared him to be the constructive trustee of the property for the benefit of plaintiff; and that defendant received for the use and benefit of plaintiff $3,181.52 in rentals for the property, and expended on her behalf $266.86, leaving a net amount due plaintiff of $2,914.66.

Examining and construing the evidence and reasonable inferences therefrom most strongly in favor of the judgment (Crisci v. Borci, 115 Cal.App.2d 76, 251 P.2d 383; Monastero v. Los Angeles Transit Co., 131 Cal.App.2d 156, 280 P.2d 187; Juchert v. Calif. Water Service Co., 16 Cal.2d 500, 106 P.2d 886), the following is a brief summary of the pertinent facts:

Plaintiff first met defendant in 1952 while she was suffering from an asthmatic attack. Later, in February of 1953, she rented a room in his home for $10 a week, staying approximately 2½ years and paying rent for which defendant would give her no receipts. She was employed by Pacific Wire Company for approximately 13 years, earning $350 a month, which employment she left October 27, 1955. Plaintiff owned, with her deceased husband in joint tenancy, a house, the property in question.

Shortly after she moved into defendant's home he began to pursue a course of violent conduct toward her, beating her and threatening her life, which continued until after she executed to him a deed to her property on October 19, 1954. Beginning around Easter of 1953, defendant struck her on numerous occasions. Several persons noticed bruises and marks on her body—a co-worker during the first part of 1953, and in October and November of 1954; a doctor who treated plaintiff in April, 1953, and one of defendant's own witnesses who testified she noticed plaintiff with blackened eyes. Defendant beat her repeatedly with his fists and once struck her with his belt, hitting her in the back with the buckle. She did not go to the police concerning this course of conduct until November, 1955, because of his threats against her life. Defendant told her he had killed another woman and had gotten away with it.

In October, 1954, defendant beat her, blackened her eyes and left her with a "puffed-up" face. He told her if she did not sign a deed to her property conveying the title to him he would kill her. On October 18, 1954, he took her to his lawyer's office where defendant told him to prepare a deed and power of attorney. Defendant talked to his lawyer in a private office while plaintiff waited outside. The next day, October 19, 1954, plaintiff and defendant returned to his office and in the presence of the lawyer plaintiff signed the deed and power of attorney. Shortly thereafter, she called counsel and told him she had signed the documents against her will.

Defendant did not deny the execution and delivery of the deed to him, but claimed it was for good consideration. He testified that all of the rent plaintiff had ever paid him was $80 and that she owed him $1,400 back rent, although he produced no record showing any amount due him. He further stated that on October 19, 1954, he asked plaintiff for the overdue rent and she said she was going to deed him her property in payment thereof. Defendant denied having had any of plaintiff's funds in his possession with the exception of $80, although payroll checks showed defendant's name thereon as an endorser. He also denied having ever struck or threatened her.

At the conclusion of the trial plaintiff waived opening argument. During defendant's argument the trial court advised counsel that since the evidence did not disclose a gift there must be either a showing of adequate consideration for the deed or that the property is held in trust. Defendant argued there was no averment of an involuntary or any other kind of trust in the pleadings, whereupon the court stated it could permit an amendment to the complaint to conform to the evidence, and asked for discussion. Counsel requested permission to deal with the matter by way of memoranda as he had not researched the law on the trust theory. Since neither party was prepared to discuss the issue and both desired to present written memoranda thereon, the court gave plaintiff two weeks within which to present her petition for amendment of the complaint to conform to the proof. Briefs were submitted and the court permitted the amendment based on the theory of constructive trust.

Appellant contends that the trial judge erred in allowing plaintiff to amend the complaint; that the amendment was not in conformity with the lower court's leave to amend and the findings are not supported by the evidence.

[1, 2] Considering first the contention that the findings are not supported by the evidence, we are impressed by the obvious fact that appellant's argument is predicated almost entirely upon the evidence offered by him on behalf of his defense. His mere recital of evidence favorable to him is not sufficient (Lawson v. Town and Country Shops, 159 Cal.App.2d 196, 200, 323 P.2d 843). The record before us discloses considerable conflict in the testimony at the trial but of course there is before this court no issue of fact to be determined. The evaluation of the conflicting evidence does not come within the province of the reviewing court (In re Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689), which will not disturb the decision of the trier on matters of fact, determine the credibility of witnesses, or reweigh the evidence (Berniker v. Berniker, 30 Cal.2d 439, 444, 182 P.2d 557). The power of appellate review begins and ends with the determination of whether there is any substantial evi-

dence, contradicted or uncontradicted, which will support the conclusion reached by the trier of fact (Crawford v. Southern Pac. Co., 3 Cal.2d 427, 429, 45 P.2d 183; Holland v. Morgan & Peacock Properties, 168 Cal.App.2d 212, 335 P.2d 773); and appellant here has not demonstrated that there is not substantial evidence to support the challenged findings (Nicholas v. Mitchell, 32 Cal.2d 598, 197 P.2d 550; New v. New, 148 Cal.App.2d 372, 306 P.2d 987).

Appellant argues first that the evidence does not prove a resulting trust. With this position we quite agree. The record does not support such a trust (Bainbridge v. Stoner, 16 Cal.2d 423, 106 P.2d 423), the trial court did not find one, and the plaintiff has never contended by way of pleading or proof that a resulting trust existed. At the outset, plaintiff pleaded undue influence and duress and alleged that the execution of the deed was not her free and independent act. Although the evidence supports neither a gift nor a sale of the property, either for a consideration or in settlement of a pre-existing debt, there is substantial evidence to sustain the lower court's finding of undue influence and duress on the defendant's part, and its conclusion that he holds title in trust for plaintiff and defendant's conduct created a constructive trust.

[3] An involuntary trust is one created by operation of law (Section 2217, Civil Code). Section 2224 defining a constructive trust provides: "One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it." A constructive trust is a remedial device primarily created to prevent unjust enrichment (Fleishman v. Blechman, 148 Cal.App.2d 88, 306 P.2d 548). The theory upon which it is based was adopted by equity to compel the restoration to another of property to which the holder thereof is not justly entitled, and a constructive trust is imposed not because of the intention of the parties, but because the person holding the property would profit by his wrong. Monica v. Pelicas, 131 Cal.App.2d 700, 281 P.2d 269. The "undue influence" mentioned in Section 2224 (West v. Stainback, 108 Cal.App.2d 806, 240 P.2d 366), and the duress (accepting appellant's definition as "an unlawful constraint exerted upon a man whereby he is forced to do some act that he would not otherwise have done" (App.O.B., page 23)) obviously a "wrongful act" within the meaning of Section 2224, constitute conduct sufficient to justify the imposition of a constructive trust thereunder. The courts have even gone so far as to hold that the theory behind the creation of this kind of trust extends to practically any case where there is a wrongful acquisition of property to which another is entitled. Estrada v. Garcia, 132 Cal.App.2d 545, 282 P.2d 547.

[4] On the factual issue of whether duress and undue influence were exerted upon plaintiff by defendant, appellant relies on his own testimony and the asserted "inherent improbability" of that of plaintiff. The findings of the trial court reflect its refusal to believe defendant's version of the circumstances under which plaintiff executed the deed, and its rejection of the testimony of the defense witnesses, including that of defendant's counsel. In fact, the court at the close of the evidence was emphatic in telling counsel "To me, there is perjury in this case," and although it refrained from pointing an accusing finger, it is clear that by holding in plaintiff's favor and imposing a constructive trust on the property, the trial court of necessity had to accept the truth of the testimony of plaintiff and her witnesses. On the matter of credibility, defendant had been convicted of a felony, to wit, manslaughter. The trier of fact no doubt well considered this conviction in determining the truth and veracity of his testimony (People v. Westmire, 71 Cal.App.2d 432, 162 P.2d 988). On the issue of "inherent improbability" of plaintiff's evidence, we find nothing improbable about her testimony, or that of her witnesses. The record dis-

closes nothing more than a factual conflict created by the defendant which provided no more than an argument which properly could have been directed to the trier of the fact to convince him that he should rule in defendant's favor. From a review of the entire record we believe plaintiff has established her claim by evidence satisfactory and convincing (Palmer v. Burnham, 72 Cal.App.2d 626, 165 P.2d 50) and that it is more than sufficient to support the challenged findings.

We also find to be without merit appellant's contention that the amendment was not in conformity with the trial court's leave to amend in that it alleged a constructive trust whereas the court directed plaintiff to plead a resulting trust, citing authority for the rule that where special leave to amend is given, the party must comply with the leave as granted (Miller v. McKinnon, 20 Cal.2d 83, 98–99, 124 P.2d 34, 140 A.L.R. 570). This argument is based entirely upon the following alleged statement of the trial court found in Appellant's Opening Brief at page 24: "The Trial Court stated that 'assuming there was no force or duress or undue influence, that on the evidence before the court it appeared to the court that perhaps the property was held for the benefit and interest resulting from it for the benefit of the plaintiff.' (RT 256:1–12)."

The alleged quote from the Reporter's Transcript is not only incorrect but in no way reflects the trial court's thinking. Either appellant has been careless beyond all excuse, or has made intentional misrepresentation to this court. The trial judge actually said: "Let me give you one other thought that I have, taken from the evidence, and that is the thought that the deed —*assuming, just for the purpose of discussion*—that the deed was given to Mr. Pullins without any force or duress or undue influence. On the evidence that is before the Court, it would appear to this Court that perhaps that property was held for the benefit and interest resulting from it for the benefit of the plaintiff.

"There is nothing before this Court to show that it was a gift, and there must be either a consideration for the granting of this property, an adequate consideration, or the property is held in trust." (R.T. p. 255–256.) (Emphasis added.)

Counsel for defendant then discussed the matter of consideration and added: "Nor is there any pleading in this case pleading an involuntary trust or any other kind of a trust here." The court replied, "That is true, but the Court could permit an amendment of the pleadings to conform to the evidence."

In view of the court's subsequent findings, it is obvious that the trial judge believed the testimony of undue influence and duress and that the evidence, as it stood, was sufficient to constitute an involuntary trust of a constructive nature. Any interpretation limiting the leave to amend to a resulting trust is neither reasonable nor justified by the extensive colloquy between the trial judge and counsel and the ultimate findings and judgment. This is made clear by the court's statement "Well, the thing that I would like to have done at this time, and that is for the plaintiff to present a petition for the amendment of the pleadings to conform to the proof * * *" The record before us discloses that the proof showed facts and circumstances sufficient to create defendant a constructive trustee, and that the trial court viewed the evidence in the same light by making its findings accordingly.

[5] Nor can we agree with appellant's claim that the amendment was not filed on time. He argues plaintiff was given until December 18, 1957, to amend and the amendment was not filed until January 23, 1958. His reliance upon Lincoln Holding Corporation v. Union Indemnity Company, 129 Cal.App. 399, 18 P.2d 744, in this connection is misplaced. The order allowing the amendment there provided that the motion for the judgment on the pleadings be denied *on condition* that plaintiff amend its complaint within 5 days. The court held, and properly so, that when plaintiff failed to amend within the specified time,

the right to do so ceased by the terms of the order. Upon failure to perform the condition, the order was converted into a judgment because the condition was an essential part thereof. We have no such condition in the instant case. The matter was presented to the lower court by oral argument and discussion, and then submitted on written memoranda upon the request of both parties; and after careful consideration of the entire record the trial court allowed the amendment setting forth a constructive trust to conform to what it believed the proof showed. We find no abuse of the lower court's discretion in permitting the amendment after the two week period, nor has defendant shown any prejudice to his cause.

[6] As to appellant's contention that the trial court committed prejudicial error by allowing plaintiff to amend, they urge that the complaint upon which the action was tried sought a cancellation of a deed upon the ground of undue influence and fraud, and that at no time did she prove a constructive trust. Having already declared herein that the evidence was more than sufficient to sustain the lower court's findings of undue influence and duress to support the imposition of a constructive trust, and in view of defendant's own statement at page 15 of his Opening Brief, "(a)ll the evidence submitted by both sides had pertained solely to the alleged use of force and undue influence in executing the deed," we feel that his argument presents nothing further for this court to consider. Although technically a new cause of action was created by the amendment, it is clear that the elements necessary for its proof did not go beyond the evidence already adduced. In the instant case the evidence offered on the issue of cancellation of the deed was entirely compatible with, and in no way contrary to, that which in the instant case must be proved for the imposition of a constructive trust. Nor is the complaint that the court should have held a hearing, at which time new evidence could have been introduced by the defendant a valid one, for the trial court gave defendant every opportunity to present further evidence and argue the matter. The court said "* * * if counsel desire to argue the case generally in their briefs you may do so * * * because the evidence before this Court is anything but the best of evidence, *and I would be very happy for you to present any evidence that you desire.*

"Then the matter will be submitted upon the filing of final briefs in this matter." (Emphasis added.)

There is no showing that defense counsel at any time before judgment requested an opportunity to present further evidence or take advantage of the court's offer. Instead, he accepted the state of the evidence as it then existed and relying thereupon argued the matter by way of written memorandum. All parties were given ample time and opportunity to object. Nor is there a showing that after plaintiff submitted her memorandum and proposed amendment to the trial court that defendant needed time in which to further meet plaintiff's claim of a constructive trust, or if he needed it he requested it. Nor has defendant ever claimed he was surprised by plaintiff's testimony. At the trial defendant permitted the issue of duress, force and undue influence to be tried without objection and is now estopped from challenging the amendment on this ground. He had ample opportunity to present his case in the lower court—and did so; he requested no further hearing and there is no justification now for the argument that the case should have been reopened after the amendment (Simone v. McKee, 142 Cal.App.2d 307, 298 P.2d 667; Valencia v. Shell Oil Company, 23 Cal.2d 840, 147 P.2d 558). The proposed pleading presented no allegation of facts different from those presented in the trial. We find neither an abuse of the trial court's discretion in allowing the amendment (Vick v. Grasser, 169 Cal.App.2d 692, 338 P.2d 223), nor any resulting prejudice to appellant.

For the foregoing reasons the judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.

Hearing denied; WHITE, J., not participating.

52 Cal.2d 437

Sophie SHAPIRO et al., Respondents,
v.
REPUBLIC INDEMNITY CO. OF AMERICA (a Corporation), Appellant.
L. A. 25379.

Supreme Court of California,
In Bank.
July 3, 1959.

As Modified on Denial of Rehearing
July 29, 1959.

Action against automobile public liability insurer to recover amount of judgments against insureds for injuries sustained in collision with insured automobile. The Superior Court, Los Angeles County, Burnett Wolfson, J., rendered judgment for plaintiffs, and defendant appealed. The Supreme Court, Traynor, J., held that judgment against insureds obtained by insurer in action commenced after collision, reforming policy, was not binding upon persons injured in collision, who were not made parties to such action, and constituted no defense to their action against insurer.

Judgment affirmed.

McComb and Schauer, JJ., dissented.

Opinion, 334 P.2d 594, vacated.

1. Insurance 🔑435.8

Insured's minor son, being a member of armed forces at time of collision, was not a "resident in insured's household" within meaning of automobile public liability policy endorsement that there was no operator of automobile under 25 years of age resident in named insured's household.

See publication Words and Phrases, for other judicial constructions and definitions of "Resident in Insured's Household".

2. Insurance 🔑615

In action by injured person against tort-feasor's liability insurer, insurer may raise any defense against injured person that it could have raised against insured.

3. Insurance 🔑591½
Judgment 🔑707

As third-party beneficiaries of automobile public liability policy, persons injured in collision with insured automobile had an interest that could not be altered or conditioned by independent action of insurer and insured, and such rights could not be conclusively determined against injured persons in an action to which they were not made parties.

4. Insurance 🔑615
Judgment 🔑707

Judgment against insureds, obtained by insurer in action commenced after collision, reforming automobile public liability policy, was not binding upon persons injured in collision, who were not made parties to such action, and constituted no defense to their action against insurer to recover amount of judgments against insureds for injuries sustained in collision. West's Ann.Insurance Code, § 11580(b) (2).

Wyman & Finell and Marvin Finell, Beverly Hills, for appellant.

Oscar Richard Cummins and Morton R. Goodman, Beverly Hills, for respondent.

TRAYNOR, Justice.

Plaintiffs recovered judgments against John and Pauline Campbell and their son in a personal injury action that arose out of a collision with the Campbells' automobile. Plaintiffs then brought an action on the public liability insurance policy that was issued by defendant covering the Campbells' automobile. (See Ins.Code, § 11580, subd. (b) (2).) Defendant appeals from a judgment for $13,346.89 in that action in favor of plaintiffs.

[1] As originally written, the policy defined the word "insured" to include one driving with the consent of the named insured, and included an endorsement that "there is no operator of the automobile under twenty-five (25) years of age resident in the Named Insured's household or employed as a chauffeur of the automobile."

The Campbells' son, a minor, was driving the insured automobile at the time of the accident, with his parents' consent. Since he was a member of the armed forces at the time, however, he was not a resident of the insured's household within the meaning of the endorsement. Island v. Fireman's Fund Indemnity Co., 30 Cal.2d 541, 547–548, 184 P.2d 153, 173 A.L.R. 896. Accordingly, if plaintiffs' rights against the insurer are to be determined according to the terms of the original policy, the endorsement is no defense and the judgment of the trial court must be affirmed.

Defendant contends, however, that its liability to plaintiffs, if any, must be determined according to the policy as it was later reformed. The record discloses that following the accident, the Campbells brought an action against defendant for a declaration of rights under the policy. In that action defendant interposed a cross-complaint for reformation of the policy. The injured persons, plaintiffs in the present case, were not made parties to that suit. The trial court granted reformation, substituting for the quoted endorsement a provision that: "[N]o insurance is afforded by any provision of this policy or of any endorsement attached hereto or issued to form a part hereof while any insured vehicle is being operated, maintained or used by or under the control of a person under twenty-five (25) years of age." The judgment of reformation was affirmed on appeal. Campbell v. Republic Indemnity Co., 149 Cal.App.2d 476, 308 P.2d 425.

[2] Defendant contends that plaintiffs' rights under the policy must be measured by its terms as reformed and that since the driver of the car was under twenty-five years of age there can be no recovery. This result, it is urged, is dictated by the rule that an injured person stands in the shoes of the insured, and has no greater rights against the insurer than the insured would have had he paid the judgment against him and then sued the insurer. In support of this contention defendant invokes Valladao v. Fireman's Fund Indemnity Co., 13 Cal.2d 322, 89 P.2d 643; Ford v. Providence Washington Ins. Co., 151 Cal.App.2d 431, 311 P.2d 930; and Olds v. General Acc. Fire & Life Assur. Corp., 67 Cal.App.2d 812, 155 P.2d 676. These cases, however, stand only for the proposition that in a suit by an injured third person against the tortfeasor's insurer, the insurer may raise any defense against the injured person that it could have raised against the insured. Thus, in Valladao, the court held that judgment was properly entered for the defendant insurer notwithstanding the verdict, since the insurer had proved as a matter of law that the insured had violated a cooperation clause in the policy. As applied to the present case, these cases would support a ruling that defendant was entitled to make out a defense by pleading and proving facts showing that it was entitled to reformation of the policy. They are not authority, however, for the proposition that the reformation judgment is res judicata against plaintiffs, who were not parties to that action. Defendant relies solely on that judgment to support its claim of nonliability under the policy.

The same contention was considered by the Supreme Court of New Jersey in Dransfield v. Citizens Casualty Co., 5 N.J. 190, 74 A.2d 304, 306, 18 A.L.R.2d 887. There the insurer pleaded as res judicata a decree it obtained against the insured by which the policy was declared void for fraud in its procurement. The decree was entered in a proceeding against the named insured alone, begun after the injuries were sustained. The court expressly recognized the rule that "[the injured party] stands in the shoes of the assured," but held that he has a cause of action against the insurer at the time he is injured that ripens into a right of action when he recovers a judgment against the insured. It was held that his rights were not barred by the decree voiding the policy, since he was not a party to the earlier suit and was not in privity with the insured (74 A.2d at page 306). Other cases are in accord. In Pharr v. Canal Insurance Co., 233 S.C. 266, 104 S.E.2d 394, the court held that a declaratory judgment of nonliability, because of the insured's breach of a cooperation clause, was not res judicata in a later action between the injured person and the insurer. The court concluded that although the insurer had the right to raise the issue of breach of the duty of cooperation in the suit by the injured person and although the injured person would have been bound by the judgment had he been made a party to that action, nevertheless the earlier judgment, to which the injured person was not a party, did not bar the later action. New Amsterdam Casualty Co. v. Murray, 6 Cir., 242 F.2d 549, holds that the injured person's rights against the tortfeasor's insurer arise upon the happening of the accident and cannot thereafter be abridged by a judgment to which the injured person is not a party. A judgment cancelling the policy for having been procured by fraudulent representations was held not to be binding on the injured person. See also Century Indemnity Co. v. Norbut, 117 N.J.Eq. 584, 177 A. 248, 249–250; Bailey v. United States Fidelity & Guaranty Co., 185 S.C. 169, 193 S.E. 638, 641; Collard v. Universal Automobile Ins. Co., 55 Idaho 560, 45 P.2d 288, 291; Pioneer Mut. Cas. Co. of Ohio v. Pennsylvania Greyhound Lines, Inc., 68 Ohio App. 139, 37 N.E.2d 412, 423–424; 18 A.L.R.2d 891.

[3, 4] The judgment of reformation invoked by defendant in the present case was entered after plaintiffs had suffered the injuries for which they recovered judgment. As third-party beneficiaries of the policy, plaintiffs then had an interest that could not be altered or conditioned by independent action of the insurer and the insured. Olds v. General Acc. Fire & Life Assur. Corp., supra, 67 Cal.App.2d 812, 823, 155 P.2d 676. Nor can these rights be conclusively determined against the injured persons in an action to which they were not made parties.

The judgment is affirmed.

GIBSON, C. J., and SHENK, SPENCE and PETERS, JJ., concur.

McCOMB, Justice (dissenting).

I dissent. I would reverse the judgment, for the reasons expressed by Mr. Justice Patrosso in the opinion prepared by him for the District Court of Appeal in Shapiro v. Republic Indemnity Co., Cal.App. (334 P.2d 594).

SCHAUER, J., concurs.

Rehearing denied; SCHAUER and McCOMB, JJ., dissenting.

52 Cal.2d 259

Thomas W. MARTIN, as Director of the Department of Alcoholic Beverage Control, State of California, Respondent,

v.

ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD of the State OF CALIFORNIA, Appellant;

Ronald C. Chaney, Real Party in Interest.

L. A. 24698.

Supreme Court of California,
In Bank.

June 2, 1959.

Proceeding for writ of mandate directing the Alcoholic Beverage Control Appeals Board to affirm the decision of the Department of Alcoholic Beverage Control denying transfer of liquor license to applicant. The Superior Court, Los Angeles County, Frank G. Swain, J., granted writ, and the Board appealed. The Supreme Court, Spence, J., held that the Department's finding that the granting of the application would be contrary to public welfare was supported by substantial evidence, and that such finding constituted a sufficient finding of the essential ultimate fact and supported Department's decision that transfer should be denied.

Judgment affirmed.

Opinion, 330 P.2d 642 vacated.

1. Intoxicating Liquors 🔑103

Ordinarily, the ultimate fact for determination by Department of Alcoholic Beverage Control, in passing upon an application for license or for transfer of license, is whether the granting would be contrary to public welfare or morals, and if Department finds that granting of application would be contrary to public welfare, and there is substantial evidence to show good cause for such determination, Department's finding must be sustained. West's Ann.Const. art. 20, § 22; West's Ann.Gov.Code, § 11518.

2. Intoxicating Liquors 🔑70, 103, 108(5)

In proceeding upon application for liquor license or for transfer of such license, burden of proof may properly be placed upon applicant, but the burden cannot be so placed in revocation proceedings. West's Ann.Const. art. 20, § 22; West's Ann.Gov.Code, § 11518.

3. Intoxicating Liquors 🔑103

In proceeding upon application for transfer of liquor license, finding of Department of Alcoholic Beverage Control that granting of application would be contrary to public welfare constituted a sufficient finding of the essential ultimate fact, and supported Department's decision that transfer should be denied. West's Ann. Const. art. 20, § 22; West's Ann.Gov.Code, § 11518.

4. Intoxicating Liquors 🔑103

In proceeding upon application for transfer of liquor license, finding of Department of Alcoholic Beverage Control that granting of application would be contrary to public welfare was supported by substantial evidence. West's Ann.Const. art. 20, § 22; West's Ann.Gov.Code, § 11518.

Edsel W. Haws, Chief Counsel, and Charles P. Just, Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., and Edward M. Belasco, Deputy Atty. Gen., for respondent.

SPENCE, Justice.

This is an appeal by the Alcoholic Beverage Control Appeals Board (hereinafter called the Appeals Board) from a judgment of the trial court granting a writ of mandate directing the Appeals Board to affirm the decision of the Department of Alcoholic Beverage Control (hereinafter called the Department) denying transfer of a general on-sale liquor license to Ronald C. Chaney (hereinafter called the applicant). The Appeals Board had reversed the decision of the Department, and a motion to dismiss its appeal from the judgment of the trial court was heretofore denied upon the ground that the Appeals Board "is aggrieved by the judgment and entitled to appeal." Munro v. Alcoholic Beverage Control Appeals Board, 50 Cal.2d 863, 864, 326 P.2d 506, 507.

Several of the procedural questions arising under the 1954 amendment of article XX, section 22, of the Constitution have been recently determined by this court in Martin v. Alcoholic Beverage Control Appeals Board, 341 P.2d 296. Our discussion in that case of the broad discretionary powers vested in the Department and of the limited powers vested in the Appeals Board need not be repeated here. We therefore proceed directly to a statement of the factual background of this controversy.

The applicant filed an application and affidavit with the Department for the transfer of an on-sale general alcoholic beverage license. The affidavit form called for "*a full, true, and correct statement of all violations of any of the Penal Laws of the State of California or of any other State, or of the United States, for which he has been arrested, or of which he has been convicted, or to which he has pleaded guilty, or for which he has suffered imprisonment, payment of a fine, or the receiving of a suspended sentence or probation.*" There followed the question: "Have you ever been arrested?——— If the answer is 'yes' state below *in your own handwriting any and all arrests.*" In response to this query, the applicant set forth his arrest in Hollywood in 1946 for a "fight," for which he had been placed on "probation"; but he failed to mention an arrest and conviction of larceny in 1949 in Memphis, Tennessee, for which he had served 60 days at a penal farm and had been fined $10. An agent of the Department discovered this Tennessee conviction in the course of investigating the application, and the transfer was denied. The applicant petitioned for a hearing before the Department. After the hearing, the Department adopted the findings of the hearing officer reciting that "petitioner failed to include or mention the [1949 Tennessee] arrest and conviction"; that petitioner thereby "misrepresented a material fact on his application"; and that the "issuance of the license would be contrary to public welfare and morals."

The applicant appealed to the Appeals Board. The board determined, in accord with the applicant's contention, that the findings of the Department did not support the decision denying a license in that there was no finding that the applicant knowingly or purposely omitted the fact of arrest in Tennessee, the finding being that there was a failure to include or mention the arrest; that for all that appeared, the omission was unintentional, resulting from an honest mistake or negligence; that the evidence would not support such a finding had one been made; that upon questioning, the applicant openly and frankly admitted the arrest and fully disclosed all the circumstances surrounding it; that the applicant testified it was his belief that only arrests occurring in California were required to be listed, and had he understood the application more clearly, he would have listed the Tennessee arrest. The Appeals Board concluded that the unintentional or careless omission of the arrest did not constitute good cause under section 22 of article XX of the Constitution for denial of a license; and further, that the two arrests considered together were not of sufficient materiality to furnish a reasonable basis on which to deny a license. Accordingly, the Appeals Board reversed the decision of the Department.

The director of the Department then filed in the superior court a petition for a writ of mandate. The court found that there was substantial evidence to support the Department's finding that the applicant misrepresented a material fact on his application, and that the transfer of a license to him would be contrary to public welfare under section 22 of the article XX of the Constitution; that the decision of the Department denying the transfer because of such misrepresentation constituted a proper exercise of the Department's discretion; that the decision of the Appeals Board was arbitrary in that it substituted its own discretion for that of the Department; that the Appeals Board incorrectly determined the issues and acted "contrary to law" in the matter in that the findings of the hearing officer and the Department were supported by substantial evidence in the light of the whole record; and that the suppression by the applicant of the 1949 conviction constituted a good cause for denial of his application. The ensuing judgment granted a writ of mandate directing the Appeals Board to affirm the Department's denial of a license, and the Appeals Board has appealed from that judgment.

Basically, this controversy presents questions concerning the respective powers and functions of the Department and the Appeals Board similar to the questions presented in Martin v. Alcoholic Beverage Control Appeals Board, supra, 341 P.2d 296. Here, however, the Appeals Board purported to reverse the decision of the Department upon two separate grounds: (1) its determination that the findings of the Department did not support the Department's decision, and (2) its determination that the evidence would not sustain the necessary findings to support the Department's decision. The propriety of the Appeals Board's reversal therefore depends upon (1) whether the Department made a sufficient finding of the essential ultimate fact or facts; and (2) if so, whether there was substantial evidence before the Department to sustain such finding of the essential ultimate fact or facts.

Insofar as pertinent here, the abovementioned 1954 amendment provides: "The department shall have the power, in its discretion, to deny, suspend or revoke any specific alcoholic beverage license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals, or that a person seeking or holding a license has violated any law prohibiting conduct involving moral turpitude. * *"; and that "Review by the board of a decision of the department shall be limited to the questions * * * whether the decision is supported by the findings, and whether the findings are supported by substantial evidence in the light of the whole record." In this connection, the Appeals Board calls our attention to section 11518 of the Government Code, which provides: "The decision [of the Department] shall be in writing and shall contain findings of fact, a determination of the issues presented and the penalty, if any. The findings may be stated in the language of the pleadings or by reference thereto. Copies of the decision shall be delivered to the parties personally or sent to them by registered mail."

The Appeals Board also cites certain cases dealing with the sufficiency of findings in administrative proceedings involving the revocation, rather than the denial, of licenses. Allegretti v. Board of Osteopathic Examiners, 145 Cal.App.2d 435, 302 P.2d 694; Jones v. Maloney, 106 Cal.App. 2d 80, 234 P.2d 666. The cited cases do not appear to be determinative, as there is a clear distinction between proceedings involving the revocation of an existing license and proceedings involving the denial of an application for a license. McDonough v. Goodcell, 13 Cal.2d 741, 752–753, 91 P.2d 1035, 123 A.L.R. 1205. Furthermore, Jones v. Maloney, supra, 106 Cal.App.2d at page 90, 234 P.2d at page 672, quotes the liberal rules enunciated by this court in Swars v. Council of City of Vallejo, 33 Cal.2d 867, 206 P.2d 355, concerning the sufficiency of administrative findings. In the Swars case, we said at page 872 of 33 Cal.2d, at page 358 of 206 P.2d: "Although administrative findings must conform to the statutes governing the particular agency, they need not be stated with the formality required in judicial proceedings, Meeker & Co. v. Lehigh Valley R. Co., 236 U.S. 412, 35 S.Ct. 328, 59 L.Ed. 644; Cantrell v. Board of Supervisors, 87 Cal.App.2d 471, 197 P.2d 218. In connection with the action of an administrative board, the fact that certain action is taken or recommendation made may raise a presumption that the existence of the necessary facts was ascertained and found, Lindell Co. v. Board of Permit Appeals, 23 Cal. 2d 303, 323, 144 P.2d 4; Cantrell v. Board of Supervisors, 87 Cal.App.2d 471, 479, 197 P.2d 218; North Side [Property Owners'] Ass'n v. County of Los Angeles, 70 Cal. App.2d 598, 608, 161 P.2d 613; Bartholomae Oil Corp. v. Seager, 35 Cal.App.2d 77, 80, 94 P.2d 614."

[1, 2] As indicated in Martin v. Alcoholic Beverage Control Appeals Board, supra, 341 P.2d 298, it appears that ordinarily the ultimate fact for determination by the Department in passing upon an application for a license, or an application for the transfer of a license, is whether the granting "would be contrary to the public welfare and morals." This is the issue mentioned in article XX, section 22, of the Constitution, and it is the issue presented by such application within the meaning of section 11518 of the Government Code. It follows that if the Department makes a finding that the granting of the application "would be contrary to the public welfare," and there is substantial evidence to show "good cause" for such determination, then the finding of the Department must be sustained. In this connection, we make the following observations. Strictly speaking, there are no "pleadings" (Gov.Code, § 11518) in cases of applications for licenses similar to the "pleadings" in the nature of accusations in proceedings for revocation of licenses, where more specific allegations

and findings might be required. Furthermore, the burden of proof may properly be placed upon the applicant in application proceedings but not in revocation proceedings.

[3, 4] From what has been said, we conclude that the Department made a sufficient finding of the only essential ultimate fact in the present case when it found that the granting of the application would be "contrary to the public welfare." That finding supports its decision. The question remains as to whether there was substantial evidence before the Department to support such finding of the essential ultimate fact; or in other words, whether there was substantial evidence to show "good cause" for the Department's determination. We have concluded that the trial court correctly determined that there was, and that the Appeals Board had erred in determining otherwise.

The following facts appear from the uncontradicted evidence: That the applicant had been arrested on a charge of larceny in Memphis, Tennessee, in 1949, had been convicted, and had served a sentence of 60 days therefor; that he had thereafter supported his application to the Department with an affidavit which called for a "*full, true and correct statement of all violations of any of the Penal Laws of the State of California or of any other State, or of the United States, for which he has been arrested, or of which he has been convicted, or to which he has pleaded guilty, or for which he has suffered imprisonment, payment of a fine, or the receiving of a suspended sentence or probation*," and which affidavit form required in bold type that the applicant set forth in his own handwriting "*Any and All arrests*"; and that the applicant set forth in said affidavit only a 1946 arrest in Hollywood for a "fight" and omitted any reference whatever to his arrest, conviction, sentence and imprisonment in Tennessee in 1949. It was upon this evidence that the hearing officer and the Department found that the applicant had "misrepresented a material fact on his application" and that the "issuance of the license would be contrary to public welfare. * * *" It seems clear that the foregoing evidence gave rise to a strong inference that the applicant had knowingly and intentionally omitted the more serious and more recent conviction in Tennessee, and we are of the opinion that the Department was justified in believing this to be the fact.

The Appeals Board takes the position, however, that the Department's finding that the applicant "misrepresented a material fact on his application" was insufficient to support the Department's decision; that a finding that the applicant knowingly and intentionally omitted the Tennessee conviction was required; and that the evidence would not support a finding to that effect if such finding had been made by the Department. This position is untenable. As above indicated, we cannot agree that either the evidence or findings were insufficient. The burden of proof was on the applicant, and the Department was not bound to believe the applicant's weak explanation that "Well, I just thought it was a State license. I should have understood the application more plainly and I just didn't put it down." As stated by the hearing officer, "He seemed to remember something that happened before that time, three years prior to that time, and omitted a more severe penalty that he had been arrested for three years later. It is material, counsel. I can't agree with you that this is not a misrepresentation of a material fact." We therefore conclude that the Department did make the finding of the essential ultimate fact that the "issuance of the license would be contrary to public welfare," and that there was substantial evidence showing "good cause" for such determination. No further or more detailed findings were required under the circumstances. See Swars v. Council of City of Vallejo, supra, 33 Cal.2d 867, 872, 206 P.2d 355.

It follows that the Appeals Board erred and exceeded its jurisdiction in determining that the evidence and findings did not support the decision of the Department, and it further follows that the trial court properly directed the Appeals Board to affirm the decision of the Department.

The judgment is affirmed.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER, McCOMB and PETERS, JJ., concur.

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52 Cal.2d 287

Thomas W. MARTIN, as Director of the Department of Alcoholic Beverage Control, State of California, Respondent,

v.

ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD of the State OF CALIFORNIA, Defendant and Appellant;

Martin Bert Haley, Real Party in Interest and Appellant.

S. F. 20102.

Supreme Court of California,

In Bank.

June 12, 1959.

Proceeding for writ of mandate directing the Alcoholic Beverage Control Appeals Board to affirm the decision of the Department of Alcoholic Beverage Control revoking liquor license. The Superior Court, City and County of San Francisco, John B. Molinari, J., entered judgment granting writ, and the Board and the licensee appealed. The Supreme Court, Spence, J., held that licensee's failure, on each of several applications for renewal of license, to disclose that licensed business was in fact a partnership, as he was required to do by statute, constituted misrepresentation of a material fact which afforded sufficient basis for disciplinary action, and that the Department did not abuse its discretion in imposing the penalty of revocation of license.

Judgment affirmed.

Schauer and Peters, JJ., dissented.

Opinion, 331 P.2d 452, vacated.

1. Intoxicating Liquors 🔑108(10)

Alcoholic Beverage Control Appeals Board, in reviewing propriety of decision of Department of Alcoholic Beverage Control revoking license because of licensee's misstatement of ownership in application for renewal of license, must not limit or control in any way the discretion legally vested in the Department. West's Ann.Const. art. 20, § 22; West's Ann.Bus. & Prof.Code, §§ 23300, 23355, 23951, 23953, 24200(a–c).

2. Intoxicating Liquors 🔑108(9)

Finding of Department of Alcoholic Beverage Control that liquor licensee had repeatedly violated statutory provisions governing licenses by failing to disclose true ownership of licensed business was tantamount to a specific finding that continuance of license would be contrary to public welfare. West's Ann.Const. art. 20, § 22; West's Ann.Bus. & Prof.Code, §§ 23300, 23355, 23951, 23953, 24200(a–c).

3. Intoxicating Liquors 🔑102

Statutory provisions requiring that an application for a liquor license contain, in the case of a copartnership, the names of individual partners and that such application be signed by each of the partners, relate to applications for renewal of license as well as to original applications. West's Ann.Bus. & Prof.Code, §§ 23951, 23953.

4. Intoxicating Liquors 🔑106(3)

Liquor licensee's failure, on each of several applications for renewal of license, to disclose that licensed business was in fact a partnership, constituted misrepresentation of a material fact which afforded a sufficient basis for disciplinary action. West's Ann.Bus. & Prof.Code, §§ 23951, 23953, 24200(c).

5. Intoxicating Liquors 🔑108(5)

Department of Alcoholic Beverage Control was not estopped from taking disciplinary action against licensee for licensee's failure to disclose that licensed business was in fact a partnership, as he was required to do on application for renewal of license, by fact that both licensee and partner might have been advised by someone in Liquor Division of Board of Equalization that it was not necessary to put both of their names on license, where there was no evidence as to identity of alleged advisor or whether he was informed of facts concerning partnership, and where it was not even satisfactorily established that alleged advisor was an employee of the Division. West's Ann.Bus. & Prof.Code, §§ 23300, 23355, 23951, 23953, 24200(a–c).

6. Estoppel ⟹62(1)

Principles of equitable estoppel are not ordinarily applied to deprive public of protection of statute because of mistaken action on part of public official or employee.

7. Intoxicating Liquors ⟹108(10)

Propriety of penalty imposed for violation of statutory provisions respecting liquor licenses is a matter vested in discretion of Department of Alcoholic Beverage Control, whose determination thereof will not be disturbed unless there is a clear abuse of discretion. West's Ann.Const. art. 20, § 22; West's Ann.Bus. & Prof.Code, §§ 23300, 23355, 23951, 23953, 24200(a–c).

8. Intoxicating Liquors ⟹106(3)

Department of Alcoholic Beverage Control did not abuse its discretion in revoking liquor license of licensee who, in each of several applications for renewal of license, misrepresented a material fact by failing to disclose that licensed business was in fact a partnership. West's Ann. Const. art. 20, § 22; West's Ann.Bus. & Prof.Code, §§ 23300, 23355, 23951, 23953, 24200(a–c).

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Edmund G. Brown and Stanley Mosk, Attys. Gen., and Wiley W. Manuel, Deputy Atty. Gen., for respondent.

SPENCE, Justice.

This is an appeal by Martin Bert Haley, the licensee, and also by the Alcoholic Beverage Control Appeals Board (hereinafter called the Appeals Board) from a judgment of the trial court granting a writ of mandate directing the Appeals Board to affirm the decision of the Department of Alcoholic Beverage Control (hereinafter called the Department) revoking the general on-sale liquor license theretofore issued to Haley. For a general discussion of the respective powers conferred by article XX, section 22, of the Constitution upon the Department and the Appeals Board, reference is made to our recent decisions in Martin v. Alcoholic Beverage Control Appeals Board, 340 P.2d 1, and Martin v. Alcoholic Beverage Control Appeals Board, 341 P.2d 291.

In 1942 Haley applied for and received an on-sale liquor license for premises known as the Brite Spot in San Jose, of which he was then the sole owner. In either 1942 or 1943, Haley entered into an oral arrangement with one Frank Mendoza for the operation of the business as a partnership. Thereafter, each contributed money, exercised authority in running the business, and shared in the profits. They represented the business to be a partnership for the purpose of applying for business loans and insurance policies, and in preparing income tax returns. In 1953, on advice from the sales tax division, they obtained a sales tax permit in the names of both partners. Each testified that in 1953 they inquired from someone in the liquor division of the Board of Equalization whether they should obtain a liquor license in the partnership name, and that they were advised that this was not necessary. On the application for a renewal license each year from 1943 through 1955, only Haley signed his name as sole owner of the business, though the form indicated that in the case of a partnership, the renewal application should be signed by each partner.

In April 1955, the Department filed an accusation against Haley charging him with violations of certain sections of the Alcoholic Beverage Control Act because of the undisclosed ownership of Mendoza in the business over the years 1943 to 1955. The hearing officer found that the accusation was true, that Haley had violated sections 23300, 23355, 23951, and 23953 of the Alcoholic Beverage Control Act (as now numbered in the Bus. & Prof. Code), and that grounds for suspension or revocation of the license under the provisions of section 24200, subdivisions (a), (b), and (c) of the act had been established. He recommended that the license be revoked, and the Department adopted his recommendation. Haley appealed to the Appeals Board. The board upheld the Department on all issues except the penalty, which it found to be disproportionate to the offense found and to be arbitrary as a matter of law; and it reversed the decision with directions to the Department to reconsider the penalty imposed.

The director of the Department then filed in the superior court a petition for a writ of mandate. Following the trial, judgment was entered granting a writ of mandate directing the Appeals Board to vacate its decision reversing the Department's order and to affirm the Department's decision revoking Haley's on-sale license.

Section 23300 of the Business and Professions Code provides that no person shall perform any act which a licensee may perform under the authority of a license unless the person is authorized to do so by a license issued by the Department. Section 23355 provides that the license issued by the Department authorizes the person to whom issued, and no others, to exercise the rights and privileges specified, at the premises for which issued. Section 23951 provides that the application for a license shall contain "in the case of a copartnership, the names of the individual partners." Section 23953 requires that such application "be signed by each of the partners."

As hereinafter appears, the principal question argued by all parties relates to the power of the Appeals Board to reappraise the propriety of the penalty imposed where the Department has properly found upon substantial evidence that the licensee is subject to some disciplinary penalty. The record indisputably shows that Haley was not the sole owner of the business during the years in question, and that the failure to disclose the existing partnership on any of his renewal applications over a period of at least 12 years constituted repeated violations of the act. Upon this premise the Department argues that the offense committed was legally sufficient to justify revocation, and that the Appeals Board did not have the power to interfere with the penalty so imposed by the Department.

As here pertinent, the 1954 amendment to article XX, section 22, of the Constitution provided: "The department shall have the power, in its discretion, to * * suspend or revoke any specific liquor license if it shall determine for good cause that the * * * continuance of such license would be contrary to public welfare or morals. * * * Review by the board of a decision of the department shall be limited to the questions whether the department has proceeded without or in excess of its jurisdiction, whether the department has proceeded in the manner required by law, whether the decision is supported by the findings, and whether the findings are supported by substantial evidence in the light of the whole record. * * * When the order reverses the decision of the department, the board may direct the reconsideration of the matter in the light of its order and may direct the department to take such further action as is specially enjoined upon it by law, but the order shall not limit or control in any way the discretion vested by law in the department. Orders of the board shall be subject to judicial review upon petition of the director or any party aggrieved by such order."

[1] Where the question of the scope of judicial review has arisen in mandamus proceedings, it has been held that the propriety of the penalty imposed by an administrative agency is a matter vested in the discretion of such agency, and that its decision thereon will not be disturbed unless there has been a clear abuse of discretion. Nardoni v. McConnell, 48 Cal.2d 500, 507, 310 P.2d 644; Bonham v. McConnell, 45 Cal.2d 304, 306, 288 P.2d 502; Griswold v. Department Alcoholic Bev. Control, 141 Cal.App.2d 807, 812, 297 P.2d 762; Altadena Community Church v. State Bd. Equalization, 109 Cal.App.2d 99, 104, 106–107, 240 P.2d 322. The statutory provision defining the scope of the judicial inquiry into the validity of an administrative decision expressly declares that the court's "judgment shall not limit or control in any way the discretion legally vested" in the administrative agency. Code Civ.Proc. § 1094.5, subd.(e). By a parity ot reasoning, the same limitation is applicable to the power of the Appeals Board in reviewing the propriety of the Department's decision on the penalty, when the Constitution has placed the discretion in the Department (art. XX, § 22).

[2] While the Department made no specific finding that the continuance of Haley's license would be "contrary to public welfare" (Const. art. XX, § 22), its finding that Haley had repeatedly violated the above-cited sections of the Alcoholic Beverage Control Act was tantamount thereto. Mercurio v. Department Alcoholic etc. Control, 144 Cal.App.2d 626, 631, 301 P.2d 474.

[3, 4] Haley contends that sections 23951 and 23953 of the Business and Professions Code relate only to original applications, and that the failure of a partner to sign an application for renewal is not a violation of those sections as charged against him. There is no merit in this contention, as those sections obviously relate to all applications. Furthermore, the renewal application form preliminary recited that the "undersigned hereby certifies that there have been no changes in the material facts set out in the original application," and below the signature line, there was the note that "in the case of a partnership the renewal shall be signed by each of the partners." Haley was charged with violation of the sections requiring disclosure of the partnership, and it was found on undisputed evidence that the business was in fact a partnership. Section 24200 of the Business and Professions Code recites the grounds for suspension or revocation of a license and includes, by subdivision (c), "The misrepresentation of a material fact by any applicant in obtaining any license." The record thus shows that Haley made a misrepresentation of a material fact on each of several renewal applications. Therefore sufficient basis for disciplinary action existed.

Haley further contends that the Department was estopped to take disciplinary action against him. He rests this argument on the fact that both he and his partner Mendoza testified that in 1953 an employee in the liquor division of the Board of Equalization advised them that it was not necessary to put both of their names on the license. He also argues that if there was not a strict estoppel, this evidence was introduced to show mitigating circumstances, and a finding should have been made thereon, as it would have a direct bearing on whether or not the Department had abused its discretion in revoking his license. In this connection, it should be noted that Haley overlooks the fact that the renewal applications had been filed annually by him alone for at least ten years prior to the purported advice from the alleged employee.

[5, 6] However, the required elements for an estoppel are not present here. There was no evidence as to the identity of the alleged advisor or whether he was informed of the facts concerning the partnership, nor was it even satisfactorily established that he was an employee of the Department's predecessor. One of the essential elements of estoppel is that the person to be estopped must be advised of the facts. (18 Cal.Jur.2d § 5, p. 406.) More-

over, the principles of equitable estoppel are not ordinarily applied to deprive the public of the protection of a statute because of the mistaken action on the part of a public official or employee. Jacques, Inc. v. State Bd. of Equalization, 155 Cal.App. 2d 448, 462, 318 P.2d 6; also San Diego County v. California Water & Tel. Co., 30 Cal.2d 817, 826, 186 P.2d 124, 175 A. L.R. 747.

The main contention advanced by both Haley and the Appeals Board is that under all the facts and circumstances, revocation of the license by the Department constituted an abuse of its discretion. Haley urges that his violation was innocent, that the continued failure to include Mendoza's name on the renewal application was due to ignorance and mistake rather than to any intent to evade the law; that nothing affecting public welfare or morals ever occurred in the operation of the premises since Haley's original license in 1941, and it would be absurd to believe that his "technical violation" would be sufficient ground for holding that continuance of the license would be contrary to public welfare. The Appeals Board further argues that where, as here, the licensee has committed a violation which places his license in jeopardy, but there is no evidence that the public was injured, a penalty which denies him the opportunity to bring his business operation into compliance with the requirements of the law is so disproportionate to the offense found as to be arbitrary as a matter of law. Cornell v. Reilly, 127 Cal.App.2d 178, 184, 273 P.2d 572.

[7, 8] But viewing the propriety of the penalty as a matter vested in the discretion of the Department under our constitutional provision (art. XX, § 22), and considering the rule that its determination of the penalty will not be disturbed unless there is a clear abuse of its discretion (Nardoni v. McConnell, supra, 48 Cal.2d 500, 507, 310 P.2d 644; Bonham v. McConnell, supra, 45 Cal.2d 304, 306, 288 P.2d 502; Griswold v. Department Alcoholic Bev. Control, supra, 141 Cal.App.2d 807, 812, 297 P.2d 762), it does not appear that the Department abused its discretion here. The Department is charged with the responsibility of supervising the operation of liquor establishments and those who would exercise the privileges of liquor licensees. Undoubtedly, it has encountered serious problems in attempting to prevent the operation of such establishments by undisclosed partners or owners. Lighter penalties may have proved wholly ineffective to discourage this practice. In our recent decision in Macfarlane v. Department of Alcoholic Beverage Control, 51 Cal.2d 84, 330 P.2d 769, 773, where a liquor license was revoked upon evidence that the licensee had violated section 337a of the Penal Code (the taking of unlawful bets on horse races at the licensed premises), we said: "Petitioner also urges that revocation, rather than mere suspension, of license is too harsh. On the record this might appear to some of us to be a just criticism. But no such determination is within our proper function. The conduct for which the license was revoked constituted a crime under the laws of this State, and was thus at least technically contrary to public welfare or morals. The Constitution (art. XX, § 22) expressly authorizes license revocation in the discretion of the department under such circumstances, and this court is not free to substitute its own discretion as to the matter, even if it were inclined so to do."

Haley argues that the Macfarlane case is distinguishable because it involved the finding of violation of an "entirely distinct and separate criminal statute, wholly independent of the laws pertaining to the licensing of dealers in liquor, and aimed at an evil of growing concern to law-abiding society." However, the concept of the broad discretion vested in the Department for fixing the penalty remains the same; and the repeated violations that Haley unquestionably committed here sustain the Department's revocation of his license. The most that can be said is that reasonable minds might differ as to the propriety of the penalty imposed, but this fact serves only to fortify the conclusion that the Department acted within the broad area of discretion conferred upon it. Const. art. XX, § 22; Martin v. Alcoholic Beverage Control Appeals Board, supra. We are therefore of the opinion that the trial court correctly determined that the Appeals Board had exceeded its powers in reversing the decision of the Department.

The judgment is affirmed.

GIBSON, C. J., and SHENK, TRAYNOR and McCOMB, JJ., concur.

SCHAUER, Justice (dissenting).

In my view the appeals board was correct in holding that as a matter of law, in the circumstances of this case, the department acted arbitrarily, rather than within the area of its discretion, in revoking the defendant's license.

The discretion vested in the Department of Alcoholic Beverage Control is not intended to endow it with absolute, unlimited, dictatorial power; the mere stating of this fact shows that the exercise of such power is inconsistent with the concept of "discretion." Certainly we should recognize that the discretion given to the department is broad and inclusive. But that statement of power is true only within the limits of fixed legal principles. (Brill v. Fox (1931), 211 Cal. 739, 743, 297 P. 25. "Such power cannot enlarge its own boundaries or support acts requiring other legal bases. Even within its legal limits the power is not unbridled. The mere fact that a court may have jursdiction to make an order does not equip it to exercise *judicial discretion.* Its acts must not only be confined within the field of *discretion* but must also be of a character within the bounds of the limiting adjective 'judicial.' To exercise that power all the material facts in evidence must be both known and considered, together also with the legal principles essential to an informed, intelligent, and just decision. * * * The term 'judicial discretion' was defined in Bailey v. Taaffe, (1866) 29 Cal. 422, 424, as follows: 'The discretion intended, however, is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised *ex gratia,* but a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice.'" (Gossman v. Gossman (1942), 52 Cal.App.2d 184, 194–195, 126 P.2d 178.) The Department of Alcoholic Beverage Control is bound by the same rules as a court in the exercise of the discretion vested in it.

Here the facts are that the licensee has committed a violation of the law neither on the premises nor in the manner of conducting the business, but only in the wording or content of the license renewal applications. In different circumstances the failure of an applicant to correctly list the names of all partners could indeed be material and constitute adequate ground for revocation of a license. But in the circumstances here shown the inaccuracy in wording the renewal applications was substantially immaterial. The applications were made in the name of the original licensee and failed to show the name of the added partner. But the name of the partner, together with the fact of partnership, in 1953, was on advice of the sales tax division of the department's predecessor, added to the listing on the sales tax permit. There is no suggestion that the license would not have been renewed from year to year if the application had been made in the names of both partners rather than in the name of the original licensee alone. Regardless, therefore, of whether the department was bound to believe the testimony of the licensee and his partner that in 1953 an employe of the liquor division of the department's predecessor had advised them, upon their inquiry, that it was not necessary to put both names on the license, it is apparent that the error by the applicants was an innocent mistake and was without prejudice to the department or the public.

An agent of the department testified, in substance, that he had made an investigation of the licensee; that he had been informed that the partnership "was a verbal one"; that "they did not go through any escrow company, attorney, or otherwise"; and that "Mr. Haley apparently at the time of my investigation from what I could glean from his conversations, he didn't realize he was doing anything wrong as far as this partnership between he and Mr. Mendoza was concerned. * * * I would say it was more ignorance on his part than anything else."

I agree with the argument of the appeals board that where, as here, the licensee has committed a violation which places his license (and, consequently, his business, his property, his investment, his livelihood) in jeopardy, but there is no evidence that the public was injured, a penalty which denies him the opportunity to (as stated in the majority opinion) "bring his business operation into compliance with the requirements of the law," i. e., to add the name of the "new" partner to the license application and have that application then considered on its merits, is so disproportionate to the offense found as to be arbitrary as a matter of law. (Cf. Cornell v. Reilly (1954), 127 Cal.App.2d 178, 184[3], et seq., 273 P.2d 572.)

The above stated conclusion is emphasized by the fact that the business in question, which is to be destroyed, has in all other respects apparently been operated lawfully and without complaint since 1942, with the "new" partner having acquired his interest no later than 1943. The fact that the business had been operated for so long a period with a record completely clear of violations other than this single mistake[1] in respect to adding the name of the partner appears to me to establish that the public interest has not suffered by the violation. Concerning the duty of the department and the intent of the law in such a case the director himself (under date of October 7, 1957) issued a policy statement declaring:

"We must exercise our great power judiciously, reasonably * * *. We should not permit its use in an arbitrary or arrogant manner. To achieve the proper use of the authority we have been given by the Constitution, we must first analyze its purpose and then determine the objectives we seek in its use. * * *

"In many cases, and I am speaking now of the assessment of suspensions, I think we have gone beyond the objectives of our obligation under the Constitution and the laws. * * * We have punished the violator of the law without regard to the threat his violation posed to the welfare and morals of the community. * * *

"The very words of the Constitution negate the idea that we are dealing with laws which, if violated, automatically require a suspension or revocation of the license. The exercise of our power is with 'discretion.' Discretion is the exercise of judgment upon a reasonable basis. Therefore, unless there is factual support that a suspension is required in the public interest, I question that there has been a reasonable exercise of our discretion where we order a suspension in the case of an isolated or technical violation by one of our licensees.

"Our purpose in the exercise of our disciplinary authority over licenses is not to punish but to protect the public * * *."

In my view the director in the above quoted language, has correctly interpreted the constitutional grant of power, and the appeals boards, not the department or the superior court, has as a matter of law correctly interpreted and applied the power vested in the department and the board.

For the reasons stated I would reverse the judgment of the trial court.

PETERS, Justice.

I dissent:

There is no disagreement between the majority opinion of Justice SPENCE and the dissenting opinion of Justice

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[1] The very fact that the single mistake was repeated or persisted in year after year, to no purpose whatsoever, serves to accentuate the apparent innocence of the omission rather than to give it the character of intentional deception.

SCHAUER on the law applicable to the fixing of penalties by the Department. The fixing of the penalty rests in the discretion of the Department. Within the limits of that discretion the determination of the Department is final and conclusive on the Appeals Board and on the courts. The majority opinion concedes and the dissenting opinion holds that there can be an abuse of discretion as a matter of law in the fixing of the penalty, and that if such occurs, the Appeals Board and the courts possess the power and the duty to reverse and to send the case back to the Department for a reappraisal of the penalty.

The difficulty comes in determining when a particular penalty falls within and when without the proper discretion of the trier of the fact. If the penalty is so excessive that reasonable minds cannot reach any other conclusion but that the penalty is excessive, then as a matter of law, the discretion of the trier of the fact has been abused. To this principle all agree. The Appeals Board has determined, as a matter of law, that this is such a case.

In determining whether or not a penalty is excessive as a matter of law, it must be remembered that this is a proceeding to revoke a license. In such a case, the burden rests on the petitioner to prove all elements of its case, including facts to justify the penalty. We are not permitted to engage in conjecture as to why a particular penalty was imposed. We are not permitted to assume that the Department, being specialists in the field, knew of facts not appearing in the record that might support what otherwise would appear to be an excessive penalty. The Appeals Board is a specialist in the same field, and yet it found the penalty excessive as a matter of law.

We are limited to the record. If from that record we believe that the penalty was excessive as a matter of law, we should reverse. In determining this question, I suppose that the real question is whether the penalty is so excessive that it shocks the conscience. Some consciences are more easily shocked than others. The penalty herein imposed shocks my conscience. For most of the factual reasons set forth in the dissent of Justice SCHAUER, I believe the penalty here imposed was excessive as a matter of law. This being so, the case should be sent back to the Department for a reappraisal of the penalty.

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52 Cal.2d 425

PEOPLE of the State of California, Respondent,
v.
Harold Almus LANGDON, Appellant.
Cr. 6391.

Supreme Court of California,
In Bank.
June 26, 1959.
Rehearing Denied July 22, 1959.

Defendant was convicted in the Superior Court, Los Angeles County, Thomas L. Ambrose, J., of robbery in the first degree, attempted robbery in the first degree, forgery, kidnapping for purpose of robbing a person who thereby suffered bodily injury, and of assault with intent to commit rape, and he appealed. The Supreme Court, McComb, J., held that when jury trial is waived, trial court in criminal case has same discretionary power with regard to sentencing as is given jury when they are triers of fact; and held that notwithstanding use of quoted language, in Penal Code section providing that defendant may suffer death penalty "at the discretion of the jury" trying case against defendant who inflicted bodily harm on kidnap victim, trial court could impose death sentence in such case where jury had been waived.

Affirmed.

1. Jury ⚷29(7)

That defendant stated that waiver of his right to jury trial was conditional upon case's remaining before judge then presiding did not result in waiver's being ineffective, at least where condition was complied with.

2. Criminal Law ⚷633(1)

There was no duty upon trial judge to explain nature and possible consequences of defendant's action in waiving jury trial to defendant who was represented by counsel and who had been before criminal courts on at least three previous occasions, where there was nothing to indicate that defendant did not understand nature of waiver.

3. Criminal Law ⚷258(3)

When jury trial is waived, trial court in criminal case has same discretionary power with regard to sentencing as is given jury when they are triers of fact; and notwithstanding use of quoted language, in Penal Code section providing that defendant may suffer death penalty "at the discretion of the jury" trying case against defendant who inflicted bodily harm on kidnap victim, trial court could impose death sentence in such case where jury had been waived. West's Ann.Pen.Code, § 209.

4. Criminal Law ⚷1035(3), 1166½(12)

Trial judge's remark, that he considered death penalty more humane than life imprisonment, did not constitute prejudicial error; and, if defendant felt that trial court's casual remark prejudiced his rights in any way, he should have called matter to trial judge's attention at time rather than attempt to predicate error thereon on appeal.

5. Criminal Law ⚷532

Trial court, which disbelieved defendant's testimony that promises had been made to him in order to get his confession, did not err in receiving confession without first determining whether it was freely and voluntarily made.

6. Criminal Law ⚷1186(7), 1209

Punishing defendant separately for kidnapping and for robbery and sex crime which, under circumstances, were essential parts of kidnapping offense would amount to double punishment; but where defendant was subject to validly imposed sentence of death, no purpose would be served by reversal of other judgment of conviction. West's Ann.Pen.Code, §§ 209, 654.

7. Constitutional Law ⚷250
Kidnapping ⚷1

Penal Code section providing punishment for kidnapping for purpose of robbery was not subject to claimed infirmity of violating defendant's rights to equal protection of laws by making illegal distinction between robber who injures his victim without causing victim to move and robber who forces his victim to move a slight distance and then subjects him to bodily harm. West's Ann.Pen.Code, § 209.

◆

Thomas L. Berkley and Frederic L. Harvey, Jr., Berkeley, for appellant.

Stanley Mosk, Atty. Gen., Clarence A. Linn, Chief Asst. Atty. Gen., and John S. McInerny, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

After trial before the court without a jury, defendant was found guilty of (a) three counts of robbery in the first degree, (b) attempted robbery in the first degree, (c) three counts of forgery, (d) kidnaping for the purpose of robbery, the kidnaped person suffering bodily injury, and (e) assault with intent to commit rape.

The court found that defendant was armed with a dangerous weapon at the time of the commission of the foregoing offenses. After trial on the issue of penalty, the court sentenced him to death on the kidnaping charge and to the state prison for the term prescribed by law on the other charges. Defendant appeals from the convictions.

Facts: About 9:10 p.m. on December 27, 1957, defendant entered the Western Union office at 1307 West 7th Street, Los Angeles, and pretended to be interested in sending a telegram. While Mrs. Willingham, the clerk on duty, was helping defendant with his telegram, another man came in. When she glanced up at him, he told her to keep writing, whereupon defendant went behind the counter. Both men had guns. While the two men held guns on her, defendant took cash, checks, about 215 blank money order drafts, and traveler's checks in the sum of about $15,000 from the cash drawer.

On December 28, 1957, defendant, using the name Richard W. Mitchell, cashed a $20 traveler's check at a clothing store operated by Samuel Zablen in Los Angeles. This was one of the checks stolen the night before from the Western Union office. In order to cash the check, defendant showed Mr. Zablen a driver's license bearing the name "Richard William Mitchell."

Later the same day, defendant cashed one of the stolen traveler's checks at a shoe store owned by William Levy in Los Angeles. The amount of the check was $20, and again defendant used the name of Richard W. Mitchell. Still later on December 28, he cashed another of the stolen traveler's checks at the shoe store of Bernard Learnihan in Los Angeles. The amount of the check was $50, and defendant used the name and identification of Richard W. Mitchell.

Mr. Mitchell testified that the duplicate driver's license that defendant used for identification had been issued to him earlier in 1957 but that he had lost it some time prior to October 14, 1957. When the license was issued to him, he had failed to sign it, and the signature on it at the time of the trial was not his.

About 10 a. m. on February 28, 1958, defendant and his partner, James Spates, robbed the liquor store of Harold Curiel at 7528 South Figueroa Street, Los Angeles. The men, each armed with pistols, entered Curiel's store shortly after he had opened for business. After threatening him with their guns and tying him up, they took approximately $60 from his cash register and also took his wallet containing about $15.

On March 8, 1958, defendant and Spates robbed the dry goods store of Maurice Block at 1721 E. 103 Street, Los Angeles. Defendant entered the store first about 8 p. m. and asked to see a white sweater. Jennie Torres, a clerk in the store, took him to the rear of the store and was showing him a sweater when Spates entered and stuck a pistol against Mr. Block's body. Block grabbed Spates' pistol and a struggle ensued, during which Joseph Evans, another customer, came to Block's assistance, and together they disarmed him. Upon being disarmed, Spates fled from the store and managed to elude his pursuers. During the struggle, defendant seemed to suggest silently to Miss Torres that she not go to Block's aid. He did not display any weapon, nor did he attempt to help Spates. The police were summoned, and defendant remained in the store until they arrived and questioned him about the attempted holdup. He identified himself to the police officers as Richard Mitchell and showed them a driver's license bearing that name.

About 5:30 p. m. on March 12, 1958, Miss Jo Cooper was working alone in the Western Union office at 5945 South Avalon, Los Angeles. Defendant entered the office, threatened her with a pistol, and said, "This is a holdup." He then forced Miss Cooper to open the safe and cash drawer, from which he took 250 blank Western Union money orders, American Express money orders, and cash. He then had Miss Cooper lie on the floor and tied her wrists. In doing so he tore her skin and bruised her wrists. He then forced her into a small room at the rear of the office, where he made her lie down and committed an indecent assault on her. When she tried to resist him, he hit her several times on the head with a pipe wrench. Defendant was then interrupted, and when he returned, he attempted to assault her sexually. During this period he removed her underpants. When she continued to resist him, he held a gun against her head and threatened to kill her. Defendant was again interrupted for a few moments. When he returned, he found

Miss Cooper on her feet and began to beat her again. Shortly thereafter he left the store. Miss Cooper was taken to the hospital, when she was found to be hysterical and to have suffered three deep lacerations near the top of her scalp, from which she was bleeding profusely.

Defendant was arrested about March 28, 1958, by officers of the Sacramento Police Department. While he was in custody he was questioned by Officer Eastenson of the Los Angeles Police Robbery Detail. At this time he made a written statement, confessing to the robbery of the Western Union office on December 27, 1957.

Defendant was later questioned by Officer Tidyman, after which he gave a second statement in which he implicated Spates and confessed to the robbery of Harold Curiel, Maurice Block and Miss Cooper. In this conversation he admitted robbing and hitting Miss Cooper with his gun, but he denied attacking her sexually. He also denied hitting her with a wrench. During this conversation, Officer Tidyman saw a wound on defendant's hand, which he admitted had been caused by Miss Cooper's biting him.

During the course of Officer Tidyman's investigation of the robbery and assault on Miss Cooper, he went to defendant's apartment at 430 East 27th Street in Los Angeles and found a gun, a Western Union money order, some cards, and a tag bearing defendant's name. He also found various other items that had been taken from the robbery victims and some of the clothing defendant had worn at the time of the robberies.

Defendant was the only witness in his own defense. On direct examination he admitted his guilt of the robberies and the forgeries; and, in connection with the charges involving Miss Cooper, he admitted hitting her. On cross-examination he stated that he had first tied her hands and had then told her to go into the back room, that he threatened her with a pistol, and that he tied up her feet, slapped her and, when she tried to get away, pistol-whipped her. He stated that during all this time her hands were tied.

Defendant also admitted prior felony convictions for (1) burglary and forgery in 1946, (2) forgery in 1947, (3) forgery in 1949, and (4) forgery in 1954.

Questions: First. *Did defendant effectively waive his right to a trial by jury?*

Yes. Defendant contends that (a) his purported waiver of a jury trial was qualified in such a manner as to make it no waiver at all and (b) the trial court committed prejudicial error by not fully explaining to him the nature of his action in waiving a jury trial.

[1] These contentions are devoid of merit. (a) The record shows that when defendant's case was called for trial on May 27, 1958, he personally waived his right to a jury trial. The exact proceedings are as follows:

> "Mr. Osterman [for defendant]: Your Honor, on this matter I have discussed with the District Attorney's office, Mr. Alexander, and also with counsel for Spates, and I think the matter can be disposed of without a jury, if the matter was continued today, provided the matter remains in this courtroom. I don't think it will take over an hour and a half to try.
>
> "Mr. Nathanson [for the People]: Well, it depends on what kind of a trial it is, your Honor.
>
> "The Court: He is just indicating, without a jury.
>
> "Mr. Nathanson: I realize that, but I mean, if it goes on the transcript, that is one thing, but there are a great many witnesses, and I think it would take a considerable more time than an hour and a half.
>
> "Mr. Osterman: There are several counts there, your Honor. We are trying to straighten out which counts.
>
> "Mr. Nathanson: I feel if the matter goes over, there is a possibility

that there may be a disposition without too much time being consumed, and I know we are in no position to take it up today here.

"The Court: Do you want to waive a jury today, then?

"Mr. Osterman: We will waive a jury today, your Honor.

"The Court: You represent—

"Mr. Osterman: Langdon, your Honor.

"The Court: Which is Mr. Langdon?

"The Defendant Langdon: Here, sir.

"The Court: Mr. Langdon, do you waive your right to a trial by jury, and want to be tried by the judge without a jury?

"The Defendant Langdon: Yes, providing it stays in your court, your Honor.

* * * * * *

"The Court: Do the People join?

"Mr. Nathanson: The People join, your Honor.

"The Court: As to both these waivers?

"Mr. Nathanson: Yes, your Honor."

The record thus shows that defendant expressly and explicitly waived his right to a jury trial, and the fact that he stated that the waiver was conditional upon the case's remaining before the judge then presiding does not result in its being ineffective. (Cf. People v. Terry, 99 Cal. App.2d 579, 584 [9], 222 P.2d 95; People v. Olson, 166 Cal.App.2d 532, 333 P.2d 192; People v. Bastio, 55 Cal.App.2d 615, 618, 131 P.2d 614 [hearing denied by the Supreme Court]; People v. Pughsley, 74 Cal.App.2d 70 [1] et seq, 168 P.2d 27.)

The question whether defendant could have withdrawn his waiver if the condition he had sought to impose was not met is not before us. He was tried before the superior court judge for whom he had indicated a preference, and the condition which he purported to attach to the waiver was therefore complied with.

In re Adams, 160 Cal.App.2d 454, 325 P.2d 107; People v. Barnum, 147 Cal.App. 2d 803, 305 P.2d 986; People v. Benjamin, 140 Cal.App.2d 703, 295 P.2d 477; and People v. Pechar, 130 Cal.App.2d 616, 279 P.2d 570; relied on by defendant, are not here in point, since those cases deal merely with the requirement of a personal waiver by a defendant of his right to a jury trial. Such a waiver is present in this case.

[2] (b) There is nothing in the record to support the proposition that the trial court should have explained to defendant the nature and possible consequence of his action in waiving a jury trial. Defendant was represented by counsel, and he fails to indicate anything in the record to show that either he or his counsel was misled as to the result which might occur from his waiving a jury trial. Defendant not only was represented by counsel, but according to the record had also been before the criminal courts on at least three previous occasions.

A somewhat similar situation was considered in People v. Martinez, 154 Cal. App.2d 233, 236 [3] et seq, 316 P.2d 14. In that case the defendant, who had pleaded guilty, alleged that the trial court committed prejudicial error because it had not explained to him the effect and meaning of his plea of guilty before he entered it. The court pointed out that since the defendant was represented by counsel at the time of his plea of guilty, there was no duty upon the trial court to inquire into the matter to determine whether the defendant fully understood the implications of his action.

The same rule applies in the present case. There was no duty on the trial court to inquire into the waiver of a jury trial by defendant unless the trial judge had some reason, which does not appear here, to think that defendant did not understand the nature of the waiver. Defendant should not be allowed to waive a jury trial, take his chances before a trial court, and then when he finds himself dissatisfied with the result, be allowed to predicate error upon such technicality or vague possibility of misunderstanding.

[3] Second. *Does the trial court have the same power to sentence, in a prosecution for a violation of section 209 of the Penal Code where a jury has been waived, as a jury would have were they the triers of fact?*

Yes. Defendant argues that the trial court did not have the right to impose the death penalty upon him, since section 209 of the Penal Code provides that in kidnaping cases for the purpose of robbery where bodily harm is inflicted the defendant may suffer the death penalty *at the discretion of the jury trying the same.*

Defendant claims that since the Legislature did not also specify that the trial court had the same power when hearing a case without a jury, it must be assumed that it was not intended that the trial court have such power. This contention is without merit. When a jury trial is waived, the trial court in a criminal case has the same discretionary power with regard to sentencing as is given a jury when they are the triers of fact. (People v. Dessauer, 38 Cal.2d 547, 554 [10], 241 P.2d 238; In re Boyd, 108 Cal.App. 541, 543 [2], 291 P. 845.)

In addition, section 190.1 of the Penal Code provides that in cases where the penalty is in the alternative, death or imprisonment for life, the issue of guilt shall first be determined and "the trier of fact" shall then hear further proceedings "on the issue of penalty." In view of the waiver of a jury, the trial court was the "trier of fact," and his authority to fix the penalty was specifically provided for by the foregoing code provision.

[4] Third. *Did the trial court commit prejudicial error by stating at the time he made his finding relative to the penalty to be imposed: "As I previously stated, for this particular offense of which the defendant has been adjudged guilty, the law provides one of two penalties, either death or life imprisonment without the possibility of parole. Incidentally, whether it is worth anything or not, I think of the two penalties the death penalty is the more humane. They are both death penalties. The only difference is the time limit in which the death will result"?*

No. The remarks of the trial judge did not show that he disagreed that the death penalty was the extreme penalty. This is demonstrated by the fact that at the time of passing sentence, he remarked on the "aggravated aspect" of the facts in this case and said, among other things: "I see nothing in the case which would lead us to mitigate the offense in any particular, the ruthless, premeditated and very energetically carried out assault on this woman, under the circumstances which obtained. It is therefore our conclusion that the defendant, for said offense, suffer the penalty of death."

These remarks show that the trial court considered this a case where he should impose the highest possible penalty. Since he imposed the death penalty, it is obvious that he properly considered it to be the extreme penalty in this state. If defendant felt that the trial court's casual remark prejudiced his rights in any way, he should have called the matter to the trial judge's attention at the time rather than attempt to predicate error thereon on appeal. (Cf. People v. Ernst, 121 Cal.App.2d 287, 294, 263 P.2d 114; People v. Hill, 116 Cal.App.2d 212, 218 [6], 255 P.2d 54.)

[5] Fourth. *Did the trial court err in receiving defendant's confession without first determining whether it was freely and voluntarily made?*

No. Officer Tidyman questioned defendant after his arrest in Sacramento. After talking with the officer, defendant confessed to the various crimes with which he was charged and later convicted. No promises of immunity or reward were made to him. He admitted that he made and signed the confessions and testified that Officer Tidyman told him that if he signed one of the confessions, kidnap and assault charges would not be filed against him.

The trial court in rendering its decision, after indicating a disbelief of defendant's testimony, made the following statements: "I think the defendant's attempt to show that he was promised that if he would confess to all these other things that they would not file a kidnapping or assault charge on him was—of course, Sergeant Tidyman denies that any such arrangement was made or even suggested, and of course it wouldn't have been of any value if it had been, if he had made any such promise, and I can't imagine any reason for him doing it if he knew anything about the case, he must have, but even if he had, it would be of no avail to the defendant, but, rather, shows a trading attitude there, and an attempt in some manner to get away from these matters which he, himself, knows, this one case, which he, himself, knows was the most serious thing in the series."

Defendant claims that these comments by the trial judge show an erroneous view of the law because they indicate that the trial judge thought defendant's confession was admissible regardless of the statements made to defendant by Officer Tidyman. It is apparent that the trial judge did not mean what defendant contends he meant. A reading of the record shows that what the trial judge meant was that he did not believe defendant's testimony that promises had been made to him in order to get his confession. In addition, the trial court's remarks obviously referred to the fact that the evidence against defendant was so overwhelming that it was not necessary to rely on his confession. The remarks do not show that the court was going to consider the confession regardless of how it was obtained.

[6] Fifth. *Was the evidence sufficient to show that defendant was guilty of both kidnaping and robbery?*

Yes. Defendant contends that the evidence with regard to the robbery, kidnaping and assault upon Miss Cooper shows that the robbery and kidnaping constituted an indivisible act and that he cannot be convicted of both crimes. The effect of this contention is that defendant admits that he was properly convicted of kidnaping for the purpose of robbery with intent to harm the victim.

Defendant is correct in his contention that punishing him separately for the violations of section 209 of the Penal Code (kidnaping) and for the robbery and sex crime which, under the circumstances here, are essential parts of those violations, would amount to double punishment, which is forbidden by section 654 of the Penal Code. However, since defendant is subject to a validly imposed sentence of death, no purpose would be served by reversal of the other judgment of conviction. (People v. Wein, 50 Cal.2d 383, 409, 326 P.2d 457; People v. Chessman, 38 Cal.2d 166, 193, 238 P.2d 1001.)

[7] Sixth. *Do the provisions of section 209 of the Penal Code violate defendant's rights to equal protection of the laws?*

No. Defendant claims that section 209 of the Penal Code violates his constitutional rights to equal protection of the laws because it makes an illegal distinction between a robber who injures his victim without causing the victim to move and a robber who forces his victim to move a slight distance and then subjects him to bodily harm.

In People v. Wein, 50 Cal.2d 383, 400 [16], 326 P.2d 457, this court upheld the constitutionality of section 209 of the Penal Code.

In People v. Thompson, 133 Cal.App.2d 4, 7 [1] et seq., 284 P.2d 39 (hearing denied by the Supreme Court), the defendant was found guilty of kidnaping for the purpose of robbery. He contended that section 209 of the Penal Code was unconstitutional under the federal and state Constitutions as violative of the equal protection clauses because it made it possible to prosecute one person, like the defendant, for kidnaping for the purpose of robbery, whereas another, on the same facts, could be prosecuted for robbery only, so that the threat of prosecution for kidnaping could be used as a means of extortion.

The court on appeal held the contention to be without merit. It pointed out that under the section as now worded, before a defendant can be found guilty of kidnaping to commit robbery, a person must be kidnaped or carried away, an element of the crime present in the Thompson case and also present here, which is not normally incident to robbery.

The judgments are affirmed.

GIBSON, C. J., and SHENK, SCHAUER, SPENCE and PETERS, JJ., concur.

52 Cal.2d 360

J. KATZEV et al., Appellants,

v.

COUNTY OF LOS ANGELES et al., Respondents.

L.A. 25012.

Supreme Court of California,
In Bank.
June 24, 1959.
Rehearing Denied July 22, 1959.

Action for judgment declaring unconstitutional Los Angeles county ordinance prohibiting sale or circulation of any "crime" comic book to any child under age of 18 years and declaring violation of ordinance to be a misdemeanor. The Superior Court of Los Angeles County, John K. Otis, Judge pro tem.,* rendered a decree adverse to plaintiffs and they appealed. The Supreme Court, McComb, J., held that the ordinance was unconstitutional as violative of provisions guaranteeing free press, equal protection and due process of law.

Reversed.

Opinion, 336 P.2d 6, vacated.

1. Constitutional Law 🔑90, 274

Los Angeles county ordinance prohibiting sale and circulation of crime "comic" books to children under age of 18 years and making violation a misdemeanor, enacted upon findings that, inter alia, many children have been incited to commit crimes as a consequence of looking at crime "comic" books, was violative of provisions of state and federal constitutions guaranteeing freedom of press, in absence of any showing of clear and present danger of substantive evil justifying suppression of constitutional guarantees. U.S.C.A.Const. Amends. 1, 14; West's Ann.Const. art. 1, § 9.

2. Constitutional Law 🔑90, 274

Publications concerning criminal news, accounts of criminal deeds, or pictures and stories of bloodshed, lust or crime are as much entitled to constitutional protection of free speech as other literature. U.S.C.A. Const. Amends. 1, 14; West's Ann.Const. art. 1, § 9.

3. Appeal and Error 🔑893(1)

Supreme Court, in reviewing findings of trial court as to whether ordinance infringed upon state and federal constitutional guarantees of freedom of expression would make independent examination of evidence to ascertain whether there had been a violation of such provision. U.S.C.A.Const. Amends. 1, 14; West's Ann. Const. art. 1, § 9.

4. Constitutional Law 🔑90

However reprehensible a legislative body may regard certain publications, it cannot forbid them if they present no clear and present danger that they will bring about a substantive evil that legislative authority has right to prevent. U.S.C.A. Const. Amends. 1, 14; West's Ann.Const. art. 1, § 9.

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* Assigned by Chairman of Judicial Council.

5. Constitutional Law 🔑90, 274

In determining whether there was clear and present danger of substantive evil warranting suppression of freedom of speech as guaranteed by state and federal constitutional provisions, court was required to determine whether gravity of any such evil, discounted by its improbability, justified invasion of freedom of speech in order to avoid danger. U.S.C.A.Const. Amends. 1, 14; West's Ann.Const. art. 1, § 9.

6. Declaratory Judgment 🔑346

In action for declaration that Los Angeles county ordinance forbidding circulation of crime "comic" books, enacted pursuant to legislative finding that, inter alia, many children had been incited to crimes as consequence of looking at crime "comic" books, was unconstitutional, record failed to disclose a close, causal connection between substantive evil of juvenile delinquency and circulation of certain crime "comic" books in general or to show that they would injure character of persons under age of 18 years and inculcate in them a preference for crime. U.S.C.A.Const. Amends. 1, 14; West's Ann.Const. art. 1, § 9.

7. Constitutional Law 🔑90, 274

Los Angeles county ordinance enacted to prohibit sale and circulation of crime "comic" books to children under age of 18 years, enacted to combat juvenile delinquency, violated state and federal constitutional guarantees of freedom of the press in, inter alia, that it was too broad and applied to publications having no relationship to juvenile delinquency; and in that it failed to draw any distinction between various accounts of crime. U.S.C.A.Const. Amends. 1, 14; West's Ann.Const. art. 1, § 9.

8. Constitutional Law 🔑211

Los Angeles county ordinance prohibiting the sale and circulation of crime "comic" books to children under age of 18 years was unconstitutional in denying persons such as distributors of comic books equal protection of the laws, in establishing arbitrary and unreasonable exemptions from its provisions where it exempted comic books dealing solely with luridly depicted tales of violence and crime because stories were drawn from religious writings, where it granted exemptions for comic strips in newspapers and where it drew irrational line between all true accounts of crime, even though disgustingly portrayed and all fictional accounts of crime. U.S.C.A.Const. Amend. 14; West's Ann.Const. art. 1, § 11.

9. Constitutional Law 🔑211

An exemption in a statute must be reasonable in order to be valid under constitutional provisions guaranteeing equal protection of laws. U.S.C.A.Const. Amend. 14; West's Ann.Const. art. 1, § 11.

10. Constitutional Law 🔑208(1)

Where legislative classification is unreasonable, courts will invalidate the law. U.S.C.A.Const. Amend. 14; West's Ann. Const. art. 1, § 11.

11. Constitutional Law 🔑258

Under constitutional guarantees of due process, terms of penal statute creating new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, and statute which either forbids or requires doing of act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates first essential of due process of law. U.S.C.A. Const. Amend. 14; West's Ann.Const. art. 1, § 13.

12. Constitutional Law 🔑258

Los Angeles county ordinance prohibiting the sale and circulation of crime "comic" books to children under 18 years of age and making violation a misdemeanor was invalid, under constitutional guarantees of due process of law, in that it failed to establish a clearly defined standard of guilt and in that it was uncertain, under its terms, what act constituted a crime. U.S.C.A.Const. Amend. 14; West's Ann. Const. art. 1, § 13.

Gang, Kopp & Tyre, Martin Gang, Milton A. Rudin and Payson Wolff, Los Angeles, for appellants.

A. L. Wirin, Fred Okrand, Los Angeles, and Richard J. Kamins, Beverly Hills, as amici curiae on behalf of appellants.

Harold W. Kennedy, County Counsel, and David D. Mix, Deputy County Counsel, Los Angeles, for respondents.

McCOMB, Justice.

Plaintiffs appeal from an adverse judgment in a declaratory relief action attacking as unconstitutional a county ordinance prohibiting the sale or circulation of any "crime comic book" to any child under the age of 18 years and declaring a violation of the ordinance to be a misdemeanor.

Plaintiffs are dealers in magazines, books and other printed material, including crime comic books, and the distribution of the latter would be impaired through enforcement of the ordinance.

The ordinance, No. 6633, reads:

> "An Ordinance prohibiting the sale and circulation of crime 'comic' books to children under the age of eighteen (18) years.
>
> "The Board of Supervisors of the County of Los Angeles do ordain as follows:
>
> "Section 1. The Board of Supervisors finds that in the unincorporated area of Los Angeles County:
>
> "a. There is a great volume in the number and variety of crime 'comic' books available to children under the age of eighteen (18) years.
>
> "b. These crime 'comic' books resemble closely other publications devoted in substance to humor.
>
> "c. These crime 'comic' books are placed for sale side by side with humorous publications.
>
> "d. These crime 'comic' books have been sold or circulated to children under eighteen (18) years of age.
>
> "e. Many children have been incited to commit crimes as a consequence of looking at crime 'comic' books.
>
> "f. Many children have been incited to attempt the commitment of a crime as a consequence of looking at crime 'comic' books.
>
> "g. There is a clear and present danger which the Board of Supervisors finds is great and imminent that the continued sale and circulation in the unincorporated area of Los Angeles County of crime 'comic' books to children will incite said children to commit crimes or attempt to commit crimes and inculcate a preference in the minds of many of the children to participate in crime.
>
> "h. The Board of Supervisors specifically finds that the prohibition against the sale to or circulation of crime 'comic' books to children is a reasonable measure to meet the clear and present danger hereinabove found.
>
> "Section 2. Every person is guilty of a misdemeanor who sells or circulates any crime 'comic' book to any child under the age of eighteen (18) years.
>
> "Section 3. This ordinance shall not apply:
>
> "a. To those accounts of crime which are part of the general dissemination of news.
>
> "b. To those accounts of crime which appear in a newspaper of general circulation.
>
> "c. To those accounts of crime which delineate actual historical events.
>
> "d. To those accounts which delineate occurrences actually set forth in the sacred scriptures of any religion.
>
> "Section 4. As used in this ordinance, the following terms shall have the meaning given herein. When not inconsistent with the context, words used in the present tense include the future, words in the plural number include the singular number, and words

in the singular number include the plural number.

"a. Crime 'comic' book: Any book, magazine, or pamphlet in which an account of crime is set forth by means of a series of five (5) or more drawings or photographs, in sequence, which are accompanied by either narrative writing or words represented as being spoken by a pictured character, whether such narrative or words appear in 'balloons,' captions or on or immediately adjacent to the photograph or drawing.

"b. In sequence: In direct order, excluding intervening breaks which continue the account, where such intervening breaks

"(1) contain narrative material, or

"(2) contain a drawing or photograph without words or narrative material.

"c. Crime: The commission or attempted commission of an act of arson, burglary, kidnapping, mayhem, murder, rape, robbery, theft, trainwrecking, or voluntary manslaughter; or the commission of an act of assault with caustic chemicals or assault with a deadly weapon. As the term 'crime' is used in paragraph 'a.' of this section, it includes but is not limited to, acts by human beings, and further includes acts by animals or any non-human, part human, or imaginary beings, which if performed by a human would constitute any of the crimes named.

"d. Balloon: The outline enclosing words represented as coming from the mouth of a pictured character.

"e. Person: Any person, firm, association, organization, partnership, business trust, corporation, or company.

"f. Sells or circulates: To sell, offer for sale, attempt to sell, exhibit, give away, keep in possession with intent to sell or give away, or in any way furnish or attempt to furnish.

"g. Sacred scriptures: The Bible, including any version thereof, or any writing of similar stature in any established religion.

"Section 5. Every violation of this ordinance shall be punishable by imprisonment in the county jail for not more than six (6) months or by a fine or [sic] not more than $500, or by both such fine and imprisonment.

"Section 6. If any provision of this ordinance, or the application thereof to any person or circumstance is held invalid, the remainder of the ordinance, and the application of such provision to other persons or circumstances shall not be affected thereby.

"Section 7. Crime 'comic' books are now being sold and circulated to children under the age of eighteen (18) years in the unincorporated territory of Los Angeles County, destroying their moral fiber and inciting them to crime and juvenile delinquency. Such damage, once accomplished, is irreparable. By reason of the foregoing, this ordinance is immediately needed for the preservation of the public health, safety, and welfare and shall take effect upon the passage hereof.

"Section 8. This ordinance shall be published in Journal of Commerce and Independent Review, a newspaper printed and published in the County of Los Angeles."

[1] Question: *Is the ordinance unconstitutional under the First Amendment to the United States Constitution (made applicable to the states by the Fourteenth Amendment), which prohibits the enactment of any laws "abridging the freedom of speech, or of the press," and under article I, section 9, of the California Constitution, which forbids the passage of any law "to restrain or abridge the liberty of speech or of the press"?*

Yes, for these reasons:

First. The ordinance is an unjustifiable abridgment of freedom of the press, because distribution of such crime comic books is protected by the state and federal Constitutions, and no showing has been made of a clear and present danger of a substantive evil justifying suppression of the constitutional guarantee.

These principles are here applicable:

[2] i. Publications containing criminal news, accounts of criminal deeds, or pictures and stories of bloodshed, lust, or crime are as much entitled to the protection of free speech as other literature (Winters v. People of State of New York, 333 U.S. 507, 510, 68 S.Ct. 665, 92 L.Ed. 840);

[3] ii. In reviewing the findings of the trial court as to whether an ordinance infringes the First Amendment to the United States Constitution or article I, section 9, of the California Constitution, the court will make an independent examination of the evidence to ascertain whether there has been a violation of either of the provisions (Feiner v. People of State of New York, 340 U.S. 315, 316, 71 S.Ct. 303, 95 L.Ed. 267); and

[4] iii. However reprehensible a legislative body may regard certain publications, it cannot forbid them if they present no "clear and present danger" that they will bring about a substantive evil that the legislative authority has a right to prevent (Danskin v. San Diego Unified School Dist., 28 Cal.2d 536, 542 [1], 171 P.2d 885; Bridges v. State of California, 314 U.S. 252, 261, 62 S.Ct. 190, 86 L.Ed. 192; People v. Garcia, 37 Cal.App.2d Supp. 753, 761 [7], 98 P.2d 265).

Applying the foregoing rules to the ordinance in the instant case, we must re-evaluate the evidence to determine whether there is a "clear and present danger" of a substantive evil warranting the suppression of freedom of speech as guaranteed by the constitutional provisions.

[5] This court must then determine whether the gravity of any such "evil," discounted by its improbability, "justifies" invasion of freedom of speech in order to avoid the "danger." (Dennis v. United States, 341 U.S. 494, 510, 71 S.Ct. 857, 95 L.Ed. 1137.)

In West Virginia State Board of Education v. Barnette, 319 U.S. 624, 639, 63 S.Ct. 1178, 1186, 87 L.Ed. 1628, the court said: "In weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect. It is important to note that while it is the Fourteenth Amendment which bears directly upon the State it is the more specific limiting principles of the First Amendment that finally govern this case."

Again, in Thomas v. Collins, 323 U.S. 516, 530 [4–6], 65 S.Ct. 315, 322, 89 L.Ed. 430, the court said: "For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation. Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending."

In In re Lyons, 27 Cal.App.2d 293, 296, 81 P.2d 190, 192 it was accurately stated: "The courts have always been zealous to protect the rights of persons to acquire, own and enjoy property. They have been more zealous, if possible, to protect the personal right of free speech, and perhaps justly so, for free discussion contains the germ of progress which keeps flowing the blood stream of the Republic."

[6] The record in the present case fails to disclose a close, causal connection between the substantive evil—juvenile delinquency—and the circulation of crime comic books in general.

The board of supervisors found, in passing ordinance 6633, that there are within the county of Los Angeles a great volume and variety of crime comic books available to children under the age of 18 years; that they are sold or circulated to children, many of whom are thereby incited to commit or attempt to commit crimes; and that such books destroy the moral fiber of children and incite them to crime and juvenile delinquency.

The record fails to show that there is a clear and present danger that the circulation of crime comic books in general will injure the character of persons under the age of 18 years and inculcate in them a preference for crime. Accordingly, the ordinance is unconstitutional under the above constitutional provisions.

[7] *Second.* Because it applies to publications that have no relationship to juvenile delinquency, the ordinance is too broad. The ordinance makes it a crime to circulate any comic books which contain fictional, nonreligious accounts of crime. The definition of what constitutes a crime comic book is found in section 4a of the ordinance, which states that a "crime comic book" is "Any book, magazine, or pamphlet in which an account of crime is set forth by means of a series of five (5) or more drawings or photographs. * * *" Section 4c defines "crime" by listing specific crimes and adds that as this word is used in the ordinance it includes acts by animals or imaginary beings which if performed by humans would constitute one of the crimes named.

The ordinance does not require that the drawings be lewd or depict brutality, sadism, gore or horror; nor does the ordinance limit its application to accounts of crime which glorify the crime or the criminal, make crime attractive or depict in detail the manner in which crimes are committed. The ordinance brings within its scope such publications as New Funnies (town attacked by bandits in Woody Woodpecker story); Bugs Bunny (Bugs steals diamonds); and Classic Comics (Treasure Island). Conversely, it is quite obvious that many crime, horror, or sex comic books containing the features most objectionable may continue unaffected by the ordinance because they are not fictional or do not contain accounts of the enumerated crimes.

The failure of the ordinance to draw any distinction between various accounts of crime makes it unconstitutional. This overbroadness is well illustrated by the following: A parent or a dealer circulates a comic book to a child. It is a Bugs Bunny comic in which buried somewhere deep in the book is an account of Bug's stealing jewels from humans. The adult circulating the comic is guilty of a crime; intent on the part of the defendant is not a prerequisite. The adult cannot guard himself by merely glancing over the type of comic book he is circulating and relying on a well-founded assumption that the particular comic book is harmless for children.

The distributors of such comic books will be forced either to stop selling all comic books or to read every page of every title they sell. Similarly, the parent, the barber, the dentist, and the doctor who allow children to read comic books will have to check every page to determine whether somewhere hidden innocuously away is the portrayal of a crime. The newsdealer could leaf through a comic book and quickly determine whether it falls under clear standards of the lurid, gruesome, or macabre, based upon the manner of depiction. However, under the present ordinance, his failure to check thoroughly each page might subject him to the chance of criminal liability.

[8] *Third.* The ordinance denies distributors such as plaintiffs equal protection of the laws, since it establishes arbitrary and unreasonable exemptions.

The ordinance is unconstitutional because it unreasonably exempts certain types of comic books and comic strips and thus denies plaintiffs the equal protection of the laws guaranteed by the Fourteenth Amendment of the United States Constitution and article I, section 11, of the California Constitution.

Sections 3c and 3d of the ordinance exempt from the ban many comic books dealing solely with luridly depicted tales of violence and crime, because the stories are true or drawn from religious writings. Section 3b grants exemption to comic strips in newspapers, although these comic strips may not vary one iota from those appearing in the comic book media.

[9] Because these exemptions are unrelated to the purported purpose of the legislation, they impose an unfair burden on plaintiffs, thus denying them equal protection of the laws. An exemption must be reasonable in order to meet the standard prescribed by Yick Wo v. Hopkins, 118 U.S. 356, at page 369, 6 S.Ct. 1064, at page 1070, 30 L.Ed. 220, where it is stated that "the equal protection of the laws is a pledge of the protection of equal laws."

[10] Where the legislative classification is unreasonable, the courts will invalidate the law. In Franchise Motor Freight Ass'n v. Seavey, 196 Cal. 77, 81 [2], 235 P. 1000, 1002 we said that "a statute makes an improper and unlawful discrimination if it confers particular privileges upon a class arbitrarily selected from a larger number of persons, all of whom stand in the same relation to the privileges granted, and between whom and the persons not so favored no reasonable distinction or substantial difference can be found justifying the inclusion of the one and the exclusion of the other. 5 Cal.Jur. 825, and cases cited." (Cf. Barker Bros., Inc. v. City of Los Angeles, 10 Cal.2d 603, 608 [5] et seq., 76 P.2d 97; Smith v. Cahoon, 283 U.S. 553, 556–557, 51 S.Ct. 582, 75 L.Ed. 1264.)

No valid reason has been presented why comic books dealing in a disgustingly detailed way with the exploits of Murder, Incorporated, John Dillinger, or Jesse James will have any less harmful effect on children than Popeye, Tom Mix, or fictionalized accounts of the activities of law enforcement officials like G-Men.

The ordinance is invalid for drawing an irrational line between all true accounts of crime, even though disgustingly portrayed, and all fictional accounts of crime. The ordinance ignores the important factor which might support some comic book legislation, namely, the manner of depiction and the approach of the comic book. The same objection applies to the exclusion from the ordinance of all depictions of crimes which are culled from religious writings. This exemption has no justification when considered in the light of the purpose of the ordinance.

Likewise, the exemption provided for newspaper comic strips is without justification. Although a newspaper would be perfectly free to circulate a fictional portrayal of crime, a comic book which followed the frequent practice of reprinting newspaper comic strips would be banned. Unlike the exemptions for accounts of crime that are true or drawn from religious writings, this latter one is not based on content, nor is it a completely different form of presenting a story. Rather, the exemption is based solely on the nature of the product produced on paper. (Cf. Morey v. Doud, 354 U.S. 457, 466 et seq., 77 S.Ct. 1344, 1 L.Ed.2d 1485.)

Fourth. The ordinance fails to establish a clearly defined standard of guilt.

Both the California Constitution, article I, section 13, and the Constitution of the United States, Fourteenth Amendment, provide that no person shall be deprived of life, liberty, or property without due process of law. Due process means that "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." (Lanzetta v. State of New Jersey, 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed. 888; In re Porterfield, 28 Cal. 2d 91, 120, 168 P.2d 706, 167 A.L.R. 675.)

[11] The standard to be applied is set forth in Connally v. General Const. Co., 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L. Ed. 322: "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."

[12] Section 4a of the ordinance defines a crime comic book as "Any book, magazine, or pamphlet in which an account of crime is set forth by means of a series of five (5) or more drawings or photographs, in sequence, which are accompanied by either narrative writing or words represented as being spoken by a pictured character * * *." This definition embraces what is commonly known as a comic book, but it goes further. Books are included; so are accounts which utilize photographs; narrative writing as well as dialogue is included.

There are on the market numerous children's books of fairy tales and folk tales, containing illustrations interspersed with dialogue or narration. If such portrayals are "in sequence" as defined by section 4b of the ordinance, they may fall within the prohibition of the ordinance. To outlaw these traditional and innocuous storybooks because of a desire to eliminate the seamy and gory in comic books is going far beyond any demonstrable need. Yet if such books are not within the ban, by what standard can a parent or newsdealer determine where to draw the line?

The exact term in the ordinance is "account of crime." Although the draftsman carefully spelled out which crimes he meant, we are not told what constitutes an "account." "Account" is defined in Webster's New International Dictionary (2d ed. 1957) as "a statement of facts or occurrences; a relation or narrative; report; description; as, an *account* of a battle." Suppose the crime is committed before the story opens, but a policeman reports to his superior the evidence he has found and the rest of the story is devoted to the chase. If this is an "account," all detective stories would be barred, even though they do not picture the criminal in the act of committing the crime, if there are five or more drawings or photographs in sequence depicting the "account."

Section 4a of the ordinance requires that the "account" of crime be set forth in five or more panels, but what does "account" include? If the criminal takes only one or two panels to kill his victim, although the entire story may deal with his subsequent detection, is this portrayal within the ordinance?

These questions point up the ambiguity which leaves a distributor unable to determine whether comic books in his possession subject him to criminal liability.

It is uncertain what acts constitute the crime prohibited by the ordinance. Clearly, the ordinance attempts to prohibit the selling of crime comic books to children, or offering or attempting to sell, giving, furnishing or exhibiting crime comic books to children. It is not clear, however, whether plaintiffs are subjecting themselves to arrest for keeping crime comic books on their shelves for sale to adults. Assuming that such an exhibit of comics to adults is not permissible, the ordinance falls squarely within the doctrine announced in Butler v. State of Michigan, 352 U.S. 380, 77 S.Ct. 524. 1 L.Ed.2d 412.

Assuming, on the other hand, that an exhibit of comics to adults is permitted under the ordinance, no clear provision is made to warn plaintiffs when such an exhibit falls within the ban. Perhaps the distributor is in violation as soon as a child walks over to the rack and glances through a crime comic book. Under any circumstances, dealers in comic books should not be required to hazard assumptions and guesses as to the meaning of the ordinance.

Section 4c of the ordinance says that a crime comic includes depiction of "acts by human beings, and further includes acts by animals or any non-human, part human, or imaginary beings, which if performed by a human would constitute any of the crimes named." Comic book characters are frequently portrayed as human, except for some insignificant animal features, such as big ears, or a victim may be imaginary although close to human form because he is the inhabitant of another planet. The problem thus arises, when does an animal commit a crime on a human? If the ordinance is taken literally, every time an animal acts toward a human in a way that would constitute a crime if the animal were human, the portrayal comes under the ordinance. This "as if" test would make an "account of crime" out of a person's losing an arm to a shark, since if the shark were human its act would constitute cannibalism or mayhem, or to a dog's eating some food found on a person's porch, since if the dog were human its act would constitute theft.

The ordinance as written is entirely too uncertain and "leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against." (United States v. L. Cohen Grocery Co., 255 U.S. 81, 89, 41 S.Ct. 298, 300, 65 L.Ed. 516.)

The judgment is reversed.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER and PETERS, JJ., concur.

SPENCE, J., concurs in the judgment.

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52 Cal.2d 385

CITY OF PORT HUENEME, Appellant,
v.
CITY OF OXNARD et al., Respondents.

CITY OF OXNARD, Respondent,
v.
CITY OF PORT HUENEME, Appellant,
L. A. 25345.

Supreme Court of California,
In Bank.
June 24, 1959.

Consolidated mandamus proceedings were brought by two cities attacking annexation proceedings by the other under the Annexation of Uninhabited Territory Act. The Superior Court, Ventura County, Atwell Westwick, J., entered judgment upholding two annexations of territory by the City of Oxnard and declaring void an annexation undertaken by the City of Port Hueneme, and the City of Port Hueneme appealed. The Supreme Court, Schauer, J., held that territory must be contiguous to city at time of inception of annexation proceedings under Annexation of Uninhabited Territory Act.

Judgment affirmed insofar as it decreed that attempted annexation by the City of Port Hueneme was void, and judgment reversed insofar as it decreed that annexations by the City of Oxnard were valid.

Opinion, 333 P.2d 837, vacated.

See also Cal., 341 P.2d 325.

1. Municipal Corporations ⚿29(4)

Question whether territory included within proposed annexation by city under the Annexation of Uninhabited Territory Act was inhabited, so that valid annexation proceedings could only have been undertaken under the Annexation of Inhabited Territory Act, was a question of fact, which did not depend on whether houses of registered voters, in which they ate and slept, were within boundaries of the proposed annexation, but on whether such houses were an integral part of the whole parcel, including portion thereof which fell within boundaries of proposed annexation, so as to render the whole parcel inhabited. West's Ann.Gov.Code, §§ 35100–35158, 35300–35326.

2. Municipal Corporations ⚷29(4)

Where, at time annexation of territory by city under the Annexation of Uninhabited Territory Act was first proposed, there were 18 adult residents within described boundaries, but only five were registered voters, and after filing of boundaries with County Boundary Commission but before commission approved them, nine more of the residents registered to vote, thus raising number of registered voters within territory proposed to be annexed to 14, and officials of city immediately withdrew first proposed boundaries from consideration by commission and substituted boundaries revised so as to exclude three houses inhabited by eight of the 14 registered voters, and excluded houses were located on land, which was in each case part of a larger parcel belonging to same owner, and remainder of larger parcel was included within second proposed annexation, second proposed annexation was void and of no effect. West's Ann.Gov.Code, §§ 35300–35326, 35303.

3. Appeal and Error ⚷891, 1122(1)

Application by appellant in Supreme Court to produce additional evidence, oral in character, and to have Supreme Court then make findings of fact in addition to, or contrary to, those made by trial court, would be denied by Supreme Court, where application and supporting affidavits indicated that by such additional evidence appellant was seeking to create a conflict with facts, which were recited in stipulation of facts on which trial court in part based its finding, and to have Supreme Court resolve conflict in favor of appellant and then make findings contrary to those of trial court in order to reverse judgment, since that was not the function of Supreme Court on appeal. West's Ann. Code Civ.Proc. § 956a; West's Ann.Rules on Appeal, rule 23(b).

4. Appeal and Error ⚷891, 1175(2), 1176(2)

Purpose of statute authorizing reviewing court to take additional evidence concerning facts occurring before decision of appeal, give or direct entry of any judgment or order, and make such other orders as case requires, is to permit reviewing court to remedy defects in record to end that judgment or order appealed from may be affirmed and further litigation terminated, and where otherwise under the old practice judgment or order would have to be reversed. West's Ann.Code Civ.Proc. § 956a.

5. Municipal Corporations ⚷29(4)

Territory must be contiguous to city at time of inception of annexation proceedings under Annexation of Uninhabited Territory Act. West's Ann.Gov.Code, §§ 35300–35326, 35301–35303

6. Municipal Corporations ⚷29(2)

In annexation proceedings under the Annexation of Uninhabited Territory Act, the Act constitutes the measure of the power to be exercised. West's Ann.Gov. Code, §§ 35300–35326.

7. Statutes ⚷223.2

Where the Legislature expressly provided in the Annexation of Inhabited Territory Act that territory need not be contiguous at inception of annexation proceedings, and the Annexation of Uninhabited Territory Act contained no similar express provision, there was a proper case for application of doctrine that where a statute, with reference to one subject, contains a given provision, omission of such provision from a similar statute concerning a related subject is significant to show that a different intent existed. West's Ann. Gov.Code, §§ 35100–35158, 35104, 35300–35326.

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Joseph W. Goss, City Atty., Oxnard, for respondents.

Robert T. Anderson, Asst. City Atty., Berkeley, Walter N. Anderson, City Atty., Manhattan Beach, Paul B. Baker, City Atty., Alturas, Homer H. Bell, City Atty., Monrovia, John R. Berryhill, City Atty., Tulare, Thomas W. Bewley, City Atty., Whittier, Louis A. Boli III, City Atty., Folsom, Lloyd A. Bullock, City Atty., Compton, LeRoy A. Broun, City Atty., Fremont, Robert Buck, City Atty., Seal Beach, Robert A. Boon, City Atty., Roseville, Jerome J. Bunker, City Atty., Palm Springs, John G. Buresh, City Atty., San Anselmo, Waldo E. Burford, City Atty., Porterville, Joseph B. Burgess, City Atty., Dos Palos, John M. Burnett, City Atty., Manteca, Henry M. Busch, City Atty., Upland, Hartley H. Bush, City Atty., Oakdale, Donald P. Cady, City Atty., Susanville, Stanley B. Christensen, City Atty., Fullerton, Richard M. Clare, City Atty., Santa Maria, John W. Collier, City Atty., Oakland, J. P. Correia, City Atty., Yreka, Lloyd M. Creasey, City Atty., Crescent City, Sherrod Stone Davis, City Atty., Woodside, Pierce Deasy, City Atty., Ione and Jackson, F. Joseph Doerr, City Atty., El Cajon, G. A. Drescher, City Atty., Wasco, John B. Ehlen, Atty. for the Town of Corte Madera and City of Sausalito, Daniel M. Fadenrecht, City Atty., Corcoran, Robin D. Faisant, Atty. for the Town of Los Altos Hills, Wm. A. Flory, City Atty., San Bernardino, Reginald E. Foster, City Atty., Pacific Grove, John A. Galvin, City Atty., Fillmore, John T. Ganahl, City Atty., Corona, R. E. Ghidella, City Atty., Napa, H. E. Gleason, City Atty., Turlock, Edward A. Goggin, Deputy City Atty., Oakland, B. D. Goodman, City Atty., Fairfield, Haskell Goodman, City Atty., Milpitas, J. E. Greene, City Atty., Dinuba, Allen Grimes, City Atty., Modesto, R. S. Harrington, City Atty., Brawley, Arthur J. Harzfeld, City Atty., San Mateo, Francis Hoey, City Atty., Martinez, Fred C. Hutchinson, City Atty., Berkeley, Bernard M. King, Asst. City Atty., Fremont, William Kinley, City Atty., Rolling Hills, Lynn W. Kloepfer, City Atty., Ontario, F. A. Knight, City Atty., Signal Hill, Manuel L. Kugler, City Atty., Chula Vista, Anthony A. Lagorio, City Atty., Los Altos, Monroe N. Langdon, City Atty., Stockton, Morgan W. Lowery, City Atty., La Verne, L. N. Lorenzen, City Atty., Mount Shasta, Kee Maxwell, City Atty., Paramount, Richard B. Maxwell, City Atty., Santa Rosa, Mike Mayo, City Atty., Montebello, Thomas F. McBride, City Atty., Concord, Alexander J. McMahon, City Atty., Sonoma, Edmund M. Moor, City Atty., Red Bluff, Robley E. Morgan, City Atty., Santa Clara, Alfred G. Mortimore, City Atty., Shafter, Robert H. Mullen, City Atty., Lodi, George G. Murry, City Atty., Gustine, Los Bancs and Newman, Thomas C. Nelson, City Atty., Mill Valley, John R. Nimocks, City Atty., Palo Alto, John Noonan, City Atty., South San Francisco, Lowell Palmer, City Atty., Calistoga, Frank L. Perry, City Atty., Redondo Beach, Grayson Price, City Atty., Chico, J. A. Ratchford, City Atty., Cloverdale and Healdsburg, David Rice, City Atty., Hawthorne, D. R. Robinson, City Atty., Auburn, Carl E. Rodegerdts, City Atty., Woodland, Donald D. Roff, City Atty., Santa Paula, Frank W. Rose, Asst. City Atty., San Mateo, Chester E. Ross, City Atty., Hollister and San Juan Bautista, Ralph W. Rutledge, City Atty., Colusa, John W. Scanlon, City Atty., Hayward, Charles B. Snow, City Atty., Newark, L. De Witt Spark, City Atty., Roseville, C. A. Stromsness, City Atty., Corning, Wm. A. Struthers, Jr., City Atty., Pleasanton, M. Tellefson, City Atty., Culver City, Wm. M. Thornton, City Atty., Exeter, George Wadsworth, City Atty., Tracy, Saul M. Weingarten, City Atty., Gonzales and Seaside, C. F. Woolpert, City Atty., Indio, Cecil C. Wright, City Atty., Orange, and Russell Zaches, City Atty., Monterey, amici curiae on behalf of respondents.

SCHAUER, Justice.

These two mandamus proceedings, consolidated for trial, findings, and judgment, come before this court on appeal by the City of Port Hueneme (hereinafter called Hueneme) from a superior court judgment upholding two annexations of territory by the City of Oxnard (hereinafter called Oxnard), and declaring void and annexation undertaken by Hueneme of territory which overlaps in part that sought to be annexed by Oxnard. The periods of time (from about March 4, 1955, to May 4, 1955) during which the two cities were respectively pursuing the three annexation proceedings also partially overlapped. (See Gov.Code, § 35308.) We have concluded that each of the three attempted annexations was defective and that the judgment should be affirmed with respect to the Hueneme proceeding but reversed insofar as it decrees Oxnard's purported annexations to be valid.

Trial was had upon a stipulated statement of facts, admissions in the pleadings, and exhibits attached to the pleadings, which include maps showing the boundaries of both Oxnard and Hueneme and boundaries of the subject annexations.[1] All three annexations were commenced under the Annexation of Uninhabited Territory Act of 1939. (Gov.Code, §§ 35300–35326; see also §§ 35000–35003.) Unless otherwise stated section numbers hereinafter cited will refer to Government Code sections as they read at the times here involved.

Hueneme Annexation.

From the stipulated facts it appears that when the annexation undertaken by Hueneme, known as the Brucker-Lown Annexation, was first proposed there were 18 adult residents within the described boundaries, but only five were registered voters. "After the filing of said boundaries with" the county boundary commission (see § 35002) but before the commission had approved them, nine more of the residents registered to vote, thus raising the number of registered voters within the territory proposed to be annexed to 14. Immediately thereafter "officials of Port Hueneme withdrew the first proposed boundaries of the Brucker-Lown Annexation from consideration by the Boundary Commission and substituted therefor" boundaries revised so as to exclude[2] three houses inhabited by eight of the 14 registered voters. These excluded houses were located on land which was in each case part of a larger parcel belonging to the same owner, the remainder of which larger parcel was included within the so-called "second proposed" Brucker-Lown Annexation. Thereafter the revised boundaries were approved by the boundary commission, a petition for the "revised Brucker-Lown Annexation" was received by the city council of Hueneme, and after a public hearing the council adopted an ordinance purporting to annex the territory. (§§ 35305–35307, 35311–35314.)

Section 35303 provides that "territory shall be deemed uninhabited if less than twelve registered voters reside within it at the time of the filing [with the city legislative body] of the petition for annexation or the institution of proceedings on motion of the city legislative body." The trial court found that the territory "so attempted to be annexed by Port Hueneme was not uninhabited territory but was inhabited territory," and concluded that the annexation proceedings were therefore void, and that valid annexation proceedings could only have been undertaken under the inhabited territory Annexation Act of 1913 rather than the uninhabited Act of 1939. This determination was correct.

[1,2] Whether the territory included within the proposed annexation was inhabited is a question of fact which does not depend upon whether the houses of the registered voters in which they ate and slept were within the boundaries of the proposed annexation but upon whether such houses were an integral part of the whole parcel (including the portion thereof which fell within the boundaries of the proposed annexation) so as to render the whole parcel inhabited. (People ex rel. Pennington v.

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[1] Both cities were municipal corporations of the sixth class at the times involved.

[2] That the objective of Port Hueneme was to exclude the registered voters rather than to make any substantial change in the territory proposed to be annexed is strikingly indicated by examination of Appendix I (Oxnard map, portion of Exhibit 1, Case 44546) and Appendix II (Port Hueneme map, portion of Exhibit A, Case 44530), attached to the reply brief of the city attorney of Oxnard.

City of Richmond (1956), 141 Cal.App.2d 107, 111–114, 296 P.2d 351.) Contrary to the contention of Hueneme, the stipulated facts hereinabove set forth fully support the court's finding that the territory included within the proposed Brucker-Lown Annexation was inhabited and plainly evidence an attempt by Hueneme to exclude from such annexation the habitations of eight registered voters and thus to sever such habitations from the parcels of which they were an integral part. There is nothing in either United States Pipe & Foundry Co. v. City Council (1957), 150 Cal.App.2d 630, 310 P.2d 431, or in Johnson v. City of San Pablo (1955), 132 Cal.App.2d 447, 283 P.2d 57, relied upon by Hueneme, to compel a contrary finding. It follows that, as adjudged by the trial court, Hueneme's attempted annexation under the uninhabited Act of 1939 was void and of no effect. (See American Distilling Co. v. City Council of City of Sausalito (1950), 34 Cal.2d 660, 664–665 [1], 213 P.2d 704, 18 A.L.R. 2d 1247.)

[3, 4] Hueneme, citing section 956a of the Code of Civil Procedure, has filed an application with this court to produce additional evidence, "oral in character," and for this court "in accordance with said additional evidence, to make Findings of Fact in addition to, or contrary to, those made by the trial court." (See Rule 23(b), Rules on Appeal.) The application and supporting affidavits accompanying it indicate that by such evidence Hueneme seeks to create a conflict with facts recited in the stipulation of facts on which the trial court in part based its finding that the territory attempted to be annexed by Hueneme was inhabited, rather than uninhabited,[3] and to have this court resolve the conflict in favor of Hueneme and then make findings contrary to those of the trial court in order to reverse the judgment. Such is not a function of this court. As declared in Gantner v. Gantner (1952), 39 Cal.2d 272, 281 [13], 246 P.2d 923, citing Tupman v. Haberkern (1929), 208 Cal. 256, 266, 280 P. 970. "The purpose of section 956a is to permit an appellate court to remedy defects in the record 'to the end that the judgment or order appealed from may be affirmed and further litigation terminated, and where otherwise under the old practice the judgment or order would have to be reversed.'" The Tupman case points out that section 956a "was not intended to convert the appellate tribunals of the state into triers of fact." (At pages 269–270 of 208 Cal. at page 975 of 280 P.). The issue as to the inhabited character of the territory included within the boundaries of the proposed Brucker-Lown Annexations is conceded by Hueneme to have "been present at all times," it was clearly and specifically presented to and determined by the trial court, and the application of Hueneme to produce further evidence in this court will be denied.

Oxnard Annexations.

The two Oxnard Annexations here involved are known as 55–3 and 55–5. At the times the city council received the petitions requesting these two annexations (§ 35305), the territory which they encompassed was not contiguous to the boundaries of Oxnard as those boundaries then existed but was contiguous to territory encompassed in Oxnard Annexation 55–2, which latter territory was contiguous to the existing Oxnard boundaries. Annexation 55–2 was not yet complete nor had that territory become a part of the city; the ordinance approving the annexation had been adopted by the city council (§ 35314) but had not become effective nor had a copy thereof been transmitted to or filed by the Secretary of State. (§§ 35316–35318.[4]) However, completion of Annexation 55–2 did take place prior to adoption of ordinances approving 55–3 and 55–5, with the result that 55–3 and 55–5 thereupon became contiguous to existing Oxnard boundaries.

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[3] More particularly, it appears that Hueneme seeks to attempt at this late hour to show that persons residing in one of the houses excluded from the so-called "second proposed" Brucker-Lown Annexation were tenants in, rather than owners of, such house and that the balance of the larger parcel from which such house was excluded was used by the owner for agricultural purposes, with which the tenants had no connection; and further that another of the excluded houses was under separate ownership rather than being (as declared in the stipulated facts) part of a larger parcel. Hueneme does not mention the number of registered voters, it claims resided in the two houses.

Section 35302 declares that "The boundaries of a city may be altered and *contiguous* uninhabited territory annexed * * * pursuant to this article [i. e., the uninhabited Act, §§ 35300–35326]." (Italics added.) The trial court held that contiguity to 55–2 was "sufficient and adequate contiguity to permit valid commencement" of annexation proceedings 55–3 and 55–5, that the so-called "absolute" contiguity which existed at the time of adoption of the approval ordinances was sufficient to permit Oxnard to proceed with completion of the two proceedings, and that such proceedings were valid.

[5] In support of this holding Oxnard contends that section 35302 does not require contiguity to city boundaries at the time the petition to annex uninhabited territory is received by the legislative body but only requires contiguity at the time the annexation proceedings are completed and the territory becomes part of the city as provided in section 35318,[4] and that inasmuch as contiguity existed before completion of proceedings 55–3 and 55–5 such proceedings met the statutory requirements and were valid. This contention is without merit.

[6] As declared in American Distilling Co. v. City Council, of City of Sausalito (1950), supra, 34 Cal.2d 660, 664 [1], 213 P.2d 704, 18 A.L.R.2d 1247, in annexation proceedings the statute constitutes "the measure of the power to be exercised." Moreover, section 35301 specifies that when, as in the present case, "proceedings for the annexation of territory to a city are commenced pursuant to this article [§§ 35300–35326, uninhabited Act], the provisions of this article and of Article 1 [general provisions, §§ 35000–35003] of this chapter alone apply." There is nothing in any of such provisions which suggests that the contiguity made requisite by section 35302 need not come into existence until after the annexation proceedings have been initiated (by either the presentation to the city legislative body of a petition signed by owners whose land is involved (§ 35305), or (§ 35310) on that body's own motion). Rather, section 35302, which authorizes annexation of "contiguous uninhabited territory," is immediately followed by the provisions of section 35303 that territory shall be deemed uninhabited according to the number of registered voters residing within it *"at the time of the filing of the petition* for annexation *or the institution of proceedings on motion* of the city legislative body." (Italics added.) It appears reasonable to conclude that the Legislature intended that contiguity likewise be determined at that time.

Oxnard argues further that omission of the words "so proposed" from section 35302 when the uninhabited Act of 1939 was codified as a part of the Government Code in 1949, supports its position that contiguity need not exist at the inception of annexation proceedings. Prior to the 1949 codification section 2 of the act provided that "Any such territory *so proposed* to be annexed to a municipal corporation must be contiguous thereto." (Stats.1939, p. 1567; italics added.) Inasmuch as section 35002 of the Government Code requires that before an annexation petition may be received or proceedings initiated by the legislative body the "proposal" for annexation of territory to a city must be submitted to the county boundary commission for a report upon various matters affecting the "proposed boundaries," it appears that such significance as may be attributed to omission of the words "so proposed" extends no further than to now permit presentation of a "proposal" to the boundary commission to annex territory not yet contiguous to the city but does not operate to validate annexation proceedings if contiguity does not yet exist when the matter reaches the city's legislative body. Moreover, the change in the wording of the statute was proposed by the code commission which, in its report submitting the redraft of the 1939 act as well as the redraft of the "Annexation Act of 1913" (inhabited territory) and other statutes for codification in the Government Code, expressly stated that it was not the commission's intention by its proposed codification to make any substantive changes in the statutes codified. (Report of the California Code Commission, Legislative Session of 1949.)

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[4] Section 35316: "When an ordinance approving annexation becomes effective, the clerk of the legislative body shall immediately prepare * * * a certified copy of the ordinance * * * and transmit it to the Secretary of State."

Section 35317: "Upon receipt of the certified copy of the ordinance, the Secretary of State shall file it * * *"

Section 35318: "From the date of filing by the Secretary of State, annexation is complete, and the territory becomes part of the city."

Oxnard also points to the fact that the inhabited Act of 1913 (Gov.Code, §§ 35100–35158) provides, in section 35104, that "To qualify for annexation, new territory shall be contiguous to: (a) The city, or (b) Contiguous territory where the electors have voted for annexation to the city," and in reliance upon People ex rel. Forde v. Town of Corte Madera (1952), 115 Cal.App.2d 32, 43–44 [8], 251 P.2d 988, argues that because the Legislature has expressly provided that territory need not be contiguous at the inception of annexation proceedings under the inhabited Act of 1913, the courts should read a similar provision into the uninhabited Act of 1939. In that case it was declared that where the courts are called upon to construe words in either annexation act the words should be interpreted in such manner that the two acts will be harmonious, unless a logical explanation exists which justifies a differentiation, and that no such explanation existed for a rule based on an express provision of the inhabited act (§ 35105) that physical contiguity was not broken by the existence of a highway or right of way and for a contrary rule under the uninhabited Act of 1939 because of absence of such an express provision therein. This holding rested in part, however, upon the further comment that to conclude that a difference was intended between the two acts when they were codified in 1949 would "require us to imply that by nonaction [i. e., omission of the provision from the uninhabited act] the Legislature intended to change existing law," an implication which the court refused to make. But to uphold Oxnard's position on this point would also require an implication that a change in the law was intended when the 1939 act was codified—an implication which, as pointed out hereinabove, is not supportable.

[7] Rather, we are persuaded that this is a proper case for application of the doctrine that "Where a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different intention existed." (People ex rel. Paganini v. Town of Corte Madera (1950), 97 Cal.App.2d 726, 729 [1], 218 P.2d 810.) In addition to the single fact of omission from the Act of 1939 of a provision that annexed territory need not be contiguous at the inception of the proceedings, it may be further observed that the provision in the 1913 act (§ 35104) is specific in stating that if territory is not contiguous to the city it must be contiguous to "Contiguous territory where the electors have voted for annexation to the city." That act further provides, in section 35141, that "a favorable vote on the annexation of territories not contiguous to the city is not effective unless there is also a favorable vote on the territories that would make the noncontiguous territories contiguous to the city." It is thus apparent that omission from the 1939 act of a provision similar to that found in section 35104 was not unintentional on the part of the Legislature, and that for the courts to validate proceedings under the 1939 act where contiguity is not achieved until some time subsequent to commencement of the annexation would require reading into the statute various uncertain and undefined exceptions plainly not within

legislative intent. Merely to outline the several ingenious arguments ably presented by Oxnard and by amici curiae as to why the proceedings should be permitted to progress to various suggested stages before contiguity should be required would serve only to indicate that they are of a nature more properly addressed to the Legislature than to the courts. (Cf. Johnson v. City of San Pablo (1955), supra, 132 Cal.App.2d 447, 457 [7], 283 P.2d 57.) The same may be said of arguments pro and con as to allegedly undesirable delays to property owners or to other cities desiring to annex which assertedly could or would ensue if contiguity is required at the outset of annexation proceedings on the one hand, or if it is not so required on the other. If the Legislature wishes or intends to permit annexation under the circumstances here attempted by Oxnard in proceedings 55–3 and 55–5 it can and presumably will so declare by express statutory provision.

Oxnard urges that In re Lancaster City Ordinance No. 20–1952 (1953), 374 Pa. 543, 98 A.2d 33, provides authority supporting its position. In that case the court employs the expression "intercontiguity" to describe a situation in which, as here, land not contiguous to the city is nevertheless contiguous to a tract which is contiguous to the city and which tract is in the process of being annexed. The brief opinion holding that such "intercontiguity" permitted the owners of the noncontiguous land to legally petition for annexation does not discuss pertinent state law or the history thereof, and is not persuasive in view of the California statutes on the subject.

At oral argument contentions were advanced by Oxnard that because the territory desired by Hueneme which overlaps that sought by Oxnard falls within a parcel which is connected only at a corner with the other parcels included within the attempted Hueneme annexation, such "cornering" rendered that parcel noncontiguous, and that by reason of such asserted noncontiguity Hueneme is not an interested party which may attack the overlapping annexation proceedings of Oxnard. Because of our conclusions on the other points raised, we do not reach these contentions.

The application by Hueneme to produce additional evidence is denied. The judgment is affirmed insofar as it decrees that the Hueneme Brucker-Lown Annexation is void, but that portion of it which decrees that Oxnard Annexations 55–3 and 55–5 are valid and effective is reversed, each party to bear its own costs on appeal.

GIBSON, C. J., and SHENK, TRAYNOR, SPENCE, McCOMB and PETERS, JJ., concur.

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52 Cal.2d 888

CITY OF PORT HUENEME, Petitioner,
v.
CITY OF OXNARD et al., Respondents.
L. A. 25358.

Supreme Court of California,
In Bank.
June 24, 1958.

Mandamus proceeding was filed in District Court of Appeal to halt further annexation proceeding by city, and proceeding was transferred to Supreme Court. The Supreme Court, Schauer, J., held that where a stay order was issued pursuant to stipulation of parties in mandamus proceeding to halt further annexation proceeding, and parties further stipulated that if Supreme Court should determine on appeal from judgment in companion case that three annexations involved in the companion case were invalid, the stay order might be vacated and dissolved and that petition for mandate be denied, and Supreme Court made such determination in the companion case, Supreme Court would vacate the stay order previously issued and petition for mandate would be denied.

Stay order previously issued vacated and dissolved and petition for mandate denied.

Stipulations 🔑14(5)

Where a stay order was issued pursuant to stipulation of parties in mandamus proceeding to halt further annexation proceeding, and parties further stipulated that if Supreme Court should determine on appeal from judgment in companion case that three annexations involved in the companion case were invalid, the stay order might be vacated and dissolved and that petition for mandate be denied, and Supreme Court made such determination in the companion case, Supreme Court would vacate the stay order previously issued and petition for mandate would be denied.

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Jerome H. Berenson, City Atty., Oxnard, and Burke, Williams & Sorensen, Los Angeles, for petitioner.

Joseph W. Goss, City Atty., Oxnard, for respondents.

SCHAUER, Justice.

This is a companion case to City of Port Hueneme v. City of Oxnard, L.A. 25345, Cal., 341 P.2d 318, in which all essential facts are stated. In this proceeding Hueneme seeks by petition for mandamus[1] to halt a further annexation proceeding commenced by Oxnard subsequent to entry of the trial court's judgment in L.A. 25345 of territory which also partially overlaps that sought to be annexed by Hueneme in L.A. 25345. A stay order was issued pursuant to stipulation of the parties.

The parties further stipulated that, if in L.A. 25345 this court determines all three annexations there involved to be invalid, the stay order may be vacated and dissolved and the petition for mandate denied. This court having heretofore made such determination (City of Port Hueneme v. City of Oxnard, L.A. 25345, Cal., 341 P.2d 318), the stay order previously issued is vacated and dissolved and the petition for mandate is denied.

GIBSON, C. J., and SHENK, TRAYNOR, SPENCE, McCOMB and PETERS, JJ., concur.

171 Cal.App.2d 688

Ernest HOFMEISTER and Ernest Ayala, Partners Under the Firm Name and Style of Kayhof Co., Plaintiffs and Appellants,

v.

DELTA VERDE FARMS, a corporation, et al., Defendants and Respondents.

PRODUCERS IMPERIAL COMPANY, a corporation, Plaintiff and Respondent,

v.

Ernest HOFMEISTER and Ernest Ayala, etc., et al., Defendants.

Ernest Hofmeister and Ernest Ayala, Partners Under the Firm Name and Style of Kayhof Co., Appellants.

Civ. 5850.

District Court of Appeal, Fourth District, California.

July 2, 1959.

Rehearing Denied July 27, 1959.

Hearing Denied Aug. 26, 1959.

Creditors' action for declaratory judgment respecting rights and duties of parties under a farm management agreement and for order restraining defendant producers from paying out certain funds in its possession. The Superior Court of Imperial County, Elmer W. Heald, J., entered judgment for creditors and defendants appealed. The District Court of Appeal, Mussell, J., held that there was substantial evidence to sustain finding that all the parties including corporation, acting in concert to obtain more cotton allotments than they were entitled to as individuals on their own farms which were leased to corporation which obtained all the necessary financing secured by one crop mortgage, were engaged in a joint venture.

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[1] Filed with the District Court of Appeal and transferred to this court after petition for hearing granted in L.A. 25345.

Affirmed.

1. Joint Adventures 🔑8

In action for judgment declaring that parties defendant, including corporation, had been engaged in a joint venture for raising and harvesting of cotton, under testimony disclosing that corporation and other parties defendant banded together to secure more cotton acreage allotment than they were entitled to as individuals on their own farms which were leased to corporation that obtained necessary financing by execution of one crop mortgage, there was sufficient evidence to sustain finding that goods and merchandise sold to parties defendant were in fact sold for the benefit of joint venture.

2. Joint Adventures 🔑7

Where corporation and individual farm owners acted in concert to obtain more cotton acreage allotments than they were entitled to on individual farms which were subsequently leased to corporation which obtained necessary financing by executing one crop mortgage, each party as a joint venturer was responsible for all goods and merchandise bought for benefit of joint adventure and not merely for service and materials applied to land they farmed.

3. Evidence 🔑458

Where farm management agreement provided for lease of land to corporation and that individual farm owners would pay all the expenses of farming and be entitled to all the profits but it was not clear whether such profits were limited to cotton grown by tenant or whether cost of other farming operations carried on by corporation were to be considered and the agreement constituted a part of the joint venture as shown by other testimony, court properly admitted evidence as to circumstances surrounding execution of agreement and various other documents executed in connection therewith.

4. Appeal and Error 🔑204(3)

Where appellants did not make appropriate or timely objection to introduction of parol evidence, alleged error in its admission could not be considered on appeal.

5. Joint Adventures 🔑1.10

Where there was substantial evidence that all parties acted in concert to obtain more cotton allotments than they were entitled to as individuals on their own farms, which were leased to corporation that obtained all financing by execution of one crop mortgage to secure total loan, and in the proceeds of which all parties participated and obligated themselves individually, farm management agreement leasing land to corporation was part of a joint venture between defendants.

6. Evidence 🔑584(1)
Trial 🔑142

Trial judge or jury may disbelieve direct evidence and rely on circumstantial evidence to support a finding, and even where conflicting inferences may with equal reason be drawn from the evidence, choice of which inference to draw rests in the judgment of the trier of fact.

7. Chattel Mortgages 🔑138(1)

Where cotton crop produced by joint venture was covered by one-crop mortgage, trial court properly refused to enforce producer's lien since producer had no lien superior to or against goods financed by hypothecating or pledging the crop itself. West's Ann.Agric.Code, §§ 1300.7, 1300.8.

8. Appeal and Error 🔑110

Appeal from order denying a new trial would be dismissed and such order was not appealable.

◆

Victor A. Gillespie, Brawley, and Rigmor Barker Cope, El Centro, for appellants.

Dickenson, Sattinger & McKee, El Centro, for respondents Valley Chemical Co., Valley Insecticide Service Co. and Union Oil Co.

Pauline Nightingale, Los Angeles, Conrad Lee Klein, Hollywood, and Joseph Abihider, Los Angeles, for respondent Division of Labor Law Enforcement, Dept. of Industrial Relations of California.

Ralph I. French, Brawley, for respondent Strickland Bros.

MUSSELL, Justice.

Plaintiffs in their first amended complaint in this action for declaratory relief, injunction and accounting, action No. 29292 in the Superior Court, seek a judgment declaring the rights and duties of the parties under a "Farm Management Agreement". They also ask for an order restraining the defendant, Producers Imperial Company, from paying out certain funds in its possession; that judgment be rendered declaring that they are entitled to funds derived from sales of cotton from their land; and that they have judgment against the defendant, Delta Verde Farms, for the sum of $21,107.75.

On the same day on which this amended complaint was filed the Producers Imperial Company, a corporation (hereinafter referred to as "Producers"), filed a complaint in interpleader. This action, No. 29349 in said Superior Court, joins as defendants plaintiff Ernest Hofmeister and others (hereinafter called "Kayhof", Valley Chemical Company (hereinafter called "Valley Chemical"), Union Oil Company (hereinafter called "Union"), Valley Insecticide Service Company (hereinafter called "Valley Insecticide"), the California Division of Labor Law Enforcement, Department of Industrial Relations, State of California (hereinafter called "Division of Labor Law Enforcement"), and Strickland Brothers.

In the complaint in interpleader it is alleged that "Producers", in connection with cotton farming operations for Delta Verde Farms, a corporation, in the processing of said cotton for ultimate sale, have collected certain sums of money to which Producers have no personal claim; that a dispute has arisen between the defendants; that Valley Chemical, Union and the Division of Labor Law Enforcement claim portions of said money by way of executed assignments; that Valley Insecticide has attached some of said money; and that Strickland Bros., a copartnership, claim that the sum of $6,824.50 is due them for lease rental.

Delta Verde, in addition to its answer, filed a cross-complaint in which the allegations of the complaint in interpleader are admitted and in which it is alleged that Producers became indebted to Delta Verde by reason of Producers processing and selling Delta Verde's cotton crop; and that Delta Verde, in turn, is indebted to other defendants in interpleader. Delta Verde expressly admits its indebtedness to Valley Chemical, Valley Insecticide, Union, the Division of Labor Law Enforcement, Strickland Bros. and others. It is further alleged therein that the cotton from which the funds in dispute are derived was grown pursuant to a joint venture or pooling agreement between Delta Verde, Kayhof and others, under which all growing and other expenses incurred under and pursuant to the joint venture or pooling agreement were to be paid prior to the distribution of profits and that the claims of various defendants in interpleader arise out of the indebtedness incurred by the joint venture. These allegations were denied in the Kayhof answer.

Valley Insecticide alleged in its cross-complaint that its claim has priority against the funds held by Producers; that a consent judgment was entered by it against Delta Verde and execution levied thereon, which is unsatisfied. A joint venture was alleged and it was further alleged that Delta Verde acted as agent for Kayhof.

In the answer and cross-complaint filed by Valley Chemical it was alleged that Delta Verde assigned certain sums to Valley Chemical out of the funds in the hands of Producers and that the assignment is prior and superior to the claim of Kayhof.

The answer of Union alleged a claim for goods, wares and merchandise furnished to Delta Verde and an assignment in favor of Union on said funds in the hands of Producers.

In the answer and cross-complaint filed by the Division of Labor Law Enforcement it is alleged that Delta Verde executed an assignment of claims for labor on said funds in the hands of Producers and in their answer the Strickland Bros. claim rent due from the proceeds of the cotton crop grown by Delta Verde.

The actions for declaratory relief and interpleader were consolidated for trial by stipulation of the parties and it was further stipulated that all of the evidence introduced at the consolidated trial could be considered by the court in each cause of action.

The court, at the outset of the trial, held that because of the ambiguity in the Farm Management Agreement and because of the fact that other agreements are referred to therein, parol evidence and the other agreements could be introduced in evidence to assist the court in arriving at a determination of the rights, duties and obligations of the parties involved.

Early in 1954 or in December, 1953, J. L. Clardy, Ernest Hofmeister, Ernest Ayala and Halford E. Kelsey were all officers of, shareholders, directors or employees in a corporation known as Delta Verde Farms Corporation. This corporation was formed in October, 1953, for the purpose of growing a crop of sugar beets and other crops. There were issued 1,800 shares of stock, 300 shares each to Hofmeister, Ayala and Kelsey and 900 to H. G. Clardy. In October, 1953, Ernest Hofmeister and Ernest Ayala were operating as partners with Kelsey under the firm name of Kayhof Company. J. L. Clardy and his son, H. G. Clardy, were carrying on farming operations under a corporation known as Cali-Verde Farms. This group of individuals, over a period of time beginning in December, 1953 or January, 1954, had several conversations concerning the possibilities of procuring for themselves additional cotton allotments for their respective lands. They ascertained that such allotments under federal allotment laws could be transferred from one ranch or specified plot or parcel of land to another ranch, plot or parcel of land under two conditions only; first, that all parcels, or plots, or ranches were held by one person; or, secondly, that all parcels, plots or ranches were held by one person or individual under a valid lease agreement. After many conversations this group of individuals worked out a scheme, plan, enterprise and combination or joint pooling undertaking in order to procure the desired cotton allotments for their respective lands. They located a ranch known as the Sweetwater Farm, which had some 200 or more acres of valid cotton allotments under the federal cotton allotment law. They decided to procure these allotments and divide them on an agreed basis. They then had Delta Verde Corporation lease the Sweetwater farm upon which were the desired cotton allotments. Cali-Verde Farms and Kayhof leased their lands to Delta Verde and, Kelsey, after he had withdrawn from Kayhof, on March 29, 1954, also leased his land to Delta Verde. By this arrangement all the farm lands involved were held by Delta Verde as lessee, thus enabling the parties to divide up the desired cotton allotments and apply them to their own lands. The lease by Kayhof to Delta Verde of the Kayhof land was dated March 17, 1954, and was for a period between February 1, 1954 and January 1, 1955. The lease was signed by Kayhof as lessor, by Ayala and Hofmeister, and by Delta Verde, by Kelsey as secretary-treasurer of the corporation. At this time all these parties were interested in both Delta Verde and Kayhof Company and were stockholders in both.

On or about March 17, 1954, an agreement, denominated "Farm Management Agreement", was entered into between Delta Verde and Kayhof and this is the agreement which plaintiff asks the trial court to construe and to determine the rights of the parties thereto. It is as follows:

"Farm Management Agreement

"Whereas, Delta Verde Farm Corp. is the Lessee for the period February 1, 1954, to January 30, 1955, of certain lands in Imperial County, California, more particularly described as follows:

"Parcel 1: About 7 acres in the Northwest Corner of Tract 230;

"Parcel 2: About 77 acres in the East one-half of Tract 230;

"Parcel 3: About 120 acres on the East side of Tract 277 and the West edge of Tract 170 lying West of the Alamo River;

"All parcels lie within Township 14 South, Ranges 14 and 15 East, 3 miles East of Brawley and 1 mile South of the Holtville Hiway.

"And Whereas, Kayhoff, a copartnership consisting of Halford E. Kelsey, Ernest Hofmeister and Ernest Ayala, is in the business of farming in Imperial County, California;

"It Is Hereby Agreed by and between the parties hereto as follows:

"1. Delta Verde Farms Corp. agrees to furnish to Kayhoff all financing for the production of cotton and other farm crops to be grown on the above described premises during the term of this contract and Kayhoff agrees to pay Delta Verde Farms Corp. or its assigns interest at the usual bank rates for such loans.

"2. Kayhoff agrees to manage and to farm the above described lands in a good and farmerlike manner according to the best practices followed in Imperial Valley.

"3. Kayhoff will pay all the expenses and costs of farming and shall be entitled to all of the profits.

"4. Kayhoff will be entitled to exercise its rights to all of the cotton allotment on the land described above and in addition thereto Kayhoff shall have the right to use on the above described premises sufficient cotton allotments held by Delta Verde Farms Corp. on other lands which it now has leased or may lease for the 1954–1955 cotton crop in Imperial County to permit Kayhoff to farm a total of 200 acres of cotton.

"5. This contract shall be effective from February 1, 1954 and shall terminate on January 30, 1955.

"Delta Verde Farms Corp.
"By /s/ Halford E. Kelsey
"Sec. Treas.
"Kayhoff
"By /s/ Ernest Hofmeister."

Lease agreements and farm management agreements similar to those executed by Kayhof and Delta Verde were executed by Delta Verde with Kelsey and Cali-Verde Farms. Under these agreements Delta Verde was to finance the growing of cotton on all the parcels of land involved and, in order to do so, Delta Verde executed a crop mortgage covering all of the cotton crops to obtain the sum of $76,150, payment of which, in addition to the security of the mortgage, was guaranteed by the individuals named. The cotton on all the lands involved was grown, harvested and ginned in the name of Delta Verde, sold in the name of Delta Verde, and the proceeds credited on the books of the gin to the name and account of Delta Verde. The federal cotton allotment for all of said cotton allotments was issued in the name of Delta Verde.

The record shows that the sum of $39,603.78 was received by Producers from the sale of all the cotton over and above advances made by Producers. This sum was deposited in court and the court found that it is the property of Delta Verde as the result of a joint venture entered into between J. L. Clardy, Ernest Hofmeister, Ernest Ayala and Halford E. Kelsey acting and operating under the Delta Verde Farms, a corporation. The court further found that the following claims should first be paid out of the funds held by Producers before there was any division of the profits between the joint venturers and that after said claims were paid Kayhof was entitled to $5,877.14 net profits from the cotton raised by the partners, plus $10,933.13, money advanced, and that Kelsey was entitled to the sum of $2,923.75, plus $9,673.32, money advanced. The amounts allocated to Kayhof and Kelsey were based upon the cotton acreage farmed by them. The claims allowed for first payment were

Division of Labor Law Enforcement........	$ 2,275.02
Valley Chemical Company....................	10,889.07
Union Oil Company of California...........	1,621.11
Valley Insecticide Service Company........	6,942.50
Strickland Bros............................	10,561.30.

There is no serious contention on the part of the appellants that these claimants did not furnish materials and services in the totals stated or that the claims are erroneously computed.

[1, 2] Appellants contend that they were responsible only for that part of the materials and services applied to the land which they farmed and only the particular cotton crop which they cultivated. However, the trial court found that in furtherance of said joint venture and undertaking and at the special instance and request of the Delta Verde corporation, made on behalf of and acting for said joint venture, the said claimants sold and delivered goods and merchandise to the said joint venture for the use and benefit thereof and that the sums claimed were due and owing from such venture. This finding is supported by the evidence and reasonable inferences which the court was entitled to draw therefrom.

The record shows that appellants managed and farmed their lands and harvested therefrom 470 bales of cotton and delivered this cotton to Producers for ginning and sale. They received a cotton allotment through the joint venture of 50 acres, which, added to the 150 acre allotment they then had, enabled them to raise cotton on approximately 200 acres. There is testimony that the cotton and cotton seed grown by appellants and delivered to Producers was sold for $78,287.80; that the money borrowed from Delta Verde was paid in full; that the cost of appellants' crop totaled $63,679.16 and that of the money on deposit with the court approximately $30,000 was traceable to the sale of cotton raised on Kayhof lands. However, the court held that appellants were only entitled to profits from their crop after the expenses of Delta Verde were paid, including the creditors whose claims are hereinabove listed.

[3, 4] Appellants' argument that the court erred as a matter of law in holding that the "Farm Management Agreement" was ambiguous and in admitting parol evidence with respect thereto is without merit. In 18 Cal.Jur.2d Evidence, section 278, page 768, it is stated that extrinsic evidence to show the facts and circumstances surrounding the execution and delivery of the instrument and of the situation of the parties, including the object, nature and subject matter of the agreement, is admissible if the written instrument is ambiguous and if an understanding of such circumstances is necessary to ascertain the intent of the parties and the meaning of the language employed; and that evidence of this nature is admitted in order to place a trial judge in the position of the contracting parties. The agreement involved is not dated and provides that Delta Verde is the lessee of the land therein described, but no provision is made therein for the payment of rent. The agreement refers to another agreement, namely, a lease, but does not name the lessor or set forth the terms of said lease. The agreement refers to cotton allotments held by Delta Verde or other lands which it has leased or may lease. While the agreement provides that Kayhof will pay all the expenses of farming and shall be entitled to all the profits, it is not clear whether such profits are limited to the cotton grown by Kayhof or whether the costs of other farming operations are to to be considered. The agreement was but a part of a joint venture as was shown by the testimony admitted. Under the circumstances shown the court properly

permitted evidence as to the circumstances surrounding the execution of the agreement and the various other documents executed by the parties in connection therewith. Moreover, appellants did not make appropriate or timely objection to the introduction of this evidence and error in its admission cannot be considered on appeal. Nuttman v. Chais, 101 Cal.App.2d 476, 478, 225 P.2d 660; Lewis & Queen v. S. Edmondson & Sons, 113 Cal.App.2d 705, 710, 248 P.2d 973. In re Estate of Fraysher, 47 Cal.2d 131, 135, 301 P.2d 848, it was held that evidence which is admitted in the trial court without objection, although incompetent, should be considered in support of that court's action, and that objection may not be first raised at the appellate court level. The record also shows in this connection that appellants themselves introduced evidence of the circumstances surrounding the execution of the instruments and they cannot now complain of the admission of evidence which they themselves introduced. Ashley v. Rivera, 220 Cal. 75, 79, 29 P.2d 199.

[5, 6] Appellants claim that the trial court erred as a matter of law in holding that the farm management agreement in question was part of a joint venture between appellants and other defendants in the case. This claim is likewise without merit. In Nels E. Nelson, Inc. v. Tarman, 163 Cal.App.2d 714, 725, 329 P.2d 953, 958, the court said: "Whether there was a joint venture is a question of fact for the trial court to determine from the facts and inferences therefrom. Milton Kauffman, Inc. v. Superior Court (1949), 94 Cal.App.2d 8, 17, 210 P.2d 88." In the instant case there was substantial evidence that all parties acted in concert to obtain more cotton allotments then they were entitled to as individuals and on their own farms; that all lands involved were leased to Delta Verde and all financing was obtained through it; that Delta Verde executed one crop mortgage to secure the total loan, in the proceeds of which all the parties participated and obligated themselves individually for the repayment of the entire crop mortgage; that the marketing card for the entire acreage involved was held in the name of Delta Verde and that all parties were stockholders and all but one, officers of Delta Verde; that in order to obtain cotton allotments it was necessary that the lands be under a bona fide lease held by one person or corporation; that the equipment of the parties was pledged as security for the total loan; that all sales were actually conducted in the name of Delta Verde and the obligations incurred by it. These and other circumstances shown by the record furnish ample evidentiary support for the conclusion of the trial court that a joint venture existed. It is well settled that a trial judge or jury may disbelieve direct evidence and rely on circumstantial evidence to support a finding, and that even where conflicting inferences may with equal reason be drawn from the evidence the choice of which inference to draw rests in the judgment of the trier of the fact. Pierce v. Standow, 163 Cal.App.2d 286, 288, 329 P.2d 44.

[7] Appellants' next contention is that the trial court erred as a matter of law in refusing to enforce the producer's lien of appellants pursuant to the provisions of section 1300.7 of the Agricultural Code, or in enforcing a constructive trust based thereon. Here, again, we disagree with appellants' contention. The record shows that Producers, who processed and sold the crops involved, dealt with Delta Verde as the owner and producer thereof. Kayhof, under the farm management agreement, agreed to manage and to farm the property which was leased by it to Delta Verde in order to obtain additional cotton allotments. Under the provisions of section 1300.8 of the Agricultural Code the producer has no lien superior to or against the goods where the financing of the crop has been done by hypothecating or pledging the crop itself, as was done in this case.

Finally, it is claimed that the court erred in overruling various demurrers of appellants with respect to various cross-complaints involving alleged creditors, judgment creditors or assignees of Delta Verde

Farms, and in sustaining the claims of such creditors, judgment creditors, or assignees of Delta Verde Farms where the uncontradicted evidence was that such debts were not those of appellants. This argument is based on the assumption that no joint venture existed and since the evidence is sufficient to sustain the finding of joint venture, and, since the trial court found it to exist, and that the farming operations were conducted by and through Delta Verde, the debts incurred by it in connection with the cotton crops were properly charged against the funds deposited in court by Producers.

[8] The findings herein are supported by the evidence and support the judgment. The attempted appeal from the order denying a new trial is dismissed as such an order is not appealable. In re Estate of Dopkins, 34 Cal.2d 568, 569, 212 P.2d 886.

Judgment affirmed.

GRIFFIN, P. J., and SHEPARD, J., concur.

171 Cal.App.2d 840

COUNTY OF MONTEREY, Plaintiff and Appellant,

v.

A. C. MADOLORA and Madolora Co., Defendants and Respondents.

George NAKAGAWA, Frank Nakagawa, Morrie H. Morgan, Henry Z. Morgan, A. C. Madolora, Fred Calpito, Pete Algas, Stanley Morisoli and Louise Clark, Plaintiffs and Respondents,

v.

COUNTY OF MONTEREY, Defendant and Appellant.

Civ. 18468, 18469.

District Court of Appeal, First District, Division 2, California.

July 10, 1959.

Action by county to collect taxes levied upon strawberry plants and by taxpayers to recover like taxes paid under protest. Judgment for the taxpayers in the Superior Court, County of Monterey, Anthony Brazil, J., and the county appealed. The District Court of Appeal, Draper, J., held that a strawberry plant is not a "vine" so as to permit the county to assess commercially grown strawberry plants separately from the lands upon which the plants grow.

Judgment affirmed.

1. Statutes 🔑176

Construction of a statute is a question of law for the court.

2. Taxation 🔑68

A strawberry plant is not a "vine" so as to permit the county to assess commercially grown strawberry plants separately from the lands upon which the plants grow. West's Ann.Rev. & Tax.Code, § 105; West's Ann.Const. art. 12, § 2.

See publication Words and Phrases, for other judicial constructions and definitions of "Vine".

3. Evidence 🔑519

In determining whether a strawberry plant was a vine so as to permit county to assess commercially grown strawberry plants separately from the lands upon which the plants grow, court in determining the question could look to the testimony of a botanist witness. West's Ann.Civ.Code, § 1645.

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William H. Stoffers, County Counsel of Monterey County, John O. Thornberry, Deputy, Salinas, for appellant.

J. R. Lamoreaux, Salinas, for respondents.

DRAPER, Justice.

Is a strawberry plant a vine? That is the question presented in these consolidated cases.

One action is by the county to collect taxes levied upon strawberry plants, and the other is by taxpayers to recover like taxes paid under protest. Judgment was in favor of both groups of taxpayers, and the county appeals.

Land and the improvements thereon are to be separately assessed for taxation (Cal. Const., Art. XIII, § 2). Under constitutional authorization (Art. XIII, § 13), the Legislature has defined "improvements" as including "fruit, nut bearing, or ornamental trees and vines * * *" (Rev. & Tax.Code, § 105). On the assumption that strawberry plants are vines, the county here assessed commercially grown plants separately from the lands upon which the plants grew. Concededly, strawberry plants come within the quoted code section only if they are vines. If not within this section, they cannot be separately assessed. Miller v. County of Kern, 137 Cal. 516, 70 P. 549.

[1] Construction of a statute is a question of law for the court. Hall v. City of Taft, 47 Cal.2d 177, 188, 302 P.2d 574; Sheehy v. Shinn, 103 Cal. 325, 328–329, 37 P. 393; California Motor Express v. State Board of Equalization, 133 Cal.App.2d 237, 241, 283 P.2d 1063.

[2] By dictionary definition, a vine is a plant having a stem (Webster's New International Dictionary, 2d Ed.; Funk & Wagnalls New Standard Dictionary). General usage seems clearly to regard the stem, by which a plant climbs or extends, as the principal distinguishing characteristic of a vine. But a strawberry plant is stemless (Funk & Wagnalls New Standard Dictionary; The Oxford-English Dictionary). In other respects, the dictionary definitions of the strawberry, whether called by that common term or by its botanical name "fragaria," contain elements which seem to negate vineal characteristics. Appellant finds comfort only in the Webster definition of "strawberry vine" as "the plant which yields the strawberry." In view of the contrary indications of the many definitions of the strawberry, we cannot deem this single statement controlling. Thus we conclude that in the general and ordinary understanding, a strawberry plant is not a vine. Such usage is the normal guide in statutory construction. McMillan v. Siemon, 36 Cal.App.2d 721, 726, 98 P.2d 790.

[3] If, however, the word "vine" be deemed used in its technical sense, we may look to the testimony of the botanist witness. Civ.Code, § 1645; Sheehy v. Shinn, supra, 103 Cal. 325, 329, 37 P. 393. His testimony establishes that a stem and tendrils, characteristics of a vine, are not found in the strawberry plant. He points out that the runner of a strawberry plant is not a stem, but merely a means of propagation which disintegrates when a new plant roots from a node of the runner.

The strawberry plants here involved are not vines within the meaning of the code section. Thus they may not be assessed separately from the land.

Judgment affirmed.

KAUFMAN, P. J., and DOOLING, J., concur.

171 Cal.App.2d 631

PEOPLE of the State of California,
Plaintiff and Respondent,
v.
Maurell MACK, Defendant and Appellant.
Civ. 3585.

District Court of Appeal, First District,
Division 2, California.
July 1, 1959.

Defendant was convicted of robbery in the first degree and from a judgment of the Superior Court, County of Alameda, Cecil Mosbacher, J., the defendant appealed. The District Court of Appeal, Dooling, J., held that discrepancies in the victim's statement of identification did not preclude con-
sented whether the defendant had a gun.
viction and that a jury question was pre-

Judgment affirmed.

1. Robbery ⟹24(3)

In robbery prosecution, discrepancy in victim's testimony identifying the perpetrator as "in his forties" while he actually was 27 and her failure to remember whether defendant's face was scarred or he wore a mustache did not render her positive identification of defendant at a lineup "inherently improbable" so as to preclude conviction.

See publication Words and Phrases, for other judicial constructions and definitions of "Inherently Improbable".

2. Robbery ⟹26

Whether defendant had a gun was a question for jury in prosecution for robbery in the first degree.

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James F. Thacher, San Francisco, for appellant.

Stanley Mosk, Atty. Gen., Clarence A. Linn, Chief Asst. Atty. Gen., Arlo E. Smith, Deputy Atty. Gen., for respondent.

DOOLING, Justice.

Appellant and one Surrell were found guilty by a jury of robbery in the first degree. The evidence showed that on November 16, 1957, at about 1:20 a. m., Mrs. Jenkins was working alone in the Clown Liquor Store in a rear storeroom. She heard the buzzer sound indicating that a customer had entered the store. At the door between the storerooms and the store Mrs. Jenkins was met by appellant who said "Get over there" indicating the direction of the cash register. Appellant pulled back his coat and Mrs. Jenkins saw the handle of a gun protruding from the waistband of his trousers. As Mrs. Jenkins was placing some wine bottles which she had brought from the storeroom on the counter, she first noticed Surrell standing in front of the cash register. He handed her a paper bag into which she placed the money from the cash register and handed the bag to appellant who was standing next to her on the "work side" of the counter. Appellant then stated "Get back in that room and shut that door." Mrs. Jenkins backed into the storeroom and appellant and Surrell ran from the store. She then emerged from the storeroom and "pushed the button for the police."

Immediately after the robbery appellant, who was 27 years of age, was described by Mrs. Jenkins as being "around in [his] forties." Subsequently Mrs. Jenkins identified appellant at a lineup, at the preliminary hearing and on the trial, as one of the robbers.

Two points only are made on appeal: 1. that the identification of appellant by Mrs. Jenkins as one of the robbers was inherently improbable; and 2. that the evidence is insufficient to show that appellant was armed "with a dangerous or deadly weapon."

[1] 1. None of the discrepancies in Mrs. Jenkins' statements rendered her positive identification inherently improbable as that term has been defined in the cases. People v. Lyons, 47 Cal.2d 311, 319–320, 303 P.2d 329; People v. Huston, 21 Cal.2d 690, 693, 134 P.2d 758. Her failure to remember whether appellant's face was scarred or he wore a mustache and her statement to the police that he was about forty were factors for the jury to weigh, nothing more. People v. Houser, 85 Cal.App.2d 686, 694, 193 P.2d 937 and cases cited.

[2] 2. While the witness testified that she could not describe the shape or color of the gun that she saw protruding from appellant's waistband and did not know anything about guns anyway her testimony was positive that it was a gun that she saw. This also presented a jury question which the jury resolved against appellant. People v. Green, 93 Cal.App. 435, 437, 269 P. 687.

Judgment affirmed.

KAUFMAN, P. J., and DRAPER, J., concur.

Matter of the ESTATE of Harry AUSLENDER, Deceased.
Morris Auslen, Petitioner and Respondent,
Harry Auslen, Respondent and Appellant.*
Civ. 9472.

District Court of Appeal, Third District, California.
July 1, 1959.
As Modified July 21, 1959.
Hearing Granted Aug. 26, 1959.

Proceeding for settlement of accounts filed by coadministrators of decedent's estate. The Superior Court, Sacramento County, Malcolm C. Glenn and Jay L. Henry, JJ., entered orders allowing one of the administrators reimbursement for certain expenses, and surcharging the other administrator's account, and appeals were taken. The District Court of Appeal, Van Dyke, P. J., held, inter alia, that where judgments were obtained by two corporations in which decedent had a major interest, in the Superior Court, against decedent's estate, and such judgments became final, notwithstanding misconduct of an administrator in acting as trustee for both the corporations, and for the estate, they were not void, and the Superior Court, sitting in probate, could not decree the judgments void and surcharge administrator's account for amounts paid corporations in satisfaction of such judgments, in view of fact the superior court in the exercise of its general jurisdiction had jurisdiction of the parties and of the subject matter, and there was nothing in the face of the judgment records to indicate fraud.

Orders surcharging appellant's account with certain sums reversed, orders allowing supplemental accounts of respondent and his attorney reversed and remanded, otherwise orders affirmed.

1. Executors and Administrators ⚷453(4)

Where judgments were obtained by two corporations in which decedent had a major interest, in the Superior Court, against decedent's estate, and such judgments became final, notwithstanding misconduct of an administrator in acting as trustee for both the corporations, and for the estate, they were not void, and the Superior Court, sitting in probate, could not decree the judgments void and surcharge administrator's account for amounts paid corporations in satisfaction of such judgments, in view of fact the superior court in the exercise of its general jurisdiction had jurisdiction of the parties and of the subject matter, and there was nothing in the face of the judgment records to indicate fraud.

2. Executors and Administrators ⚷453(4)

Where title of corporations to property claimed by a decedent's estate, and corporations' rights to money judgments against the estate were at issue in suits they brought in the Superior Court, whether or not alter ego doctrine could have been relied on as a defense was immaterial, since the matter was concluded by the judgments rendered against the estate.

3. Judgment ⚷638

The Superior Court sitting in probate is bound by a final judgment of the Superior Court, regular on its face.

4. Executors and Administrators ⚷278

Where an administrator prepaid a lawful demand without order of court, although such payments were made at the peril of disallowance, in absence of showing that third-party interests were prejudiced, such payments should have been allowed.

5. Executors and Administrators ⚷278

Where an administrator paid certain moneys to a corporation without an order of the court, but such payment preceded by only a few weeks the rendition of a judgment in favor of the corporation against the estate for such amount, and such judgment was final when administrator's account was heard, a surcharge of the account based on improper finding that judgment in favor of corporation was void, was improper.

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* Opinion vacated 2 Cal.Rptr. 769, 349 P. 2d 537.

6. Executors and Administrators ⚷109(4)

In proceeding for settlement of his account, surcharge of administrator for amounts expended by him in his travels while negotiating purchase of interest of certain heirs would be affirmed where evidence sustained finding that trip was motivated not to benefit the estate, but for the benefit of administrator.

7. Executors and Administrators ⚷85(9)

Where record would not support conclusion that decedent and certain corporations in which decedent owned the major interests were one and the same, probate court could not compel decedent's administrator to turn over to the estate money paid by the corporations to him for services rendered to it at time he was serving as decedent's administrator.

8. Executors and Administrators ⚷503

Account of expenditures filed by a coadministrator of a decedent's estate, and his attorney, were improperly allowed where they were not supported by proper vouchers or receipts, and where no testimony was received from either coadministrator or his attorney or from any other source, notwithstanding the fact that the accounts were verified and contained averments that the expenditures were for the benefit of the estate, and were reasonable and proper and necessarily made.

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George Olshausen, San Francisco, for appellant.

Leonard S. Lurie, San Francisco, for respondent.

VAN DYKE, Presiding Justice.

When Harry Auslender died two of his nephews were appointed co-administrators of his estate. They were brothers. Harry Auslen, appellant herein, was the older of the two and by far the more active in the work of administration. He filed an account current and Morris objected thereto. The court disallowed substantial items claimed by Harry as credits and he appeals from that order. Morris and his attorney both filed accounts, claiming reimbursement for certain expenses they had met and Harry objected to the allowance thereof as charges against the estate. The items were allowed and Harry appeals from the orders making those allowances. This second appeal is minor in importance compared with the first and principally involves the claim that the items of expense allowed were wholly unsupported by vouchers or other evidence. The order settling the account of Harry surcharged his account in the total sum of $49,859.58.

The inventory listed a commercial account in the Anglo-California National Bank in the amount of $5,675.14 and a second commercial account in the same bank amounting to $19,370.80. There was a note appended to this latter item which recited the following: That the administrators had taken the account into their possession but that the ownership was disputed by Elton Investment Company, a corporation, which had filed a suit in the superior court to establish ownership of the fund. The inventory listed 2,500 shares in Fashion Shop, a California corporation, appraised at $14,705.89, and 20,002 shares of Elton Investment Company, a California corporation, appraised at $35,750. There was listed a claim against Fashion Shop appraised at $12,867.52. To this item there was appended a note stating that Fashion Shop had filed a claim against the estate in the sum of $25,000 and had brought suit upon it. There were two promissory notes listed, one calling for payment to decedent of $1,410.76, the other of $2,685.02. To these items there was also appended a note reciting that the ownership thereof was in dispute and was the subject of an action brought by Fashion Shop, wherein that corporation claimed ownership. There were two parcels of real estate with one of which we are not concerned. The second parcel was a portion of Lot 4, in the Block bounded by J and K, 6th and 7th Streets in Sacramento city, appraised at $70,000. Again a note was appended to the listing of this item, stating that Elton Investment Company claimed ownership and had brought an action to establish its title. The total appraisal figure was $162,983.03. The inventory was filed January 13, 1954. On the 7th of May following the Superior Court in Sacramento County, in the exercise of its general jurisdiction, rendered a judgment in favor of Fashion Shop against the estate of decedent, decreeing that Fashion Shop owned the two promissory notes claimed by it and directing delivery of the notes to it by the administrators. The judgment also decreed that Fashion Shop have judgment against the administrators as such for the sum of $10,000 to be paid in due course of administration, but further decreed that Fashion Shop "pay out and expend a sum of not to exceed Two Thousand Five Hundred Dollars ($2500.00) for and on account of the administration expenses of said estate," the same when so paid to constitute "a pro tanto satisfaction of the money judgment." On the same day judgment was entered in the suit brought by Elton Investment Company. That judgment decreed that Elton Investment Company was the owner of the real property at 7th and J Streets in Sacramento city and directed conveyance by the administrators. It also decreed that Elton Investment Company recover the sum of $50,000 to be paid by the estate in due course of administration but that Elton Investment Company "pay out and expend a sum of not to exceed Seven Thousand Five Hundred Dollars ($7,500.00) for and on account of the administration expenses of said estate", the same when so paid out to constitute "a pro tanto satisfaction of the money judgment." After the rendition of the two judgments the administrators filed a supplemental inventory, wherein they eliminated from the inventory as first filed the property adjudged to belong to the two corporations.

Elton Investment Company and Fashion Shop, hereinafter called Elton and Fashion, were corporations mostly owned and wholly dominated by the decedent during his lifetime. Appellant investigated their stock ownership, and found that the stock books indicated decedent had owned 20,002 shares of the capital stock of Elton and that C. Appelbaum, an aunt of decedent, owned 14,000 shares; that decedent had owned 2,500 shares of the capital stock of Fashion, and C. Appelbaum 1,750 shares. However, there was strong evidence that Appelbaum was a dummy stockholder for the benefit of decedent and that she held as his trustee. Decedent died September 29, 1952. Beginning January 22, 1953, there occurred a series of corporate meetings. Officers were elected and as to both corporations there were created the offices of treasurer and managing director. Appellant was elected to those offices "with full and unlimited authority to act for and in behalf of [naming the corporation] in all matters pertaining to the same." Respondent became a director of both corporations. Directors' meetings followed. Resolutions were adopted for each corporation, declaring that the administrators as such owned 20,002 shares of the capital stock of Elton and that C. Appelbaum owned 14,000 shares; that the administrators owned 2,500 shares of the capital stock of Fashion and C. Appelbaum 1,750 shares thereof. New stock certificates were issued accordingly. At later corporate meetings reports were made that investigation of the affairs of the corporations indicated that much of the property standing in the name of decedent when he died really belonged to one or the other of the two corporations and the corporate officers were directed to take steps to protect the interest of each corporation in respect thereto. The managing director was ordered to make a thorough study of the situation and if just claims for the corporations against the estate were indicated the secretary was authorized to file claims against the estate. Claims were filed, were rejected by the administrators and thereafter suits were brought by the corporations resulting in the judgments hereinbefore referred to.

There were two groups of heirs, one called the eastern heirs. The other group called western heirs, resided in California. The eastern heirs were entitled to receive 60 percent of decedent's distributable estate and the western heirs were entitled to 40 percent. Appellant soon became active in attempting to purchase the interest of the eastern heirs for the benefit of the western heirs and after an extended trip east and many negotiations he succeeded in purchasing the interests of the eastern heirs for $25,000. They all assigned their interests to him as trustee for the western heirs. The assignments were presented to the probate court and approved.

In settling appellant's account the court rejected his claim that he was not required to account for the funds and property which by the two judgments had been decreed to belong to the corporations. The court's findings were that the judgments had been procured by the fraud of both administrators. It appears that the two judgments were entered upon the stipulation of the defendant-administrators presented to the trial court and the probate court took the position that the administrators as such knew that the estate had a factually supported and meritorious defense to the actions, that it was their duty as administrators to present that defense and that their acts in failing to do so were fraudulent.

The court further found that at the time of his death the decedent had been the sole, legal and equitable owner of all of the shares of stock of both Elton and Fashion; that during his lifetime the corporations were pure instrumentalities of decedent and that each of them was the alter ego of decedent; that the separate entity of each corporation for the purposes of the accounting was to be wholly disregarded and the activities, assets and liabilities of each considered and treated as being those of decedent. The court further declared that the consent judgments were void because obtained by the extrinsic fraud of the administrators and that each judgment, for the purposes of the accounting, was to be disregarded. The propriety of these findings is the subject of the principal attack made upon the orders appealed from. Appellant contends that the judgments must have been accepted as valid by the court sitting in probate, and must have been given their full legal effect with the result that the amended inventory filed after the judgments became final listed all property which belonged to the estate.

[1] As officers of Elton and Fashion, the administrators were trustees for the corporations. They were also trustees for the estate. When they began to press the corporate claims against the estate they brought about a most objectionable situation and there can be no doubt that had the court been informed about it they would not have been permitted to represent one trust against another. As said in In re Haas' Estate, 97 Cal. 232, 234, 31 P. 893, 32 P. 327, in doing that they would most likely have misrepresented one trust or the other. Nonetheless the judgments were obtained, they became final, and notwithstanding the misconduct of both appellant and respondent the judgments may be just judgments that properly declared the rights of the parties as those rights would have been declared had each side had disinterested representation in an adversary trial. They are not void. The superior court in the exercise of its general jurisdiction had jurisdiction of the parties and of the subject-matter and there is nothing on the face of the judgment records to indicate fraud. Until and unless they are set aside in some appropriate way as in an independent suit in equity by an interested and injured party they finally adjudicate the property rights put in issue. The superior court exercising its general jurisdiction had jurisdiction to act (Estate of Hart, 51 Cal.2d 819, 337 P.2d 73); the same court, sitting in probate, could thereafter no more decree the judgments void than it could have tried the causes in the first instance. The order surcharging appellant's account cannot rest upon the court's declarations that the judgments are void.

[2] The probate court found that during his lifetime Elton and Fashion were alter egos of decedent. This finding does not aid respondent in upholding the surcharging of appellant's account. First, if

the doctrine could have been applied against the corporations in their suits against the estate the issue must have been there presented and proved. The judgments are final as to defenses that could have been urged but were not. The title of the corporations to property claimed by the estate and their rights to money judgments against the estate were at issue in the suits they brought and whether or not alter ego could have been relied on as a defense is now immaterial. The matter is concluded by the judgments. Andrews v. Reidy, 7 Cal.2d 366, 371, 60 P.2d 832.

[3] Respondent principally relies on In re Estate of McSweeney, 123 Cal.App.2d 787, 268 P.2d 107, to uphold the court's rulings that the judgments were void and that corporations were decedent's alter egos. Therein the probate court in settling an executor's account refused to admit evidence to show that the executor had failed, in a quiet title action against the estate, to present to the court a valid defense of which the executor had knowledge, but on the contrary had not contested the plaintiff's claims and had entered into a stipulation waiving notice of trial, written findings and conclusions and notice of entry of judgment. The omitted defense had been that the deed to the property from decedent to plaintiff had not been delivered. The appellate court held that the proffered evidence should have been admitted; that notwithstanding the judgment was final the objectors were not attacking it as such but were only attacking the account by proposing to show the executors had been derelict in their duty to preserve and protect the estate by failing to defend the quiet title suit; that if they could show the estate lost property because of the derelictions of the executors they should be permitted to do so. We cannot agree with the reasoning that the court by receiving the proposed evidence would not have been permitting a collateral attack upon the decree. As we have said, the court in probate should be considered bound by a final judgment regular on its face.

We come now to the specific surcharges of which appellant complains.

[4] Appellant purchased the interests of the eastern heirs as trustee for the western heirs for $25,000. The assignments were so drawn and in that form were approved by order in probate. No claim was made that appellant was not authorized to deal for the western heirs by previous authorization or by subsequent ratification. The result is that only the western heirs are now entitled to distribution. Respondent does not here argue to the contrary. But the funds appellant used were not his own. Those funds had the following origins: Decedent died September 29, 1952. On December 20, 1952, appellant and respondent paid to Elton from estate funds the sum of $10,031.81. This was asserted to be net rentals received by decedent for the 7th and J Street property, and was paid on the assumption that Elton owned the property and that the income therefrom was held in trust for Elton by decedent. In April, 1954, $18,000 was withdrawn from estate funds and paid to Elton. Elton paid over to appellant $25,000 which he used to pay for the assignments. Thereafter, and on May 7, 1954, Elton recovered its judgment on its claims against the estate, including a money judgment for $42,500 net. In its findings the court said: "The transfer of the sum of Ten Thousand Thirty-one and 81/100 Dollars ($10,031.81) from the account of the Administrators to the account of Elton Investment Company covering rental from the property at 7th and J Streets * * * for the period January 1, 1952 to September 29, 1952, is hereby disallowed, and it is hereby ordered that all debts and credits relating to said transfer are to be cancelled, and said sum replaced in the account of the administrators." It is obvious that the court rested its disallowance on its holdings that the judgments were void, that Elton was a mere alter ego of decedent and that its assets were to be treated as those of decedent. We have said these holdings cannot support the disallowance. The Elton decree finally adjudged

"That the decedent * * * from date of acquisition of said property in his name, and the defendants * * * as Administrators * * *, from and after the date of death of said decedent, have held and possessed, * * * the same as Trustees and in trust for the Plaintiff Elton Investment Company, * * *, and that Plaintiff is forthwith entitled to sole and exclusive possession, control and title to said property, together with the rents and profits therefrom * * *." What had happened was that the administrators had prepaid a lawful demand without order of court. Although such payments are made at the peril of disallowance, yet, unless third-party interests are prejudiced, a situation not shown here, they ought to be and usually are allowed. In re Estate of Fernandez, 119 Cal. 579, 581, 51 P. 851; In re Estate of Fulmer, 203 Cal. 693, 698, 265 P. 920, 58 A.L.R. 430. In the present state of the record the surcharge cannot be affirmed. Assuming that the court might have surcharged a current account for prepayment the record is clear that such was not the ground of the surcharge.

[5] What has been said applies also to the surcharge of the $25,000. The payment of the $18,000 to Elton preceded by only a few weeks the rendition of the judgment in its favor. What Elton did with the money was of no concern to the probate court if the payment to it was proper. That payment was not preceded by court authorization, but Elton's judgment for money was final when this account was heard. The court once again obviously based its surcharge on its above stated findings and not upon payment without court order. Those findings do not support the surcharge.

[6] Some miscellaneous credits claimed by appellant were disallowed. Appellant sought to hold the estate to reimbursement of a sum of $857.53 expended by him in his travels while negotiating the purchase of the interests of the eastern heirs. The court could properly find, as it impliedly did, that appellant was not about the business of the estate in attempting to buy these interests for himself and the other western heirs. Appellant seeks to justify this charge by arguing that the eastern heirs were threatening litigation and he acted in the estate's interest by removing their incentive. But there was evidence that appellant conceived the corporate actions as a lever to pry from the eastern heirs an advantageous purchase of their interest by creating in them a fear that the western heirs, including appellant and respondent, would use the corporate claims to lessen the value of their distributive rights. It was for the court to determine factually which motive prompted appellant's activities. The surcharge must be affirmed.

[7] Appellant objects because the court surcharged his account with management salaries paid him by the corporations. This action obviously stems from the finding that the corporations and the decedent were one and the same. Since the record will not support that conclusion, the court in probate could not compel appellant to turn over to the estate money paid him by the corporations for services rendered to them.

[8] Respondent administrator herein, and his attorney, each filed an account of expenditures and asked reimbursement against the estate. Appellant objected to each on the ground that they were unsupported by proper vouchers or other proof. In his demand for transcript on appeal from the orders approving the accounts and ordering reimbursement, appellant requested a transcript of the settlement proceedings, including all vouchers submitted and all evidence, oral and documentary, received in proof. He now contends that the orders appealed from are not supported by the proof and that they must therefore be reversed. An examination of the transcript discloses no record of any proof having been made. Respondent points out that the accounts were verified and contained averments that the expenditures were for the benefit of the estate, were reasonable and proper and necessarily made. But,

so far as objected to, the burden was his to prove the accounts. 21 Cal.Jur.2d 128. For aught that appears no vouchers or receipts were furnished, no testimony was received from either respondent or his attorney or from any other source. We must therefore reverse the orders allowing the account. This, however, is and ought to be done without prejudice to a further hearing.

The orders surcharging appellant's account with the assets of the corporations and with the sums of $10,031.81, $25,000, $1,200 and $300 are reversed; the orders allowing the supplemental accounts of respondent and his attorney are reversed; and the matters are remanded for further proceedings. Otherwise the orders appealed from are affirmed.

SCHOTTKY, J., concurs.

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171 Cal.App.2d 537

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Harry TREGGS and Huey Owens, Defendants.

Harry Treggs, Defendant and Appellant.

Cr. 6366.

District Court of Appeal, Second Appellate District, Division 1, California.

June 29, 1959.

Defendant was convicted of first degree robbery. The Superior Court, Los Angeles County, Clement D. Nye, J., entered judgment of conviction and order denying new trial, and defendant appealed. The District Court of Appeal, White, P. J., held that evidence was sufficient to sustain the conviction.

Judgment and order affirmed.

1. Criminal Law 🔑1144(13)

An appellate tribunal is bound to consider the evidence adduced in trial court in light most favorable to respondent, and all intendments are in favor of the judgment.

2. Criminal Law 🔑1159(2)

District Court of Appeal will not attempt to determine the weight of the evidence but will decide only whether, upon face of the evidence, it can be held that sufficient facts could not have been found by jury to warrant inference of guilt.

3. Criminal Law 🔑1160

Before jury's verdict, which has been approved by trial court, can be set aside on appeal upon ground of insufficiency of evidence, it must be made clearly to appear that, upon no hypothesis whatever, is there sufficient substantial evidence to support conclusion reached by court below.

4. Criminal Law 🔑1159(6)

Where evidence, viewed in one light, creates hypothesis inconsistent with guilt, but, when viewed in another light, is reasonably consistent with guilt, and jury rejects hypothesis pointing to innocence, and there is substantial evidence to support implied finding of guilt, District Court of Appeal is bound by finding of court below.

5. Criminal Law 🔑1159(2)

Reviewing court may set aside jury's verdict only when there is no substantial or credible evidence in record to support it or when evidence relied upon by prosecution is so inherently improbable or false that it is incredible.

6. Robbery 🔑24(1)

Evidence sustained conviction for first degree robbery. West's Ann.Pen.Code, § 211.

7. Criminal Law 🔑409

In robbery prosecution in which defendant was charged with prior felony conviction for forgery and counterfeiting, deputy sheriffs' testimony that defendant had admitted to them that he was present at scene of robbery and that he had participated therein, saying that he had stood behind candy counter while the other participants in robbery went to back of store being robbed, was sufficient to establish defendant's identification as one who participated in the crime. West's Ann.Pen.Code, §§ 211, 470.

8. Criminal Law ⚷409, 535(1)

Upon proof of corpus delicti by evidence other than accused's admissions, he may be convicted on his own confession or admissions.

9. Criminal Law ⚷1121(1)

Where charge of perjury by witnesses against accused was not presented by the record, question was not properly before District Court of Appeal.

10. Criminal Law ⚷1159(1)

Upon appeal from judgment of conviction and order denying motion for new trial, District Court of Appeal could not retry case.

11. Criminal Law ⚷1159(4)

Questions of credibility of witnesses and of apparent inconsistencies between statements of witnesses are all within province of duly constituted arbiters of the facts, and, unless testimony can be said to be inherently improbable, reviewing tribunal will not interfere with a jury's determination of credibility of witnesses if evidence is in conflict.

12. Criminal Law ⚷741(2)

In robbery prosecution, jury was entitled, upon conflicting evidence on issue of accused's identity, to believe officers' testimony and to reject accused's testimony if they conscientiously felt warranted to do so and to determine intrinsic value of testimony of identification.

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Harrison M. Dunham, Los Angeles, under appointment by the District Court of Appeal, for appellant.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., Jack K. Weber, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County, defendants were charged with the crime of robbery (Penal Code, Sec. 211) in that they took $3,400.00, and a quantity of whiskey of the value of $54.00 from Maurice Terk, one of the proprietors of a liquor store and market. Appellant Treggs was also accused of a prior felony conviction for violation of Section 470 of the Penal Code, and of being armed with a revolver at the time of the robbery. The prior conviction was admitted. Appellant pleaded not guilty and the cause was tried before a jury which returned a verdict finding him guilty of robbery of the first degree, and that he was armed at the time the offense was committed. At the time judgment was pronounced the court found that appellant was not armed at the time of the commission of the offense and sentenced him to state prison. From the judgment and the order denying his motion for a new trial appellant prosecutes this appeal.

An examination of the record reveals the following as a fair statement of the factual background surrounding this prosecution.

At approximately 8:30 p. m. on the evening of October 20, 1957, the Rite-Way Market and Liquor Store in Los Angeles County was robbed by a group of men.

Ann Terk, a co-owner of the store, was the first to observe them. She was standing by the cash register at a long counter that ran the length of the 70 by 150-foot store, to the right as you come through the entrance. She thought four men entered the store. "One man went next to the candy counter to my left; two men approached me in front of the cash register, right in front of me. It was my impression that there was a fourth man that walked toward the coke machine, that came in with this group; and then I don't recollect seeing him again."

When the men walked over to Ann Terk, her brother Maurice Terk, a co-owner, was standing about eight feet away by the candy counter, stocking it.

One of the men asked Miss Terk for cigarettes.

"When one man asked me for a package of Winstons, I turned around to get it; the other fellow that was with him, that was directly in front of me, went over to the candy display close to my brother. I thereupon got the Winstons, rang up the sale; and when the cash register was opened, the man that was on my left came around by the cash register right next to me and put a gun into my ribs. He said, 'This is a holdup.'"

Maurice Terk's attention was attracted by the statement, and he saw three men. He was told to walk to the back of the store by the gunman, and either to "hurry up" or "go to the back". He complied.

After Ann Terk observed the gun and heard the announcement of the holdup she backed away and rang a burglar alarm. She was told to come forward, around to the other side of the counter, and to go in the back room of the store with her brother. Both were told to lie down.

Maurice Terk testified that after they assumed this position his sister was taped. Her ankles were taped, her wrists were taped behind her back and some tape was put over her mouth. A voice told Maurice Terk in the darkened back of the store to come forward to the money order section. Under gunpoint the money order section was forced open, when Terk was taken back to the safe. "The fellow that was behind me couldn't get the safe open, and I had to do it," Terk testified. Then Terk was brought forward to the money order section and told to lie on the floor next to three customers in the store. The men took $3,400, and $54 in whiskey.

Maurice Terk was sure that Harry Treggs was not in the store at the time of the robbery, and that he did not see him that day at all, though he knew Treggs as a customer. Nor could Terk's sister, Ann, place Treggs at the scene, though she thought the gunman looked somewhat like him, however "I don't think he is the man though."

Maurice Terk described his opportunities to see the men. When the holdup began he was aware of someone behind him and glanced around, but not completely, just turning his head about 90 degrees, and keeping it there for two or three seconds. He faced the back of the store.

Then he looked again to the cash register where his sister stood. He saw a Negro with a gun, his back towards Terk, but he never saw his face. He saw another man too, but kept his attention on the gunman, concerned for his sister's welfare.

Then he walked to the rear of the store, with no opportunity for a further look into the dark rear of the store, set off by a swinging door. When he was brought to the money order section that too was dark, though he got a glance at the man who brought him there. During the two or three minutes in the money order section, by the light from a window in the darkened room, he got a profile view of the man who was opening the money order drawer, though he noticed no unusual facial characteristics.

Next they went to the safe, Terk followed by a man, who, his back to Terk, tried to open the safe but couldn't, and had Terk do it. Terk had no chance to view anything on his way back to the money order section and when he got there, lying on his stomach, he saw nothing.

Terk thought that appellant Treggs' codefendant Huey Owens was the man behind him, but he couldn't positively identify him. Ann Terk named Huey Owens as "the one close to my brother at the candy counter".

Miss Terk saw the men when they came into the store "in a group". One of the four she couldn't describe "because he didn't come close to me," but she did notice that there was a fourth one who went to the coke machine, to the left of the store as you enter, and opposite from the counter where Miss Terk stood. Frightened, watching the gun when told of the holdup, she managed to notice that the gunman had kinky hair and wrinkles in his forehead. Then when they made her go to the rear she no longer faced them and she had no further chance to observe.

Before she went back, she noticed that the man near her brother and one of the men near herself "looked like brothers or relatives". They "had the same facial characteristics". The one near her "was a little shorter, a little heavier, had a mustache * * * Hair looked very similar. Wearing a blazer." Both men had "rounder faces". The one who asked for the Winstons "had a little broader face, had a mustache". She observed the man behind her brother for 40 or 50 seconds. She admitted that it was harder for her to distinguish colored people at the time of the offense than at the trial, as she had since acquired experience.

None of the customers were able to make an identification. Arthur Dominguez, a carpenter, who was in the store at the time of the robbery, said he did not recognize the appellant, that he saw three colored men in the store, but he couldn't say how they were dressed. "I'm just not sure" about Treggs, he said. But he thought he recognized Owens.

Bill Rody, a customer, who was unaware of the robbery, did not see anyone involved in what went on in the market.

Sergeant Aure of the Los Angeles Sheriff's Office testified to a conversation between himself, Treggs, and Sergeants Human and Thill of the sheriff's office. Sergeant Aure said appellant's statements were made freely and voluntarily, with no promises of reward or hope of immunity.

Sergeant Aure told Treggs he would turn him over to the Los Angeles Police Department.

"* * * At this time he (appellant) requested that I file the robbery count of the Rite-Way Market at 63rd and Holmes. I asked him—at this time I told him, 'Well, I can't even prove that you were there.' I said, 'There's no one that can identify you.'

"He said, 'I don't care. I want you to handle the case.'

"I then asked him, 'Well, where were you in the store?' And he says, 'I went over and stood behind the candy counter while the other fellows went to the back of the store.'"

Sergeant Aure asked appellant Treggs how much money they obtained and he said approximately $385, of that Treggs' share was $100.

Sergeant Aure also showed Treggs a gun which the latter said looked like the one they used in the robbery. He thought that was the gun. Ann Terk testified, "It looks like the same gun except it was a different color. It looked yellowish when I saw it." But she conceded her inexperience with firearms. Maurice Terk called it "identical except for one respect"—"that the one that I noticed appeared to be yellower, as though it had been rusty and cleaned."

Sergeant Human of the sheriff's department repeated Sergeant Aure's story, saying that Treggs admitted his presence at the robbery, said he received $100 of the stolen $385 and that he was in the background and doubted if the victims saw him. Sergeant Human said that when Aure told appellant Treggs there was no identification on him, Treggs responded, "'Well, I didn't expect you to, because I've been in that place enough and I knew they'd recognize me, so I stayed behind—or stayed in the background,' I believe his words were, 'stayed partly hidden.' I'm not exactly sure verbatim what he said."

According to Sergeant Thill of the sheriff's office, he too was present at the conversation and he also heard Treggs say he was in the store, and that they took about $400, but that he stayed in the background.

Sworn as a witness in his own behalf appellant testified that he did not enter the Rite-Way Market and Liquor Store at any time on October 20, 1957, and that the first knowledge he had that a robbery was committed there on said date was when he was questioned at the Firestone sheriff's station. He further testified that he was a customer of the market. That he was first told of the robbery by the sheriff's deputies about November 26, 1957, some five or six weeks after the robbery here in question. With regard to the foregoing statements attributed to him by Sheriff's Sergeant Aure, appellant denied making them. His version of the conversation was that the officer said, "Well, I have you on an armed robbery but it's poor identification". Appellant testified he said to the officer, "I would be a fool to go to the Rite-Way Market and rob some people that know me". That the officer then said that, "* * * he was going to file two counts of armed robbery and I told him to go ahead and file them that we'd be going to court for quite a while because I'm not guilty of it". Appellant also denied making the statements testified to by Deputy Sheriffs Thill and Human.

[1-3] Appellant concedes the time honored rule that an appellate tribunal is bound to consider the evidence adduced in the trial court in a light most favorable to the respondent, and that all intendments are in favor of the judgment (People v. Shannon, 28 Cal.App.2d 677, 680, 83 P.2d 302), and that this court "'will not attempt to determine the weight of the evidence, but will decide only whether upon the face of the evidence it can be held that sufficient facts could not have been found by the jury to warrant the inference of guilt. * * * and before the verdict of the jury, which has been approved by the trial court, can be set aside on appeal upon the ground' of insufficiency of the evidence, 'it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below'". People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778, 779. However, he urges that in the case at bar, "There is no scintilla of evidence that establishes the appellant's presence in the Rite-Way Market and Liquor Store on October 20, 1957, at the time the robbery was committed".

[4-6] It is also an established rule of law that where the evidence, viewed in one light, creates a hypothesis inconsistent with guilt, and when viewed in another light such evidence is reasonably consistent with guilt, and where the jury rejects the hypothesis pointing to innocence, and there is substantial evidence to support the implied finding of guilt, this court is bound by the finding of the court below. It is therefore axiomatic that an appellate court may set aside the verdict of the jury only when there is no *substantial* or credible evidence in the record to support it, or where the evidence relied upon by the prosecution is so inherently improbable or false as to be incredible. We are satisfied that the instant case does not present such a situation.

[7,8] Three deputy sheriffs testified to admissions made to them by appellant wherein he admitted his presence at the scene of the robbery and his participation therein, saying, "I went over and stood behind the candy counter while the other fellows went to the back of the store". Such statements and admissions as were made to the officers were sufficient to establish his identification as one of the participants in the crime (People v. Silva, 143 Cal.App.2d 162, 169, 300 P.2d 25). Appellant does not question the fact that the *corpus delicti* was established. It is the law that upon proof of the *corpus delicti* by evidence other than the admissions of an accused, he may be convicted on his own confession or admissions. People v. Davis, 106 Cal.App. 179, 188, 289 P. 194; People v. Hammond, 26 Cal.App.2d 145, 150, 78 P.2d 1172.

Appellant asserts that the testimony of the victim of the robbery and that of a customer in the market establishes that he was not one of the robbers. It is true that these witnesses could not identify appellant as one of the men present in the store. However, their opportunity for identification was limited and the emotional stress under which they were laboring at the time would of necessity make accurate identification difficult. Appellant in his statements to the officers said he stayed in the background, because he had been in the place before and feared recognition. The jury could have inferred from his statement that appellant was the fourth man observed by Ann Terk and at whom she did not get a "good look". And whatever weaknesses appear in the identification testimony, appellant himself admitted participation in the robbery. He further urges that the difference in the amount of money taken as testified to by the owner ($3,454), and his statement that the robbery netted only $385, indicates that he had "no knowledge of the facts of the robbery".

While this argument may appear plausible, still it is unavailing on appeal. The jury may well have concluded that either appellant in his statement to the officers was attempting to minimize the actual amount taken in the robbery or that his accomplices "held out" on him. It is inherent in the verdict that the jury did not believe the testimony given by appellant at the trial, but chose to believe the testimony of the officers as to appellant's statements to them, wherein he admitted his participation in the robbery regardless of the amount of money taken.

[9] Appellant next characterizes the testimony of the officers as "contrived and fabricated". Since no charge of perjury by the witnesses against appellant is presented by the record, the question is not properly before us (People v. Martin, 128 Cal.App.2d 361, 364, 275 P.2d 635).

[10–12] What appellant is apparently seeking is for us to retry the case. This we cannot do. The question of credibility of witnesses and apparent inconsistencies between the statements of witnesses are all within the province of the duly constituted arbiters of the facts, and unless testimony can be said to be inherently improbable, an appellate tribunal will not interfere with a jury's determination of the credibility of witnesses where the evidence is in conflict (People v. Newland, supra, 15 Cal.2d at page 681, 104 P.2d at page 779). In the instant case, the jury was entitled to believe the testimony of the officers and to reject that of appellant if they conscientiously felt warranted so to do, and as well, to determine the intrinsic value of testimony of identification. The determination of the jury was also fortified by the action of the trial judge in denying a new trial.

Appellant relies upon the cases of People v. Draper, 69 Cal.App.2d 781, 786, 160 P.2d 80, and People v. Gibbons, 93 Cal.App.2d 28, 208 P.2d 411, wherein it was held that the evidence was insufficient to sustain the burden resting upon the prosecution to establish guilt beyond a reasonable doubt. The evidentiary features of these cases are at once distinguishable from the facts presented in the case now engaging our attention, in that appellant herein made admissions to the officers that he was not only present at the scene of the crime, but was a participant therein.

The judgment and the order denying defendant's motion for a new trial are, and each is affirmed.

FOURT and LILLIE, JJ., concur.

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171 Cal.App.2d 540

PEOPLE of The State of California, Plaintiff and Respondent,

v.

Harry TREGGS and Bennye Treggs, Defendants.

Harry Treggs, Appellant.

Cr. 6367.

District Court of Appeal, Second District, Division 1, California.

June 29, 1959.

Defendant was convicted of robbery. The Superior Court, Los Angeles County, Clement D. Nye, J., entered judgment of conviction and order denying defendant's motion for new trial, and defendant appealed. The District Court of Appeal, White, P. J., held that evidence sustained conviction.

Judgment and order affirmed.

1. Robbery ⚷24(3)

Evidence, which included the victim's positive identification of defendant and defendant's admission, in conversations with victim and police officers, of his participation in the crime charged, was sufficient to sustain conviction for robbery. West's Ann.Pen.Code, §§ 211, 470.

2. Criminal Law ⚷409

In robbery prosecution, defendant's tacit admission of his guilt, independent of victim's identification of defendant, was sufficient to sustain his conviction of robbery after a prima facie proof of the corpus delicti. West's Ann.Pen.Code, §§ 211, 470.

3. Robbery ⚷26

In robbery prosecution, claimed inconsistencies in victim's testimony was matter for duly constituted arbiter of the facts. West's Ann.Pen.Code, §§ 211, 470.

4. Robbery ⚷26

If, in robbery prosecution, jury believed only that portion of victim's testimony bearing upon immediate circumstances of the robbery and, thus, became satisfied of defendant's guilt beyond a reasonable doubt, it was within their province to plant their verdict upon that particular portion of victim's testimony, even though they might have regarded victim's statements on other points as of doubtful verity. West's Ann.Pen.Code, §§ 211, 470.

◆

Harrison M. Dunham, Los Angeles, under appointment by the District Court of Appeal, for appellant.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., Jack K. Weber, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County, appellant and one Bennye Treggs were accused of the crime of Robbery (Penal Code, Section 211), in that they did, on October 12, 1957, forcibly take from James F. Moore, a deliveryman, $2 in a money-changer, $90 in money from his person, and cookies valued at 23 cents. Both were also accused of being armed with a revolver, and of having suffered a prior felony conviction under Section 470 of the Penal Code.

Appellant pleaded not guilty and the prior conviction was admitted. The cause was tried before a jury which returned a verdict finding appellant guilty of first degree robbery, and that he was not armed at the time of the commission of the offense. The co-defendant Bennye Treggs was acquitted. Appellant's motion for a new trial was denied and he was sentenced to state prison. This appeal is prosecuted from the judgment and the order denying appellant's motion for a new trial.

As to the factual background surrounding this prosecution the record reflects that James Francis Moore, a distributor and salesman of bakery products for Helms Bakeries, on the evening of October 12, 1957, between 6 and 7 o'clock, was in the vicinity of the two hundred block on East 70th Street, in the city of Los Angeles, where, according to his statement, "I was robbed". Identifying appellant as one of the persons present during the robbery, the witness testified, "Well, I was riding down the street blowing the truck whistle * * * and a lady walked from the shadows * * And walked toward the street. At first I wasn't positively sure that she wanted something, and she was walking right toward the truck. And she put her hand up, and I stopped. And she got in the truck and asked me for a dozen mixed cookies, which I proceeded to put in a bag." Mr. Moore identified the lady as appellant Treggs' co-defendant, Bennye Treggs. The lady was in the truck "somewhere between two and three" minutes, he said. And he had an opportunity to see her for thirty or forty seconds.

The witness said that the truck was well lighted inside, though it was dark outside. As the woman left the truck, a man stepped in from the sidewalk side and put a gun in his back. The witness testified that, "* * when I saw the gun come in the door, I didn't pay much attention to how she left or what she took with her, or anything else".

The man with the gun did not get in the truck. "He was rather tall and he stood in the street with the gun in my back".

The witness was told to lie down on the floor of the truck and "at the moment" or "thereabouts" appellant Treggs "came in from the street side". Moore noticed him with "just an upward glance" for the space of a few seconds, while he was "rifling my cash drawer in my truck".

Treggs spoke to Moore: "There's some more some place. Where is it?" And Moore told him.

Mr. Moore testified that he stated that his boss had taken about half of the money some two hours previously. Appellant Treggs asked, "Do you swear to that?" And Moore responded, "Yes, I do", while raising his hands.

The two men also took the contents of Moore's pockets, about ten to fifteen dollars in half dollars, and sausage cans filled with change, besides the contents of the cash drawer, and a money-changer.

Mr. Moore said he thought he told the lady the cookies cost 23 cents. "I handed her the cookies; I most surely would have asked her for 23 cents." But Moore didn't remember whether he got the 23 cents or not.

After collecting the money, the two men took off down a side street after warning Moore not to get up. If he tried to get up and run after them or holler they told him they would shoot him. The men did not "rough up" Moore. A few minutes later Moore called the police. He picked appellant Treggs out of a group of five or six male Negroes at the police station. He also picked out Bennye Treggs from a group of three other Negresses.

The bakeryman said that he had seen a picture of the co-defendants previously in the office of Sergeant Aure, of the sheriff's office. "Well it really wasn't shown to me, sir. I happened to see it accidentally. He had it in the center desk drawer, and he happened to open it, and I happened to see it; and I made an identification." Concerning the identification of appellant by Mr. Moore, there was testimony that the latter saw the former "Just momentarily * * * Just a few seconds". The witness had been robbed on three other occasions. At the trial it was brought out that at the preliminary examination, the witness was asked whether he had ever seen appellant before the occasion here in question, and he answered, "I can't say for sure. I thought I had, but I am not going to say for sure. I'm not positive. In other words, I'll put it that way". At the trial Mr. Moore was asked in connection with his statement that he had seen appellant on a previous occasion when he was robbed, "* * * Now, as a matter of fact, you weren't robbed before October 12th by Harry Treggs (appellant) were you?", to which the witness replied, "As a matter of fact I wasn't".

The victim of the robbery was also present during a conversation between appellant and Sergeants Aure and Human of the sheriff's office. With regard to that conversation, Mr. Moore testified:

> "Q. All right. And did he answer you freely and voluntarily? A. Yes, he did.
>
> "Q. Did you hear any promises of reward or lesser sentence, of probation, or anything? A. No, I did not.
>
> "Q. And everybody was on good terms? A. Yes, sir, everything was very cordial.
>
> "Q. And was there any threats of force or use of force, or anything like that, that you know of? A. Not to my knowledge, no, sir."

The witness then testified further:

> "I can't remember, sir, in detail; but he (Treggs) did—he did admit his participation in it; and as a matter of fact, he even volunteered the amount of money that he had gotten. He estimated between eighty and eighty-five dollars."

According to Moore, appellant Treggs also said that he had told Moore that if Moore cooperated with him he wouldn't be hurt, and he wasn't.

Sergeant Aure of the sheriff's office also testified as to the conversation between Moore, Treggs, Sergeant Human and himself. According to Aure, the conversation was free from threats of force or coercion and conducted on "good terms".

The sergeant recounted that Moore told his story of the robbery, concluding by saying (pointing at appellant Treggs) "You came in the other door and took the money." Sergeant Aure asked appellant Treggs if this were true, and the latter responded that it was.

According to Sergeant Aure, appellant added: "I didn't hurt you, or I didn't push you around, did I", and the victim stated, "No". According to Sergeant Aure, Treggs estimated his profit from the theft at between eighty and ninety dollars.

Appellant did not testify as a witness in his own behalf and offered no evidence other than a stipulation regarding testimony adduced at the preliminary examination.

[1] Appellant's sole ground for reversal of the judgment and order is that the evidence is insufficient as a matter of law, to sustain his conviction.

Much of what we said in the companion case against appellant this day filed, 341 P.2d 342, is applicable to the instant action. As in the case just cited, appellant herein relies upon the cases of People v. Draper, 69 Cal.App.2d 781, 160 P.2d 80, and People v. Graziano, 83 Cal.App.2d 701, 189 P.2d 518, and insists that, as in those cases, the evidence against appellant merely "points the finger of suspicion at him". With this contention we cannot agree because in the instant action a positive identification of appellant was made by the victim, and in conversations with the victim and the officers, appellant admitted his participation in the crime with which he was charged. The vital difference in the evidentiary features of the aforesaid cases relied upon by appellant and the case at bar is that in the Draper and Graziano cases, supra, the appellate court held that the evidence did not connect the accused with the crime charged against him, while in the case now engaging our attention, appellant's connection with the crime was established by direct evidence of the victim, coupled with the admissions of the former.

[2] Appellant also questions the manner in which the officers had the victim identify him, in that prior to the time the former identified the latter in a "line up", the officers had shown the victim a picture of appellant. However, in that regard, the victim testified, as heretofore pointed out, "Well, it (appellant's photograph) wasn't shown to me, sir. I happened to see it accidentally. He had it in the center desk drawer, and he happened to open it, and I happened to see it; and I made an identification." Deputy Sheriff Aure corroborated this. It should also be remembered that identification alone is not relied upon to sustain this conviction. There was also appellant's tacit admission of his guilt, and that alone, independent of the identification made by the victim, is sufficient to sustain the verdict (People v. Silva, 143 Cal.App.2d 162, 169, 300 P.2d 25), after a *prima facie* proof of the *corpus delicti* (People v. Davis, 106 Cal.App. 179, 188, 289 P. 194).

[3, 4] As to the claimed inconsistencies in the testimony of the victim that was a matter for the duly constituted arbiter of the facts, and if the jury, as manifestly they did, believed only that portion of the victim's testimony bearing upon the immediate circumstances of the robbery, and thus became satisfied beyond a reasonable doubt of appellant's guilt, it was, of course, within their province to plant their verdict upon that particular portion of the victim's testimony, although they might have regarded the statements of the witness on other points as of doubtful verity.

The judgment and the order denying defendant's motion for a new trial are, and each is affirmed.

FOURT and LILLIE, JJ., concur.

171 Cal.App.2d 757

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Israel Gonzales GARCIA, Defendant and Appellant.

Cr. 6572.

District Court of Appeal, Second District, Division 1, California.
July 7, 1959.

The defendant was convicted for unlawful possession of marijuana. The Superior Court, Los Angeles County, Herbert V. Walker, J., entered judgment of conviction and defendant appealed from the judgment and from the sentence and from the order denying motion for new trial. The District Court of Appeal, Fourt, J., held that defendant was not entitled to name of informer, where the informer was not a participant in and was not a witness to the defendant's arrest by officers without warrant, and informer was not in the vicinity at the time of the transaction, and the informer had not participated in the crime, and there was justification for the arrest of the defendant because of his unusual, suspicious and furtive conduct which took place in the immediate view of the officers, and the informer's communication as to the area was not in anywise the sole justification for the police to make the arrest and the informer had not given the police any names of any persons.

Attempted appeal from sentence dismissed, and judgment and order denying motion for new trial affirmed.

1. Arrest ⚿63(4)

In prosecution for possession of marijuana, evidence relating to the furtive and suspicious conduct of defendant was sufficient to give officers, who arrested defendant without a warrant, good reason to believe that an offense was being committed by defendant. West's Ann.Health & Safety Code, § 11500.

2. Arrest ⚿63(4)

An officer may make an arrest when he has reasonable cause for believing the person arrested has committed a felony.

3. Witnesses ⚿216

Defendant accused of unlawful possession of marijuana was not entitled to name of informer, where the informer was not a participant in and was not a witness to the defendant's arrest by officers without warrant, and informer was not in the vicinity at the time of the transaction, and the informer had not participated in the crime, and there was justification for the arrest of the defendant because of his unusual, suspicious and furtive conduct which took place in the immediate view of the officers, and the informer's communication as to the area was not in anywise the sole justification for the police to make the arrest and the informer had not given the police any names of any persons. West's Ann. Health & Safety Code, § 11500.

4. Witnesses ⚿216

Disclosure of name of informer is not required where there is reasonable cause for search and seizure without warrant entirely apart from the informer's communication which led the police to suspect the defendant.

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Umann & Marks, Los Angeles, for appellant.

Stanley Mosk, Atty. Gen., S. Clark Moore, Deputy Atty. Gen., for respondent.

FOURT, Justice.

This is an appeal from the judgment and "sentence" and from "the denial of motion for new trial", in a case in which the defendant was found guilty of possessing a narcotic.

In an information filed in Los Angeles County the defendant was charged with a violation of section 11500, Health and Safety Code, in that he did, on May 13, 1958, have in his possession marijuana. The defendant pleaded not guilty, a jury trial was waived, and by stipulation, the matter was submitted on the transcript of the preliminary hearing, with each side reserving the right to present additional evidence. The defendant was found guilty as charged. The motion for a new trial was denied and the defendant was sentenced to the county jail for six months. Defendant appeals from the judgment, the sentence and the order denying his motion for a new trial.

A resume of the facts as developed at the preliminary hearing is as follows: On May 13, 1958, at about 9:45 p. m., the defendant, with a boy of about ten years of age, parked a pick-up truck on Whittier Boulevard near Lorena Street. They got out of the truck and defendant walked over and talked to a man about twenty-five to twenty-seven years of age, who, apparently crippled, was using crutches. The defendant followed the crippled man across the street to a point near the northeast corner of the intersection of the streets above named. The crippled man then walked in an easterly direction on Whittier Boulevard and came to the passenger side of a 1950 Chevrolet automobile which was parked in a driveway. The defendant remained in front of the Lorena Recreation Center, which was about 100 yards from the point to which the crippled man walked to the parked car. After a short time the crippled man, who had talked to someone in the parked Chevrolet automobile, walked back to the point where the defendant was standing and said something to the defendant, and then continued on walking. The defendant then called to the young boy, who in the meantime had walked into the Recreation Center, and the defendant and the boy walked back across the street to where the pick-up truck was parked. The crippled man walked a distance of about twenty-five feet from the Recreation Center to the bus stop on the northeast corner of Whittier Boulevard and Lorena Street, where he sat down on a bench. Defendant and the boy got into the pick-up truck and the defendant drove the truck across the street into the gasoline station which was located on the northeast corner and which was then closed for business. The defendant parked the truck about fifteen feet immediately behind the seated crippled man, near the gasoline pumps. The defendant got out of the pick-up truck, looked at the rear tire of the truck and then looked around, both east and west, up and down Whittier Boulevard, and then walked over behind the crippled man at the bus stop bench. The defendant laid his hand upon the right shoulder of the seated crippled man. At that time the crippled man had his fist clenched and down to his side. When the defendant touched the crippled man on the shoulder he, the crippled man, brought his right arm and hand up behind his head over his right shoulder. The defendant placed his hand in an open fashion, palm up, and the crippled man on the bench released his hand in the fashion of dropping something. The defendant then closed his hand, turned around and walked back and got into the truck and left the location, going north on Lorena Street. Deputy sheriffs, who were seated in a car at the southwest corner of Whittier and Lorena, were there on an investigation awaiting the arrival of another person, and apparently witnessed all that has heretofore been related.

Two of the deputies followed the defendant's pick-up truck, and when the truck stopped at 403 South Indiana Street, the defendant got out and one of the officers placed the defendant under arrest. A search was made, and in the defendant's right shirt pocket was found a marijuana cigarette.

When questioned about the cigarette, the defendant stated, "'I have been out of trouble for ten years now and just because I found this I am back in trouble.' And I [Deputy Sheriff] said, 'Well, what do you mean, you found it? Did you see somebody stash it and go pick it up?' And he said, 'Yes, that is what happened.'"

The arresting officer further stated that he had "information with regard to * * * activities going on at that corner of Lorena and Whittier"; that such information was "confidential" and that he considered such "information reliable".

The defendant did not testify in his own behalf, nor did he present any witnesses. It was stipulated at the time of trial "that if the officer were asked to reveal the name of the informer he would claim the privilege and not reveal the name of the informer". Thereupon, the defendant made a motion to suppress, and a motion to strike, the evidence upon the grounds that it was illegally obtained, and each such motion was denied by the court.

Appellant asserts that he was entitled to the name of the informant as a matter of right, and upon failure of the District Attorney to reveal the name, the motion to suppress the evidence should have been granted; and further that the arrest and search and seizure of the appellant were without reasonable or probable cause.

We think there is no merit to either contention.

[1, 2] An officer may make an arrest when he has reasonable cause for believing the person arrested has committed a felony. The facts in this matter have heretofore been set forth in considerable detail, and no useful purpose would be served in repeating them. Suffice it to say that when the officers saw the furtive and suspicious conduct of the defendant, they had good reason to believe an offense was being committed. See, People v. Coleman, 134 Cal.App.2d 594, 286 P.2d 582; People v. Brown, 147 Cal.App.2d 352, 305 P.2d 126; People v. Blodgett, 46 Cal.2d 114, 117, 293 P.2d 57; People v. White, 167 Cal.App.2d 794, 334 P.2d 963; People v. Amado, 167 Cal.App.2d 345, 334 P.2d 254.

[3, 4] With reference to the contention that the name of the informer should have been given, it is noted that the informer in this case was not a participant in, nor a witness to the defendant's arrest. Disclosure is not required where there was reasonable cause for a search and seizure entirely apart from the informer's communication which led the police to suspect the defendant. People v. Williams, 51 Cal.2d 355, 333 P.2d 19. For all that appears from the face of the record, the name of the informant would in nowise assist the defendant. There is nothing to show that the informer was even in the vicinity at the time of the transaction, nor is there anything to show or indicate that the informer participated in the crime with which the defendant is charged. Furthermore, the stipulation does not necessarily assume, nor is it made certain thereby, that the officer knew the name or identity of the informant. There was no effort made to question the officer (not even with reference to the information claimed to have been received in other matters which led the officer to the conclusion that the information supplied was reliable), and we can only assume that the defendant was satisfied with the record in its unclear state. See, People v. Prewitt, 52 Cal.2d 330, 341 P.2d 1.

There was, in any event, justification for the arrest of the defendant because of his unusual, suspicious and furtive conduct which took place in the immediate view of the officers. The informer's communication as to the area was not in anywise the sole justification for the police to make the arrest. See, Scher v. United States, 305 U.S. 251, 254, 59 S.Ct. 174, 83 L.Ed. 151. There was no testimony that the informer was with the officers, nor does it appear that the informer gave the police any names of any persons whomsoever.

We think that under the circumstances of this case, there was sufficient evidence, apart from anything the informer told the officers, to show reasonable cause for the arrest. The court did not, under the circumstances, err in its rulings.

The attempted appeal from the sentence is dismissed. The judgment and the order denying the motion for a new trial are, and each is affirmed.

WHITE, P. J., and LILLIE, J., concur.

171 Cal.App.2d 751

Larry GOLDNER, Plaintiff and Appellant,
v.
Harry JAFFE, Defendant and Respondent.
Civ. 23701.

District Court of Appeal, Second District, Division 1, California.
July 7, 1959.

Action by manager of hotel against the owner thereof on a note given in connection with release of owner from claims of manager upon termination of employment of manager. From adverse judgment of the Superior Court, Los Angeles County, Edward R. Brand, J., the manager appealed. The District Court of Appeal, Lillie, J., held that evidence sustained finding that the note was executed without any consideration whatsoever.

Judgment affirmed.

1. Appeal and Error ⟹931(1)

Reviewing court will view the evidence in light most favorable to party prevailing in lower court.

2. Bills and Notes ⟹518(1)

In action by manager of hotel against the owner thereof on a note given in connection with execution of a release by manager of claims against owner upon termination of manager's employment, evidence sustained finding that the note was executed without any consideration whatsoever. West's Ann.Civ.Code, § 1577.

3. Evidence ⟹432

In action by manager of hotel against the owner thereof tried on theory that owner's consent to a release from claim of manager constituting consideration for note was given under a mistake of fact, parol evidence was properly admitted to show want of consideration affirmatively alleged by owner, and such evidence did not vary terms of written instrument but only amounted to an impeachment of the document's character.

4. Master and Servant ⟹33½

Where manager of hotel was given a note by owner for release by manager of claims against owner, who had agreed that manager was to receive 25% of operating profits and 25% of any profit derived from sale of a hotel if it should occur prior to termination of employment of manager, manager's discharge prior to sale of hotel foreclosed any claim of manager for 25% of any profit derived from sale.

5. Release ⟹57(2)

In action by manager of hotel against owner on a $5,000 promissory note given for release by manager of claims against owner, who had agreed that manager was to receive 25% of operating profits and 25% of any profit derived from sale of a hotel if it should occur prior to termination of employment of manager, wherein there was evidence that hotel lost money during manager's employment and that after his departure every room in hotel was repainted and all the furniture excepting carpets was given away, evidence supported implied finding that manager did little, if anything, to build up the hotel and that he did not merit the bonus assertedly reflected by the consideration recited in the release.

6. Contracts ⟹258

Under statute permitting trial court to adjudicate rescission of a written contract, not any and every mistake is remediable. West's Ann.Civ.Code, § 1577.

7. Contracts ⟹143

Generally, when a person with capacity of reading and understanding an instrument signs it, he is, in absence of fraud and imposition, bound by its contents.

8. Contracts ⟹258

Under statute permitting trial court to adjudicate the rescission of a written contract for a mistake of fact not caused by neglect of a legal duty on part of person making mistake, ordinary negligence does not constitute the neglect of a legal duty. West's Ann.Civ.Code, § 1577.

9. Fraud ⟹20

A party who misrepresents the facts and induces other party to rely on his statements may not validly assert that latter's reliance was negligent absent some showing that other party's conduct, in light of his intelligence and information, was preposterous or irrational, and such rule is applicable even where person making representations believed them to be true, as long as error does not stem from an original error in judgment. West's Ann. Civ.Code, § 1577.

10. Release ⊂⇒58(5)

In action by manager of hotel against owner thereof tried on theory that owner's consent to a release from claim of manager constituting consideration for note was given under a mistake of fact, owner's conduct in paying little attention to what he was signing when he signed release was not as a matter of law preposterous or irrational and his original error was not of judgment.

11. Contracts ⊂⇒99(3)

Proof of mistake entitling a party to rescission of a contract should be clear, convincing and satisfactory.

12. Release ⊂⇒57(2)

In action by manager of hotel against owner therof, tried on theory that owner's consent to a release from claim of manager constituting consideration for note was given under a mistake of fact, evidence justified release from terms of agreement and from any obligation under the promissory note sued upon. West's Ann.Civ.Code, § 1577.

13. Novation ⊂⇒4

Where hotel manager, pursuant to verbal understanding, entered upon his duties as manager of hotel and unsigned contracts were prepared whereby manager was to receive 25% of operating profits and 25% of any profit derived from sale of hotel if sale should occur prior to termination of manager's employment, a new contract, modifying terms of hiring, was not created by execution of a release by manager upon termination of his employment.

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Melvin J. Klarin, Hollywood, for appellant.

Levy, Bernard & Jaffe, F. Filmore Jaffe, Los Angeles, for respondent.

LILLIE, Justice.

Plaintiff, as payee of a promissory note for $5,000 executed by defendant, brought this action for payment. Trial was before the court sitting without a jury. From a judgment in defendant's favor on the ground that there was no consideration for the instrument plaintiff has appealed.

[1] The following summary of the pertinent facts necessarily views the evidence in the light most favorable to the prevailing party. In re Estate of Isenberg, 63 Cal.App.2d 214, 217, 146 P.2d 424. In the summer of 1955, defendant asked plaintiff to take over the management of the Chase Hotel, situated in Santa Monica and then principally owned by defendant. The parties had known each other for some 18 years. Compensation was discussed and this and other terms of employment were placed in the hands of their respective attorneys who drafted contracts presumably expressive of their clients' wishes. However, neither document was ever signed. Meantime, pursuant to a verbal understanding, plaintiff entered upon his duties as manager at an initial monthly salary of $750 which was increased a few months later to $1,000 which included room and meals for plaintiff and his wife. As a further inducement for his employment and salary, the unsigned contracts likewise so providing, plaintiff was to receive 25 per cent of the operating profits and 25 per cent of any profit derived from the sale of the hotel if the latter should occur prior to the termination of his employment which, curiously enough, was for no fixed term. Defendant testified that these percentages were in the nature of a bonus for extra services in building up the hotel.

[2] During the early part of May, 1957, the parties had a meeting at the hotel and defendant then advised plaintiff that "the deal (wasn't) working out." Plaintiff said: "Now that you are firing me you can probably sell the property for more money,

and besides you said to me that I will get 25% of the profits of the hotel." Defendant replied: "All right. I will give you $1,000 severance pay, and I will give you $5,000 (a sum suggested by plaintiff) if I have to pay you for any profit beyond the time your employment ceases." According to the defendant, plaintiff reasoned that he was entitled to at least $5,000 "for doing the work he did to build (up) the building and for the purpose of releasing me (from) any proceeds from a sale I would handle after he did leave my employment."

Mutual releases, prepared by the parties' attorneys, were then executed. Payment to plaintiff of $1,000 "for services rendered as manager," plus the execution of the note in suit, are recited as consideration therefor. When defendant defaulted on the note, plaintiff brought this action in the usual form; the answer denied delivery, and by way of separate affirmative defenses pleaded total failure of consideration and the exercise of coercion and duress. Though failing to make any finding on this latter claim, the trial court concluded that the note was executed "without any consideration whatsoever."

The sole contention on this appeal is the sufficiency of the evidence to support the foregoing finding. For reasons hereinafter stated, we are of the view that it is without merit.

[3–5] The action was tried on the theory, and the court impliedly found, that the respondent's consent to the release, constituting the consideration for the note sued upon, was given under a mistake of fact (Civil Code, section 1577). To that end, parol evidence was properly received to show the want of consideration affirmatively alleged; such evidence does not result in varying the terms of the written instrument, but amounts to an impeachment of the document's character (Cooper v. Cooper, 3 Cal.App.2d 154, 159, 39 P.2d 820; Richardson v. Lamp, 209 Cal. 668, 670, 290 P. 14). Furthermore, the unsigned contracts of employment, presumably reflecting the parties' respective thinking, were admitted without objection. An examination of both instruments, as well as the oral testimony adduced at the trial is persuasive of respondent's contention that appellant had no meritorious claim save for services rendered as manager to May 5, 1957, when the releases were executed. As hereinbefore pointed out, the parties' agreement called for a bonus payment to appellant realizable (1) from the hotel's operating profits and (2) from the sale of the property during the term of appellant's employment. Appellant's discharge prior to the sale foreclosed any claim under the latter. With respect to the bonus due to the hotel's operations profits, the evidence is quite conclusive that while appellant was manager the operation lost approximately $58,000. Also, appellant admits full reimbursement by respondent for moneys advanced in refurbishing the premises. In this connection, and tending to negate appellant's claim that much of the operating profits were put back into improvements, it appears that following his departure every room in the hotel was repainted and all the furniture, with the exception of 22 carpets, was given to the Salvation Army and the Volunteers of America. Under such circumstances, there is ample support for the implied finding that appellant did little if anything to "build up the hotel" and thus merit the bonus assertedly reflected by the consideration recited in the release.

[6] A more difficult question is presented by appellant's further argument that a case was not made out by respondent to bring him within the protective provisions of Section 1577 of the Civil Code. Under that section not any and every mistake is remediable (Reid v. Landon, 166 Cal.App.2d 476, 333 P.2d 432). As the statute declares, and as here pertinent, the mistake of fact must be one not caused by the neglect of a legal duty on the part of the person making the mistake, and consisting in an unconscious ignorance or forgetfulness of a past fact material to the controversy. Not without justification appellant

points out that respondent had access to, and was counseled by, an attorney of his own selection who assisted in the drafting of the release now sought to be avoided; that no steps were taken to rescind or cancel the instrument; that coercion was alleged but not established; in short, the bargain was struck by competent contracting parties.

[7, 8] It is the general rule, as stated in Palmquist v. Mercer, 43 Cal.2d 92, 98, 272 P.2d 26, 30, that "when a person with the capacity of reading and understanding an instrument signs it, he is, in the absence of fraud and imposition, bound by its contents." Respondent manifestly paid but little attention to what he was signing, for he testified that he did not recall the crucial provisions of his hiring agreement, as they are reflected by the unsigned contract, until two or three months before the trial. Such carelessness, says appellant, is a complete defense to respondent's claim of excusable mistake. Although the Supreme Court has observed that in nearly every instance of claimed mistake there is an element of carelessness (Van Meter v. Bent Construction Co., 46 Cal.2d 588, 594, 297 P.2d 644), it has also held that ordinary negligence does not constitute the neglect of a legal duty as that term is used in Section 1577 (46 Cal.2d at page 595, 297 P.2d at page 648).

[9–12] Furthermore, respondent also testified that he relied on appellant's representation that the latter was entitled to a percentage of the sale profits irrespective of his status as an employee. As previously noted, the agreement of the parties did not so provide, and the mistake was therefore a basic one—"material to the controversy." A party who misrepresents the facts and induces the other party to rely on his statements may not validly assert that the latter's reliance was negligent absent some showing that the other party's conduct, in the light of his intelligence and information, was preposterous or irrational (Van Meter v. Bent Construction Co., supra, 46 Cal.2d 588, 595, 297 P.2d 644). This rule is applicable even where the person making the representations believed them to be true (Reid v. Landon, supra, 166 Cal.App.2d 476, 333 P.2d 432) as long as the error does not stem from an original error in judgment (M. F. Kemper Const. Co. v. City of Los Angeles, 37 Cal.2d 696, 703–704, 235 P.2d 7). We cannot say that respondent's conduct as a matter of law was "preposterous" or "irrational," or that his original error was one of judgment. Proof of mistake should be clear, convincing and satisfactory—and that means to the trial court (Ciulla v. Telschow, 152 Cal.App.2d 597, 600, 313 P.2d 188). We have here a circumstance of admitted intimate friendship bordering on a confidential relationship between the parties. Respondent was an absentee owner who seemingly had so far lost contact with this particular operation that he permitted it to lose $58,000 over a three-year period, and the consideration of $5,000 for this release from appellant's non-existent claims constituted the closing chapter in an unfortunate venture. Under all the circumstances to enforce payment thereof would be to confirm an injustice, and we conclude that the evidence justified relief from the terms of the agreement (Civil Code, Section 1577) and in turn from any obligation under the promissory note sued upon.

Appellant has cited several cases holding that forbearance to sue is sufficient consideration for a release and that the claim need only be of doubtful validity. Here, however, the thing contracted for was valueless and hence the contract of release became a mere nullity (Holcomb v. Long Beach Investment Co., 129 Cal.App. 285, 297, 19 P.2d 31; City Street Improvement Co. v. Pearson, 181 Cal. 640, 650–651, 185 P. 962, 20 A.L.R. 1317).

[13] Likewise untenable is appellant's further claim that a new contract, modifying the terms of the hiring, was created by the release. This was a factual question impliedly rejected by the trial court.

The judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.

171 Cal.App.2d 651

Matter of the ESTATE of Elmer L. SANDERSON, also known as Elmer Lincoln Sanderson, and as E. L. Sanderson, and formerly known as Elmer L. Syster, Elmer Lincoln Syster and E. L. Syster, Deceased.

Balbena S. SYSTER, as Administratrix of the Estate of Harvey Syster, Contestant and Respondent,

v.

O'Neill P. MARTIN, as Executor, and Columbian Building Corporation of San Diego, the Roman Catholic Bishop of San Diego, a corporation sole, Charles F. Buddy and Thomas Ackerman, Legatees and Devisees, Defendants,

The Roman Catholic Bishop of San Diego, Appellant.

Civ. 5875.

District Court of Appeal, Fourth District, California.

July 1, 1959.

Rehearing Denied July 29, 1959.

Hearing Denied Aug. 26, 1959.

Will contest. The Superior Court, San Diego County, Joe L. Shell, J., entered a judgment and order refusing to admit will to probate and proponents appealed. The District Court of Appeal, Shepard, J., held that where none of the witnesses in a will contest testified as to events at the time the will was executed nor the testator's mental condition at that time, and none of the witnesses related any events which had any tendency to show that the testator at the time he made his will did not have a complete understanding of the character and condition of his property and of his relatives and persons who could expect to receive his testamentary favor, evidence was insufficient to support a finding that testator lacked testamentary capacity at the time of his execution of the will, notwithstanding testimony as to testator's eccentricities, and opinion testimony of acquaintances as to his unsound mind.

Judgment and order reversed with directions.

1. Wills 🔑53(1)

In will contest where testator's mental competency was challenged, trial court did not err in admittting testimony of witnesses produced by contestant as intimate acquaintances, but court, in so doing, would be deemed to have properly exercised its discretion.

2. Wills 🔑400

In a will contest, District Court of Appeal was required to view the evidence in the light most favorable to respondent.

3. Wills 🔑31, 41

Forgetfulness, inability to carry on a conversation, personal eccentricities, and mental confusion do not furnish grounds for holding that a testator lacked testamentary capacity.

4. Wills 🔑55(1, 4)

Where none of the witnesses in a will contest testified as to events at the time the will was executed nor the testator's mental condition at that time, and none of the witnesses related any events which had any tendency to show that the testator at the time he made his will did not have a complete understanding of the character and condition of his property and of his relatives and persons who could expect to receive his testamentary favor, evidence was insufficient to support a finding that testator lacked testamentary capacity at the time of his execution of the will, notwithstanding testimony as to testator's eccentricities, and opinion testimony of acquaintances as to his unsound mind.

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Howard S. Dattan, Encinitas, for appellant.

Robert A. Kaiser, Jeremiah F. O'Neill, Jr., Kaiser & O'Neill, Oakland, for respondent.

SHEPARD, Justice.

This is an appeal from a judgment and order denying admission to probate the will of Elmer L. Sanderson after jury verdict finding that on the day the instrument was executed the deceased, Elmer L. Sanderson, was not competent to make a will. Initially, the grounds of opposition to probate of the will included not only lack of competency of the deceased to make a will, but also that said document was not executed in the form and manner required by statute; that decedent died within 30 days of the execution of the document; that the document was within the purview of Probate Code Section 41; and that the document was not the free and voluntary act of the decedent, but the making and execution thereof was procured by undue influence. Prior to trial, the ground of undue influence was abandoned by contestant. During the trial and before the matter reached the jury for decision the trial court correctly ruled, as a matter of law, that the document conformed in form and manner to the requirements of statute. At the close of the evidence, prior to argument and jury instructions, the trial court correctly removed from the consideration of the jury the ground of opposition that the document was within the purview of Probate Code Section 41, and so instructed the jury.

The will, subject of the contest herein, was executed by decedent on January 24, 1957. He died February 1, 1957, of coronary thrombosis. He was unmarried and left no issue. His only heir at law was his adult brother, Harvey W. Syster, the original contestant herein. From June 20, 1953, until his entry into a hospital on January 21, 1957, on a diagnosis of heart trouble, the deceased lived in a rest home in San Diego, California. At the time of his death he was apparently of the approximate age of 75 years.

In 1904, he was committed to a California State Hospital for the mentally ill on a diagnosis of religious mania, and less than a year later he was discharged. In 1922, he was again admitted to a state hospital for the mentally ill on a diagnosis of "dementia praecox hebephrenic". In 1926, he was discharged as improved. In 1936 he was appointed executor of his mother's estate by the probate court of Alameda County and apparently completed his duties therein. In 1941, a title company noted his record of commitment with no formal record of discharge and he appeared before the board of examiners of the state hospital. After examination he was formally discharged as recovered.

The testimony indicates that he had approximately $27,000 in various building and loan deposits and owned some real estate and corporate stock. In 1955, he joined the Knights of Columbus, a fraternal organization, and in that connection met the attorney who drew his will in the hospital on January 24, 1957, at his request. The attorney had met him a number of times in a fraternal capacity, but had not served him in a legal capacity prior to the date of drawing the will. This attorney testified that he went to the hospital in response to a call to his father (also an attorney); that upon entering the room he found decedent sitting up on his bed, discussed with deceased who his relatives were and what his property was, and was told by deceased of the existence of a brother living in San Francisco (the original contestant); that the brother was well fixed and that he did not want to leave anything to him. The will was written in longhand by the attorney at the direction of deceased and was read back to deceased. The will was then and there executed by the deceased, the attorney and a companion attorney acting as subscribing witnesses, the testator and witnesses all being present during drafting, reading and execution of the will. The attorney took the will with him under directions to have a typewritten copy made and mailed to deceased at the rest home. Later, one of the residents of the rest home, at decedent's request, brought the typewritten copy of the will to decedent at the hospital. The will names Columbian Building Corporation of San Diego; The Roman Catholic Bishop of San Diego, Charles F. Buddy; Thomas Ackerman; St. Jude's Roman Catholic Church of San Diego; St. Ann's Roman Catholic Church of San Diego, as the sole legatees. The two subscribing witnesses to the will, in addition to testifying about the conversation respecting deceased's property and relatives and what he desired to put into his will, testified that in their opinion at the time of the execution of the will the deceased was mentally competent and of sound mind. The physician who attended the deceased at the hospital, and who had been deceased's personal physician for some years preceding, testified that in his opinion deceased had the mental capacity to understand and recollect the nature and situation of his property and to remember and understand his relations to persons about him, the relatives or persons who might expect to benefit from his will, and that he believed deceased to be mentally competent. A deputy district attorney who had been acquainted with deceased for two or three years prior to his death gave similar testimony. The credit manager of the hospital related the business conversations of deceased, and stated he was clear and coherent in talking. The nurse who attended him during his stay in the hospital recounted her contacts and conversations with him, her ability to clearly understand him, that he was quiet, cooperative and gave her no reason to doubt his mental competency.

[1] Appellant contends that the court was in error in admitting testimony of the witnesses produced by contestant as intimate acquaintances. We see no merit in this contention. As was said in Re Estate of Perkins, 195 Cal. 699, 710 [13], 235 P. 45, 49:

> "Whether or not a witness may testify as an intimate acquaintance is a question of fact for the trial court to determine. That court is vested with a wide discretion, and its determination is not subject to review unless the court has abused its discretion. Such an abuse is not here shown."

[2] Appellant next contends that the evidence produced by the contestant was insufficient to support the judgment. With this we agree. Under the rule announced in Re Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689, we must, on appeal, view the evidence in the light most favorable to respondent. The witnesses for the contestant were six in number and were all residents with deceased at a rest home, either all or part of the three or four years he there resided. Because of our views of the ultimate conclusion to be reached in this cause, we find it desirable to briefly recount their testimony in the light most favorable to contestant, who is here the respondent.

Walter E. Lowe knew the testator for four and a half years, saw and observed him daily; ate with him in the same dining room; observed him talking to other people; played shuffleboard with him; that he had no power of mind to carry on a conversation; he did not act naturally; he was destructive in pruning bushes and trees in the garden; he started a dangerous fire in the garden; he could not keep a shuffleboard score; he was emotional, moody and of unsound mind.

John D. Greiner saw deceased practically every day during the time the deceased lived in the rest home; saw him at meal times, in the halls and in the garden; saw the deceased enter another man's room without permission; saw destructive pruning; saw unreasonable anger; witness once thought deceased was going to strike him.

Richard N. Taylor knew deceased at the rest home about three years; ate at the same table; saw and observed him daily; deceased could not carry on a continuous coherent conversation; would wander off on some other subject; was ungrateful; threatened to beat him up when witness helped deceased move furniture; flew into a rage over nothing; would froth at the mouth; room like a pig pen; that he was irrational and had an unsound mind.

Mrs. Frances P. Nelson knew deceased at the rest home about two years; worked in the garden with him; saw him daily; talked to him often; deceased could not carry on a continuous conversation; became irritated because she would not accept his religion; once thought he was bowing to the sun; that he appeared to be interested in a Hindu cult book; said he was going to start a new church; that his conduct was cyclical in nature; quiet and courteous at times and again discourteous and angry; she made basins around the rose trees; he leveled all the basins around the rose trees; mumbled to himself; cried; said he was a Catholic. She expressed her opinion on the foregoing that the deceased was irrational and of unsound mind.

Mrs. Laura Baker, a practical nurse, worked at the rest home about two years; saw the deceased every day at least three times a day or oftener; talked with him little; he looked sick; held his hands over his head occasionally at meal time; apparently lacked gratitude; abruptness of speech; thought he was of unsound mind.

Mrs. Sadie Lytel, superintendent of the rest home for about two years prior to death of deceased, saw him daily; once asked him to plant pansies and instead he planted petunias; when she made him dig them up he flew into a rage and threatened to strike her; he had a very untidy room; she believed him to be of unsound mind.

Viewed in the light most favorable to the respondent there was a complete absence of any evidence that the deceased at the time of making the will, or at any other time immediately preceding or succeeding its execution, was lacking in those qualities of mind necessary to make him competent in a testamentary capacity.

In Re Estate of Perkins, supra, wherein the judgment of the trial court denying probate of a will was reversed, there was testimony that during the four years prior to testatrix' death her disposition was greatly changed; that she was highly irritable; extremely close in financial matters where she had previously been generous; suffered severe pain; required sedatives; sometimes had "starey" eyes; delirious; subject to hallucinations at times; forgetful of immediately passed events; had illusions about torn night clothing, impending marriage and trips to Europe; could not follow the reasoning of her financial adviser; was "clear off" at times; talked incoherently; that she was not of sound mind. The supreme court there said, with respect to this evidence, "It does not show that she was of unsound mind in the legal acceptation of the term at the time of the making of the will. [Citations] And the question to be determined is not what might have been her mental condition, but what in fact was her mental condition at the time that she made the will."

In Re Estate of Sexton, 199 Cal. 759, 251 P. 778, 782, in which the order of the trial court in granting a new trial after the jury had returned a verdict upholding the will was reversed, the testimony showed the deceased was suffering from arterio sclerosis; that she had suffered paralytic strokes; gradually grew worse; mentally extremely weak; feeble minded; was not able to transact important business; easily influenced; failed to answer questions; irrational. The supreme court there said:

> "Ability to transact important business, or even ordinary business, is not the legal standard of testamentary capacity, though it seems to be quite generally but mistakenly supposed, outside the ranks of the legal profession, that a capacity to transact important business is the criterion of fitness to make a valid will."

In Re Estate of Wright, 7 Cal.2d 348, 60 P.2d 434, 438, wherein the supreme court reversed the order of the trial court denying admission of a will to probate, the witnesses, including the subscribing witnesses to the will, expressed the view that the testator was of unsound mind, giving as the reasons therefor that the testator was queer; that he did not have in mind the legal description of his property; that he had a serious operation; that his living quarters were dirty; that he gave a witness a fish soaked in kerosene; that he insisted on buying furniture not for sale; turned the hose on children; drunk much of the time; accidental injury to head seemed to change him; ran out of the house only partly dressed; picked up articles from garbage cans and hid them around the house; put paper flowers on rose bushes; left home without explanation; recovered gifts from donees without explanation; falsely told of fictitious gifts to donees; failed to acknowledge his grandson; held his breath and appeared to be dead; malingered in the use of a wheel chair; kept bottles under his bed; failed to buy medicine; failed to keep engagements; unkindly. In speaking of this evidence as the basis of repeated statements of witnesses that he was of unsound mind, the court said:

> "The foregoing sets forth the full strength of contestant's case. Tested by the decisions of this court, the judgment is wholly without evidentiary support. There is no evidence that testator suffered from settled insanity, hallucinations, or delusions. Testamentary capacity cannot be destroyed by showing a few isolated acts, foibles, idiosyncrasies, moral or mental irregularities or departures from the normal unless they directly bear upon and have influenced the testamentary act."

In Re Estate of Lingenfelter, 38 Cal.2d 571, 241 P.2d 990, 996, in which the judgment of the trial court denying probate was reversed, the various witnesses based their testimony of unsoundness of mind on such factors as her being upset on the slightest provocation; that she would "disintegrate emotionally"; scream and yell; eyes become glassy; weep uncontrollably; weak will; easily led; extremely excitable; unreasonably jealous; psychoneurotic; severe pain in head; committed suicide. In speaking of this evidence the supreme court said:

> "Accepting that construction of the evidence most favorable to Lenore, it shows no lack of testamentary capacity at the time of the execution of the will presented for probate. There is testimony concerning isolated acts, foibles, idiosyncracies [sic], mental irregularities or departures from the normal which do not bear directly upon and influence the testamentary act. But much more than that is required to set aside bequests of property. * * *
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> "'Testamentary capacity cannot be destroyed by showing a few isolated acts, foibles, idiosyncracies [sic], moral or mental irregularities or departures from the normal unless they directly bear upon and have influenced the testamentary act.' In re Estate of Wright, 7 Cal.2d 348, 356, 60 P.2d 434.
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> 'Care must be taken to differentiate between mere unreasonable opinions and mental derangements. Testamentary capacity does not depend upon the testatrix' ability to reason logically or upon her freedom from prejudice. A belief may be illogical or preposterous, but it is not therefore evidence of insanity.'"

In Re Estate of Russell, 80 Cal.App.2d 711, 182 P.2d 318, 324, in which the judgment annuling the probate of a will was reversed, the testimony of various witnesses that the deceased was of unsound mind was based on such matters as bad color; incoherent speech; unreasonable repetition; refusal to follow financial advice; bad physical condition; weakened condition; mentally in stupor; failure to recognize nurse; coma; failure to articulate properly; unable to understand explanations; and the like. The appellate court, in speaking of this evidence, said:

> "While in the instant case, the testatrix was in feeble health, suffering from disease, aged and infirm, these facts are not sufficient of themselves to establish testamentary incapacity unless it be shown by a preponderance of the evidence that her condition of mind and body *at the time of the execution of the will* was such that she was unable to understand the nature and situation of her property and the disposing of it intelligently. * * *
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> "Before a solemnly executed will may be set aside, the claimed infirm-

> ities of mind or body must be shown to have had a direct bearing upon the testamentary act, and the evidence must establish the fact that the deceased devised or bequeathed her property in a manner which, except for the claimed infirmities, she would not have done."

In Re Estate of Llewellyn, 83 Cal.App. 2d 534, 189 P.2d 822, 834, 191 P.2d 419, in which the trial court's judgment in refusing to admit the will to probate was reversed, the evidence upon which the witnesses declared the testatrix incompetent was based on irritability; physical pain; poor memory; hazy; bad orientation; poor memory of business affairs; tired; sick; senile; confused; childish about his personal effects; and illusions about cigaret burning in bed. In holding that the evidence offered was insufficient as a matter of law to show inconsistency as of the time the will was executed, the court said:

> "It is true of course that evidence of the condition of the testator's mind before and even after the date of the testamentary act was admissible, but it assumes importance only insofar as it bears upon that condition at the very time of the execution of the will. * * *
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> "The presumption always is that a person was of 'sound mind' at the time of the execution of his will, and the burden therefore always rests upon the contestants to show affirmatively, and by a preponderance of the evidence, the incapacity of the testator, and the further fact that except for alleged infirmities of mind or body, he bequeathed his property in a manner that he otherwise would not have done."

[3] In Re Estate of Selb, 84 Cal.App. 2d 46, 190 P.2d 277, 279, where the appellate court reversed a judgment denying probate of a will, the opinion of the witnesses that the testatrix was of unsound mind was based on such matters as that she was very old and had deteriorated mentally and physically; that she was very repetitious; forgetful; 93 years of age; very different than 60 years before; appeared to have failed mentally and physically; untidy; dirty; at times she would not recognize her friends; did not seem to remember one of her grandson's children; frail; and feeble. The appellate court in speaking of the evidence said:

> "It has been held over and over in this state that old age, feebleness, forgetfulness, filthy personal habits, personal eccentricities, failure to recognize old friends or relatives, physical disability, absent-mindedness and mental confusion do not furnish grounds for holding that a testator lacked testamentary capacity. * * *
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> "It is well established that opinions of witnesses regarding the mental soundness or testamentary capacity of a testator are of no greater value than the reasons given in support of the opinions."

Dozens of other expressions in different language by the courts of last resort have been enunciated, and all are consistent with the foregoing expressions. In the case at bar, as in most of the cases hereinbefore cited, none of the witnesses testified as to the events *at the time* the will was executed nor of the testator's mental condition *at that time*. None of the witnesses in the case at bar related any events which had any tendency to show that the testator at the time he made his will did not have a complete understanding of the character and condition of his property and of his relatives and persons who could expect to receive his testamentary favor. On the contrary, the testimony of the subscribing witnesses was to the effect that he knew and understood the condition of his property, remembered his brother who was his nearest relative but affirmatively decided his brother did not need help. He had been a member and attendant of the Catholic Church for a considerable time previous to his death, he had no other known close relatives, and we see nothing unnatural in the will itself.

[4] Our views hereinbefore expressed, that the evidence is as a matter of law insufficient to support the judgment, renders unnecessary any discussion of other points raised by appellant.

At the conclusion of the evidence and prior to final argument proponent properly moved for a directed verdict, and after the verdict moved for a judgment notwithstanding the verdict.

The judgment and order of the court refusing to admit the will to probate is reversed, with directions to admit the will to probate.

GRIFFIN, P. J., and MUSSELL, J., concur.

Hearing denied; SCHAUER and PETERS, JJ., dissenting.

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171 Cal.App.2d 831

Application of Robert Lee DAILY for Writ of Habeas Corpus.

Cr. 6743.

District Court of Appeal, Second District, Division 1, California.

July 9, 1959.

Proceeding on petition for writ of habeas corpus. The District Court of Appeal, Nourse, J. pro tempore, held that where petitioner pleaded guilty to a felony charge in Missouri and he was placed on probation for two years and he gave a probation bond and with consent of state parole officers went to California and within two years was found guilty of burglary and forgery, proceedings on information in Missouri were not terminated but merely suspended by order placing petitioner on probation, and felony with which he was charged in Missouri and to which he pleaded guilty was an extraditable offense, and fact that petitioner left Missouri with consent of parole officers of that state did not affect his status as a fugitive from justice, and extradition of petitioner following forfeiture of his recognizance did not place him in double jeopardy.

Writ of habeas corpus discharged and petitioner remanded to custody of sheriff with directions.

Criminal Law ⇨163
Extradition ⇨30

Where petitioner pleaded guilty to felony charge in Missouri and he was placed on probation for two years and he gave a probation bond and with consent of state parole officers went to California and within two years was found guilty of burglary and forgery, proceedings on information in Missouri were not terminated but merely suspended by order placing petitioner on probation, and felony with which he was charged in Missouri and to which he pleaded guilty was an extraditable offense, and fact that petitioner left Missouri with consent of parole officers of that state did not affect his status as a fugitive from justice, and extradition of petitioner following forfeiture of his recognizance did not place him in double jeopardy. V.A.M.S. § 548.231; West's Ann.Pen.Code, §§ 1506, 1548.2.

Leonard Nasatir, Los Angeles, for petitioner.

William B. McKesson, Dist. Atty. of Los Angeles County, Jere J. Sullivan, Lewis Watnick and Ralph F. Bagley, Deputy Dist. Attys., Los Angeles, for respondent.

NOURSE, Justice pro tem.

Petitioner is in the custody of the sheriff of the county of Los Angeles under warrant of arrest issued by the governor of this state pursuant to the requisition of the Governor of Missouri for the extradition of petitioner.[1]

In June 1956, petitioner was, through information filed by the prosecuting attorney of the county of Boone, state of Missouri, charged with the theft of certain personal property of the value in excess of $200 (a felony). After his arrest and arraignment and plea of not guilty he withdrew his plea of not guilty and entered a plea of guilty and applied to the circuit court for probation. On October 16, 1956, the court suspended the proceedings and placed petitioner on probation for a term of two years. The terms of the probation being that during the term of the probation, petitioner should not violate the law and abide by all probation rules and regulations adopted by the court. The court required that petitioner give, and petitioner did give a probation recognizance or bond in the amount of $300. Petitioner, with the consent of the state parole officers, left the state of Missouri and came to California. In August 1958, petitioner was in the superior court of the state of California in and for the county of Los Angeles, found guilty of one count of burglary and six counts of forgery. The state parole officer of Missouri was advised of this fact by the probation officer of the California court and the circuit court which had granted probation revoked that probation, forfeiting petitioner's recognizance, and ordered that a warrant issue for the arrest of the defendant.

Petitioner asserts that as he came to California with the consent of the parole officer of the state of Missouri he is not a fugitive from justice and may not be extradited. He further asserts that the violation of the terms of probation is not an extraditable offense and that even if it were, his probation has not been terminated in accordance with the laws of the state of Missouri and he is therefore not subject to extradition.

We see no merit in any of these contentions. In the first place the crime on account of which Missouri seeks to extradite petitioner is the crime with which he was originally charged by the information. The proceedings on that information were not terminated but merely suspended by the order placing petitioner on probation and the felony with which he is charged in Missouri and to which he pleaded guilty is an extraditable offense and the statutes of both Missouri and California expressly provide for the extradition of one who at the time of violation of parole or probation is found in the state other than that in which he was originally charged. (See Vernon's Annotated Missouri Statutes, vol. 39, § 548.231 as amended by the revised statutes of Missouri in 1953; California Penal Code, § 1548.2.)

The fact that petitioner left Missouri with the consent of the parole officer of that state does not affect his status as a fugitive. In re Fedder, 143 Cal.App.2d 103, 299 P.2d 881.

Petitioner also asserts that the forfeiture of his recognizance was a penalty exacted for his violation of the terms of his probation and that to extradite him to Missouri would place him in double jeopardy. This contention is so tenuous as to hardly be worthy of comment. The recognizance given was in the nature of bail and its forfeiture had no effect upon the right of the Missouri court to hear and try the question of his violation of probation and to sentence him under the information originally filed against him.

The writ of habeas corpus heretofore issued is discharged and petitioner is remanded to the custody of the sheriff of the county of Los Angeles, state of California, with directions to that officer to deliver petitioner pursuant to the warrant of arrest issued by the governor of this state to the proper officers of the state of Missouri upon the judgment of this court discharging the writ of habeas corpus becoming final. (As to date of finality see Penal Code, Sec. 1506, and In re Murdock, 5 Cal.2d 644, 646, 647, 55 P.2d 843.)

WHITE, P. J., and FOURT, J., concur.

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[1] The requisition fully complies in every detail with the provisions of section 1548.2 of the Penal Code and petitioner does not attack its sufficiency.

171 Cal.App.2d 624

Alfonso ROSALES and Salvatore D'Amico, Petitioners and Appellants,

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL of the State OF CALIFORNIA, Respondent.

Civ. 18371.

District Court of Appeal, First District,
Division 2, California.
July 1, 1959.
Rehearing Denied July 31, 1959.
Hearing Denied Aug. 26, 1959.

Proceeding on accusation filed by Department of Alcoholic Beverage Control charging that premises operated by holders of an on-sale liquor license were a resort for prostitutes and were used as a disorderly house. The Alcoholic Beverage Appeals Board affirmed the decision of the hearing officer recommending revocation of the license. The Superior Court, Santa Clara County, Harold Holden, J., issued an alternative writ of mandamus and after hearing discharged the writ and denied peremptory writ, and the licensees appealed. The District Court of Appeal, Draper, J., held that evidence sustained finding of hearing officer that premises were used as a disorderly house to which people resorted for purposes injurious to public morals and health.

Judgment affirmed.

1. Appeal and Error 🔑1010(1)

Provisions of Constitution and Codes for review to determine whether "findings are supported by substantial evidence in the light of the whole record" signify no more than the adoption by the Legislature of the "substantial evidence" rule as generally applied in judicial proceedings. West's Ann.Bus. & Prof.Code, § 23084; West's Ann.Const. art. 20, § 22; West's Ann.Code Civ.Proc. § 1094.5.

2. Intoxicating Liquors 🔑108(5)

In proceeding on accusation filed by Department of Alcoholic Beverage Control charging that premises operated by holders of an on-sale liquor license were a resort for prostitutes and were used as a disorderly house, evidence sustained finding of hearing officer that premises were used as a disorderly house to which people resorted for purposes injurious to public morals and health. West's Ann.Bus. & Prof.Code, § 25601.

3. Intoxicating Liquors 🔑108(10)

Fixing of penalty for violations by holders of on-sale liquor license is vested in discretion of the Department of Alcoholic Beverage Control, and its determination will be disturbed only where there is a clear abuse of discretion.

4. Intoxicating Liquors 🔑106(2)

Department of Alcoholic Beverage Control did not abuse its discretion in revoking on-sale license for conduct of license holders in permitting their premises to be used as a disorderly house. West's Ann. Bus. & Prof.Code, § 25601.

5. Intoxicating Liquors 🔑108(10)

Fact that Department of Alcoholic Beverage Control found in favor of a nearby licensee upon like charges and comparable evidence furnished no basis for reversal of revocation of license of another licensee.

Mauroce H. Hardeman, San Jose, for appellants.

Stanley Mosk, Atty. Gen., Wiley W. Manuel, Deputy Atty. Gen., for respondent.

DRAPER, Justice.

Accusation filed by respondent Department of Alcoholic Beverage Control charged in Count I that the premises operated by petitioners under an on-sale liquor license were a resort for prostitutes, and in Count II that the premises were used as a disorderly house. A hearing officer took evidence, found both charges to be true, and recommended revocation on each of the counts "severally and separately." The department adopted this recommendation as its decision. The Alcoholic Beverage Appeals Board affirmed. The Superior Court issued alternative writ of mandate but, after hearing, discharged that writ and denied peremptory writ. Petitioners appeal.

[1] Petitioners argue that the Appeals Board is required to weigh the evidence and determine the credibility of witnesses. Impliedly, they argue that a like function is to be performed by this court. The argument is based upon the provisions of Constitution and codes providing for review to determine whether the "findings are supported by substantial evidence in the light of the whole record" (Bus. & Prof.Code, § 23084; Cal.Const., Art. XX, § 22; Code Civ.Proc., § 1094.5). Appellants point to construction of comparable statutory language by the United States Supreme Court. Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 930. Any question as to the California rule has been resolved since filing of the briefs in our case. It is now settled that the quoted language signifies "no more than the adoption by the Legislature * * * of the 'substantial evidence' rule as generally applied in judicial proceedings in this state * * *" Martin v. Alcoholic Bev. etc. Appeals Bd., 52 Cal. 2d 238, 340 P.2d 1, 6.

[2] Examined in the light of this rule, the record made before the hearing officer and reviewed by the Superior Court reveals substantial evidence to support the finding that appellants permitted their premises to be used as a disorderly house to which people resorted for purposes injurious to the public morals and health (Bus. & Prof. Code, § 25601). It is unnecessary to recite the evidence in detail. It shows that prostitutes solicited acts of prostitution upon the premises under circumstances clearly supporting the inference that they were knowingly permitted to do so by licensees or their employees; that drinks were served to obviously intoxicated persons; and that lewd and lascivious acts were performed there with the knowledge and cooperation of employees. The evidence thus is ample to sustain the order of revocation as to Count II. Swegle v. State Board of Equalization, 125 Cal.App.2d 432, 270 P.2d 518. It is clear that the department, in revoking the license "on each of Counts I and II severally and separately," considered revocation the proper penalty on either count alone. Mast v. State Board of Optometry, 139 Cal.App.2d 78, 92–93, 293 P.2d 148. Thus it is unnecessary to consider appellants' attacks upon the sufficiency of the evidence to support the finding as to Count I.

[3, 4] Appellants argue that revocation is an excessive penalty for the violation here established. But the fixing of penalty is vested in the discretion of the department, and its determination will be disturbed only where there is a clear abuse of discretion. Martin v. Alcoholic Bev., etc., Appeals Bd., 52 Cal.2d 238, 340 P.2d 1; Macfarlane v. Department of Alcoholic Bev. Control, 51 Cal.2d 84, 330 P.2d 769. On the record here, there is nothing to indicate abuse of discretion in the fixing of penalty.

[5] Finally, appellants claim that at the same time revocation of their license was ordered, the department found in favor of a nearby licensee upon like charges and comparable evidence. This, they say, requires reversal as to them. Appellants cite no authority for the view that this circumstance, if true, would require reversal in the present case. But even if this were the rule they have not brought themselves within it. The proceedings against the nearby licensee are not before us. The record in our case contains nothing to show what charges were made or what evidence produced in the other case. Thus the claim affords no possible ground for reversal here.

Judgment affirmed.

KAUFMAN, P. J., and DOOLING, J., concur.

171 Cal.App.2d 627

Robert A. FOLDEN, E. H. Hodges and Jasper Bono, individually and doing business as Trio Food Center, Plaintiffs and Appellants,

v.

Grace Helen LOBROVICH, Defendant and Respondent.

Civ. 18376.

District Court of Appeal, First District, Division 2, California.

July 1, 1959.

Hearing Denied Aug. 26, 1959.

Action for money had and received. From adverse judgment of the Superior Court, Santa Clara County, N. J. Menard, J., the plaintiffs appealed. The District Court of Appeal, O'Donnell, J. pro tem., held that where plaintiffs entered into contract with defendant under which plaintiffs agreed to pay $2,400 to apply to rent for last six months of period of lease if one was entered into, and if plaintiffs were unable to secure leases on certain other specified premises, proposed lease with defendant would become ineffective and defendant would be entitled to retain $2,400 as liquidated and accrued damages, provision for retention of $2,400 constituted neither a penalty or liquidated damages but rather was consideration for a right granted to plaintiffs to be relieved of their obligations under the contract should they not obtain leases on other properties, and plaintiffs were not entitled to recover such sum upon their failure to secure leases on other property.

Judgment affirmed.

See also 153 Cal.App.2d 32, 314 P.2d 56.

1. Damages ⚷78(6)

Landlord and Tenant ⚷34(1)

Where plaintiffs entered into contract with defendant under which plaintiffs agreed to pay $2,400 to apply to rent for last six months of period of lease if one was entered into, and if plaintiffs were unable to secure leases on certain other specified premises, proposed lease with defendant would become ineffective and defendant would be entitled to retain $2,400 as liquidated and accrued damages, provision for retention of $2,400 constituted neither a penalty nor liquidated damages but rather was consideration for a right granted to plaintiffs to be relieved of their obligations under contract should they not obtain leases on other properties, and plaintiffs were not entitled to recover such sum upon their failure to secure leases on other property. West's Ann.Civ.Code, §§ 1670, 1671.

2. Appeal and Error ⚷171(1), 842(1)

Where plaintiffs entered into a contract with defendant under which they in effect paid $2,400 for privilege of having defendant's store building available for their use and occupancy for a 10-year term if they should be able to negotiate leases for other properties, interpretation of contract was purely a matter of law and reviewing court was not restrained from interpreting its true meaning and effect by reason of fact that a different interpretation was adopted by all concerned in the trial court, and reviewing court could consider theory advanced by defendant on appeal that $2,400 constituted consideration for right granted to plaintiffs to be relieved of their obligations under contract if they did not obtain leases on other properties although case was tried in lower court on theory that determinative issue was whether retention of sum by defendant constituted a penalty or liquidated damages. West's Ann.Civ.Code, §§ 1670, 1671.

◆

William Clark, San Jose, for appellants.

John J. Jones, San Jose, for respondent.

O'DONNELL, Justice pro tem.

[1] Plaintiffs, who were partners doing business under the name of "Trio Food Center," and defendant entered into the following written contract:

> "This agreement made on March 3, 1954 between Grace Lobrovich, the Owner, of 1378 Lincoln Avenue, San Jose, a store building; and the Trio

Food Center, a partnership, the Prospective Tenant.

"The Owner agrees to remodel said premises according to a certain plans and specifications, or its mutually approved modification and specifically to erect a new store front and partitions to provide two stores and a warehouse, and lease and rent same to the Tenant. Work on remodeling to begin at once and be completed on or before June 1, 1954.

"A standard lease to be prepared and executed prior to June first upon the following terms and conditions: lease period, 10 years: rent, $400 per month; preference option, 10 years additional; effective June 1, 1954; right granted to sublease.

"The Tenant shall pay the Owner $2400 cash, receipt of which is hereby acknowledged; said sum to apply to the rent for the last six months of the period of the lease; monthly rent is payable in advance when due.

"It is further agreed between Owner and Tenant that this proposed lease will become effective only if and when Tenant secure leasing agreements satisfactory to him, on the Mascovich property forming the corner store of Minnesota and Lincoln Aves. and the second lot from said corner on Minnesota Ave; also the dArtenay store building and parking lot adjoining. And it is further agreed that should Tenant fail to secure such agreements, all obligations created hereunder will become null and void, but the $2400 above stated shall be retained by the Owner as liquidated and accrued damage."

Pursuant to the contract defendant immediately began remodeling the store building. Plaintiffs were unable to secure leases on the other properties referred to in the contract. They notified defendant of this fact and demanded return of the $2,400 they had paid her under the contract. Defendant refused to return the money and plaintiffs brought this action for money had and received. Judgment was rendered in favor of defendant and plaintiffs appeal.

The case was tried in the lower court on the theory that the determinative issue was whether the provision in the contract for the retention by defendant of the $2,400 constituted a penalty (Civ.Code, § 1670) or liquidated damages (Civ.Code, § 1671). The trial court concluded that this clause constituted an agreement for liquidated damages and that defendant was therefore entitled to retain the $2,400. On this appeal defendant advances, for the first time, the theory that the provision for defendant's retention of the $2,400 constitutes neither a penalty nor liquidated damages, but rather that it is to be viewed as consideration for a right granted to plaintiffs to be relieved of their obligations under the contract should they not obtain leases on the other properties. We are of the opinion that this latter theory is the correct one.

Both section 1670 and section 1671 of the Civil Code are concerned only with breaches of contract. There is no breach of contract in our case. In fact, the provisions of the contract were fully complied with by both parties.

The essence of the contract is simply this: Plaintiffs bought, for the sum of $2,400, the privilege of having defendant's store building available for their use and occupancy for a ten year term should they be able to negotiate leases of the other properties. Having failed to secure such leases, the contract has, by its express terms, been fully performed and is at an end.

The employment of the term "liquidated damages" to describe the consideration paid by plaintiffs for the promises of defendant was, of course, unfortunate. However, this misdescription does not alter the nature or legal effect of the payment. In Kuhlemeier v. Lack, 50 Cal.App.2d 802, 123 P.2d 918, a case quite similar on its facts to the case at bar, the lessee was, by the terms of the lease, given the right to terminate the lease prior to its stated term, in which event, however, he would "forfeit" the advance rentals he had paid. The court said (50 Cal.App. 2d at page 807, 123 P.2d at page 921): "The so-called forfeiture provision came into operation solely as a result of the lessee's voluntary action in exercising the option to terminate the lease. Since the option was exercised in accordance with the terms of the contract, it cannot be considered as a breach of the contract." The court therefore held section 1670 of the Civil Code to be inapplicable. 50 Cal.App. 2d at page 808, 123 P.2d at page 921: "The fact that the parties have used the word 'forfeit' in the lease is not determinative of their interest. * * * The fact that in the present case the lessee has agreed to relinquish or 'forfeit' a right to a sum of money, instead of to pay a sum of money, does not alter the situation. In either event the payment of money, or the relinquishment of the right to demand the return of money, constitutes the consideration for the option to terminate the lease."

[2] Plaintiffs contend that we are precluded from considering the theory of the case now being advanced by defendant by the rule that a party may not, for the first time on appeal, change the theory of his case. Panopulos v. Maderis, 47 Cal.2d 337, 303 P.2d 738. However, an exception to this rule is recognized. In the Panopulos case the court said at page 341 of 47 Cal.2d, at page 741 of 303 P.2d: "If a question of law only is presented on the facts appearing in the record the change in theory may be permitted." We think that the exception to the rule is applicable to our case. The contract here involved, though awkwardly expressed, clearly spells out the rights and obligations of the respective parties. It does not need the assistance of parol evidence to determine what those rights and obligations are. "If the language of the instrument is clear and explicit the intention of the parties must be ascertained from the writing alone. Parol evidence is admissible only where the language used is doubtful, uncertain or ambiguous and only then in cases where the doubt appears upon the face of the contract." Eastern-Columbia v. System Auto Parks, 100 Cal. App.2d 541, 545, 224 P.2d 37, 40. To the same effect see United Iron Works v. Outer Harbor, etc., Co., 168 Cal. 81, 141 P. 917, and Crow v. P. E. G. Construction Co., Inc., 156 Cal.App.2d 271, 319 P.2d 47. The interpretation of the contract here involved is therefore purely a matter of law and we are not restrained from interpreting its true meaning and effect by reason of the fact that a different interpretation was adopted by all concerned in the trial court. 4 Cal.Jur.2d, p. 484.

The judgment is affirmed.

DOOLING, Acting P. J., and DRAPER, J., concur.

Hearing denied; TRAYNOR and PETERS, JJ., dissenting.

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172 Cal.App.2d 117

James INGRASSIA, Plaintiff and Respondent,

v.

Raymond C. BAILEY, Defendant and Appellant.

Civ. 23770.

District Court of Appeal, Second District, Division 2, California.

July 17, 1959.

Action for injunction. The Superior Court of Los Angeles County, John J. Ford, J., granted preliminary injunction, and the defendant appealed. The District Court of Appeal, Fox, P. J., held that where plaintiff leased his catering route in industrial area and a truck to operate the route to defendant and gave to defendant a route list showing names and addresses of the industrial concerns that defendant was to service, the place at which defendant was to park in order to serve the employees at a particular plant, the time the defendant was to arrive at each place, the time allotted for each stop, the departure time and the number of employees at each plant and the type and quality of food, beverage and sundries which would be required at each stop, and this information was made known to defendant in confidence and defendant agreed to treat such information as a trade secret and to hold it inviolate and the information was necessary to have in order to successfully operate the route and could not be acquired from a telephone directory merely listing the names and addresses of industrial plants, defendant received confidential information or trade secrets from plaintiff, who would be granted a temporary injunction restraining defendant from utilizing such information in operating defendant's own route upon the termination of the lease.

Affirmed.

1. Injunction 🔑136(3)

Where plaintiff leased his catering route in industrial area and a truck to operate the route to defendant and gave to defendant a route list showing names and addresses of the industrial concerns that defendant was to service, the place at which defendant was to park in order to serve the employees at a particular plant, the time the defendant was to arrive at each place, the time allotted for each stop, the departure time and the number of employees at each plant and the type and quality of food, beverage and sundries which would be required at each stop, and this information was made known to defendant in confidence and defendant agreed to treat such information as a trade secret and to hold it inviolate and the information was necessary to have in order to successfully operate the route and could not be acquired from a telephone directory merely listing the names and addresses of industrial plants, defendant received confidential information or trade secrets from plaintiff, who would be granted a temporary injunction restraining defendant from utilizing such information in operating defendant's own route upon the termination of the lease.

2. Monopolies 🔑12(4)

An agreement that defendant, who leased from plaintiff a catering route in industrial area and a truck to operate the route, would not, on termination of lease, solicit the customers made known to defendant in confidence was not invalid under statute providing that a contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void. West's Ann. Bus. & Prof.Code, § 16600.

3. Contracts 🔑217

Where defendant leased from plaintiff a catering route in industrial area and a truck to operate the lease and the agreement provided that the lease should continue from month to month but could be terminated by either party at any time for cause and defendant had two automobile accidents within a short period and casualty insurance on the truck was not thereafter available, this was sufficient to justify the plaintiff's termination of the contract.

4. Equity 🔑65(2)

In action by lessor of catering route in industrial area and a truck to operate route, to enjoin lessee, after termination of lease, from serving the plants on the routes with other equipment, evidence failed to show that plaintiff had received a "kick-back" from defendant's supplier of merchandise, so that plaintiff was not barred under the unclean hands doctrine from securing relief.

5. Appeal and Error 🔑954(1)
Injunction 🔑135

Whether a preliminary injunction shall be granted rests largely in the discretion of the trial court and will not be reversed on appeal unless there is a manifest abuse of discretion.

6. Injunction 🔑147

Record disclosed no abuse of discretion in granting lessor of catering route in industrial area and a truck to operate route a preliminary injunction restraining lessee, after termination of lease, from serving the plants on the route with other equipment.

Maurice Rose, Los Angeles, for appellant.

Sweeney, Irwin & Foye, William R. Sweeney, Los Angeles, for respondent.

FOX, Presiding Justice.

Plaintiff, proprietor of a catering route in the industrial area of Los Angeles, leased the same, together with a truck with which to operate it, to defendant. Upon plaintiff's terminating defendant's lease the latter procured other equipment and immediately resumed serving the employees of the plants where he had previously stopped. Plaintiff sought to enjoin defendant's activities. A preliminary injunction was granted. Defendant has appealed.

Plaintiff is engaged in the industrial catering business, which is carried on by vending food and drinks from trucks to the employees of industrial plants as they go in to work, at coffee breaks and at lunch time. Stops are scheduled at various plants to coincide with these periods.

Plaintiff acquired the initial stops on the route in question by purchase from George W. McAttee, Jr., for $1,475. Plaintiff added other stops by hiring a route supervisor who solicited, secured and serviced such new locations.

On July 15, 1957, plaintiff leased the lunch route and truck for its operation to defendant. In accordance with the terms of the agreement defendant received from plaintiff a route list showing the names and addresses of certain industrial concerns that he was to service, the place at which he was to park in order to serve the employees of the particular plant, the time he was due to arrive at each place, the time allocated for each stop, his departure time and and the number of employees of each company. These stops were arranged in sequence in point of time. Two or three were added subsequent to July 15, 1957. The agreement between the parties provided, inter alia, that concurrently with the execution thereof and delivery of the route list, the lessor-plaintiff was "disclosing to lessee [defendant] all pertinent confidential information concerning the type, nature, and amount of food and sundries purchased by customers at each stop"; and "that said Lunch Route and identity of customer stops is conclusively regarded by lessor and lessee to be and is, as between them, a trade secret." The agreement further provided that upon termination of the agreement lessee would not solicit any of the customers on the route for a period of one year. The lease was on a month to month basis but might be terminated by either party at any time for cause.

In his affidavit, Paul Cook states that during the period here in question he was a route supervisor for plaintiff; that he personally serviced some of the stops included in defendant's route, and that the employee turnover at these plants was slight; that defendant was shown the stops on his route by the driver who previously serviced the route for plaintiff and by Cook himself; that "the type, nature and amount of food and sundries necessary to service a particular route varies from route to route in Los Angeles County; that when defendant commenced servicing the stops on his route the previous driver who had serviced the route and affiant "disclosed to defendant the type and amount of food and sundries which would be necessary for him to service the employees of the plants"; that employees of the plants on defendant's route "ordinarily would deal only with one industrial caterer at a time"; and that other caterers did not compete with defendant at his scheduled stops. Defendant was also advised as to the prices to be charged for the particular items.

In her affidavit, Mary Lou Glassburn identified herself as a catering route saleswoman; stated that she was employed by plaintiff for the purpose of servicing the route theretofore serviced by defendant; that on August 27, 28 and 29 defendant took her with him to each of the stops on his route; that defendant informed her of the time and place at which each stop was to be made; the number of persons who could be expected at each of the stops;

the price he charged for each item offered for sale; what merchandise to carry, viz., the variety of sandwiches and the number of each kind; the type of pastry and the number thereof; the assortment of salads, sundries and beverages to stock in order to serve the tastes and preferences of the customers on said route. It was on the basis of this information that requirements for the following day were anticipated and the order therefor placed with the concern that furnished him his supplies. Any loss because of unsold food was defendant's under his agreement with plaintiff. According to affiant, defendant was acquainted with the customers at each stop on a name basis. During the period affiant was traveling the route with defendant, no competing catering vehicle appeared at or near the stops being serviced by defendant. All stops were in the public street except one where defendant parked on the company's property.

Although the names and addresses of the industrial concerns are in the telephone book and public directories, there is nothing in such publications, says plaintiff in his affidavit, "to indicate that they are prospective industrial catering customers nor in any manner to indicate the number of employees, the times at which service would be required by the employees, or the willingness of such employees to purchase food, beverages and sundries from an industrial catering truck." Plaintiff further deposed: "By observation of the premises upon which the employees of the various firms listed or served, one could not determine the number of employees, the times at which service would be required, their particular likes and dislikes or fancies, nor the other necessary data indicative that these were prospective industrial catering customers." Plaintiff also stated that defendant agreed to regard the information given him as a trade secret. The agreement was terminated on August 29, 1958, by plaintiff because defendant had had two automobile accidents within a short period and "no casualty insurance could be secured" on the truck which he was operating.

In his affidavits and verified pleadings, defendant paints a substantially different picture. Additionally, defendant asserted that plaintiff secretly obtained a "kick-back" from the catering concern from which defendant purchased his supplies.

In seeking a reversal, defendant contends that (1) none of the information furnished defendant by plaintiff was confidential or in the nature of a trade secret; (2) the contract is invalid under the provisions of section 16600, Business and Professions Code; (3) the unclean hands doctrine precludes plaintiff from securing equitable relief in that he terminated the contract without cause and received a "kick-back" from defendant's supplier.

In the area here involved there are, generally speaking, two groups of cases. One is the so-called "route cases" where injunctive relief may be available. Illustrative of this group are George v. Burdusis, 21 Cal.2d 153, 130 P.2d 399; California Intelligence Bureau v. Cunningham, 83 Cal. App.2d 197, 188 P.2d 303; Wallich v. Koren, 80 Cal.App.2d 223, 181 P.2d 682, and Reid v. Mass Co. Inc., 155 Cal.App. 2d 293, 318 P.2d 54. The other group, where it was held such relief was not available, is represented by Continental Car-Na-Var Corp. v. Moseley, 24 Cal.2d 104, 148 P.2d 9; Aetna Bldg. Maintenance Co. v. West, 39 Cal.2d 198, 246 P.2d 11; Avocado Sales Co. v. Wyse, 122 Cal.App. 627, 10 P.2d 485; Mathews Paint Co. v. Seaside Paint & Lacquer Co., 148 Cal.App. 2d 168, 306 P.2d 113.

As to when equitable relief may be granted, the court stated in Alex Foods, Inc. v. Metcalfe, 137 Cal.App.2d 415, 426–427, 290 P.2d 646, 654, "* * * it is clear that if the continuance of an employer's trade depends on keeping secret the names of customers or other valuable information known to such employer, his employee, having gained knowledge of such secrets in the course of his employment, cannot, thereafter utilize such knowledge to the prejudice of his former employer. Independent of an express contract, equity will enjoin the disclosure of confidential knowledge of trade secrets which a former employee learned in the course of his employment. The fact that a defendant was employed by plaintiff for years during which he learned the names, addresses, and requirements of plaintiff's customers justifies injunctive relief where the defendant undertook to use such information in unfair competition to the detriment of plaintiff. Such knowledge is a part of the good will of the business and is a trade secret. A list of customers is a trade secret if there is confidential information as to such customers. To act upon it is an improper use of confidential information and amounts to unfair competition. * * * Equitable protection may be invoked against the subsequent use by a former employee of knowledge of the 'peculiar likes and fancies and other characteristics' of the former employer's customers where such knowledge will aid him in securing and retaining their business. This rule applies generally to trade route cases as well as others involving a knowledge of the customers desires for specialized information, their preferences for certain products, and their buying habits. (Citation.)"

While it is obvious that the instant case does not involve an employer-employee relationship, we believe the principles enunciated in the route cases are here fully applicable.

[1] Defendant's main thesis is that he received no confidential information or trade secrets from plaintiff. He argues that the industrial plants serviced by him were listed in the telephone directory and observable from the highway. It is obvious, however, that such directory or observation of the plant would not disclose (1) the number of employees, (2) the number of employees who would likely patronize a catering service, (3) the type and quality of food, beverage, and sundries which would be required, (4) the likes, dislikes, fancies and buying habits of prospective customers, (5) what plants furnished eating facilities for their employees, (6) the time to arrive and the duration of the stop, and (7) the order in which he should make the stops for the most efficient operation of the route. Such information may well spell the difference between success and failure in such a venture. Respondent aptly describes this aspect of the case as follows: "To provide service for many patrons on a profitable basis, a schedule must be developed and adhered to strictly * * *. The driver must be at each stop on time and leave on time in order to be at the next stop when the break there begins. He must know the swiftest route from one stop to the next. He must know exactly where to park when he arrives, the customers must be ready for service on his arrival and at precisely the same time each day. These things are not readily apparent to the man who just goes out and gets a truck, loads it up and merrily drives down the highway with his telephone book at his side. They are told and shown to him by the man who has built up and developed the route, who had discovered the stops * * * arranged the stops in an orderly schedule and actually run the route, ironing out the rough edges until it is a smooth operation and really worth something."

Defendant's argument that no trade secret was involved in that plaintiff did not furnish him with the name of any specific individual customer is without merit. This type of operation obviously does not lend itself to such detailed particularization. The "customer" under the facts of this case was a "group of employees" at a designated industrial plant at a specific time who, experience has shown, consistently purchased goods from plaintiff's truck on a day to day basis, the variety and quantity of such purchases being reasonably predictable on the basis of past experience. Each group, of course, fluctuated to some extent; an individual employee who usually bought his lunch from plaintiff's truck might be ill on any given day, or he might terminate employment at this particular plant; new workers may be taken on, and the like. However, day in and day out, the basic group of patrons remained substantially the same.

Plaintiff, of course, does not have any vested or exclusive rights to a specific parking spot on the public highway at the plants serviced by the defendant, nor does he claim any such rights. Plaintiff's complaint is based upon defendant's appropriation and use to the plaintiff's prejudice of the other information previously discussed which was made known to the defendant in confidence. This information is a real asset of plaintiff's business and the foundation upon which its success, indeed, its very existence, is built.

It is therefore clear that the evidence amply supports the trial court's determination that information in the nature of a trade secret was here present.

An agreement between the parties that something is a trade secret will not make of it a trade secret if in fact it is not. However, in the present case, we have both an actual trade secret plus an agreement by defendant to treat the information received from plaintiff as a trade secret and to hold such inviolate. Furthermore, such information was deemed by defendant as essential to the successful operation of the route, as appears from the affidavit of Mary Lou Glassburn summarized in the statement of facts.

Defendant argues that the case of Fortna v. Martin, 158 Cal.App.2d 634, 323 P.2d 146, is controlling. In that case the court held that information the defendant had obtained in his employment in a termite control business, which included the manner in which his employer secured business, knowledge that financial institutions required a termite clearance before making loans on improved property, knowledge of the materials used and services performed in termite control work, and of the employer's method of making estimates and fixing prices was not confidential information, being readily ascertainable. As already discussed, plaintiff's scheduling of stops, the quantity and variety of food, drink and sundries to be carried, and other related information disclosed to the defendant was not readily ascertainable as was the information in the Fortna case.

[2] Defendant's argument that his contract with plaintiff violated section 16600, Business and Professions Code, is without merit. Under this section, a "contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." In the instant case there is no promise or agreement by the defendant that, after the termination of the contract, he would not engage in any profession, trade, or business. The contract merely provided that defendant would not solicit those customers made known to him in confidence. Such an agreement is not rendered invalid by section 16600. The following language in Gordon v. Wasserman, 153 Cal.App.2d 328, 330, 314 P.2d 759, 761, is apposite: "It clearly appears by the terms of the contract that it does not prevent defendant from carrying on a weekly credit, or any other business. He covenants not to use plaintiffs' confidential lists to solicit customers for himself. Similar covenants have been held valid and enforceable * * *." This principle was reaffirmed in Gordon v. Landau, 49 Cal.2d 690, 694, 321 P.2d 456.

[3] Defendant next argues that plaintiff should be denied equitable relief for, asserts defendant, plaintiff has not alleged any cause for terminating the lease. The agreement in this respect provided: "This lease shall continue from month to month but may be terminated by either party at any time for cause." In his affidavit, plaintiff deposed that "said written agreement was terminated on or about August 29, 1958 because the defendant had two automobile accidents within a short period and no casualty insurance could be secured by your affiant on the truck which he was

operating." This was sufficient to justify the termination of the contract.

[4] Defendant also contends that plaintiff received a kick-back from the catering company which furnished defendant his supplies and, because of this fact, plaintiff should be denied equitable relief. Whether or not plaintiff in fact received such a kick-back was, of course, a question of fact. The trial court apparently resolved this question adversely to defendant. Because of defendant's obvious interest, the court was not required to give full credence to his assertions even though such were not contradicted by opposing affidavits. Smith v. Smith, 157 Cal.App.2d 658, 662, 321 P.2d 886; Hill v. Thomas, 135 Cal.App.2d 672, 681–682, 288 P.2d 157.

[5, 6] Finally, it should be noted that this is an appeal from a preliminary injunction only. As stated in Isthmian S. S. Co. v. National Marine etc. Ass'n, 40 Cal.2d 433, at page 435, 254 P.2d 578, 579: "Whether a preliminary injunction shall be granted rests largely in the discretion of the trial court and will not be reversed on appeal unless there is a manifest abuse of discretion." In Sommer v. Metal Trades Council, 40 Cal.2d 392, at page 402, 254 P.2d 559, 566, the court discussed the trial court's exercise of discretion as follows: "On the application for the preliminary order the court also could, and undoubtedly did, weigh the probable injury which would ensue to the plaintiff by denying the temporary relief as against the absence of probable injury which would accrue to the defendants by granting it. The record does not indicate that the court abused its discretionary power in making these determinations adversely to the defendants and in granting the injunctive order pending a trial on the merits." Likewise, in the instant case, it cannot be said that there was an abuse of discretion.

The order is affirmed.

ASHBURN and HERNDON, JJ., concur.

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171 Cal.App.2d 591

In the Matter of the Estate of George TURNER, Deceased.

STATE of California, Appellant,
v.
UNITED STATES of America, Respondent.
Civ. 23651.

District Court of Appeal, Second District, Division 2, California.

June 30, 1959.

Hearing Denied Aug. 26, 1959.

Action involving right to property of veteran of United States armed forces who died in Veterans' Hospital without leaving a surviving spouse, next of kin or heirs entitled under laws of his domicile to his personal property. From adverse judgment of the Superior Court, Los Angeles County, Burdette J. Daniels, J., the state appealed. The District Court of Appeal, Fox, P. J., held that where veteran, upon admission to Veterans' Administration hospital, executed a form providing that upon his death leaving no widow, next of kin or heirs, all personal property not disposed of by will or otherwise would become property of United States in accordance with statute to that effect, there was a valid contract between veteran, who died seven days later, and United States, and such agreement was not unenforceable as being illusory or lacking any required mutuality.

Judgment affirmed.

1. Escheat ⚷2

Statute providing that whenever any veteran shall die while a member or patient in any facility, or any hospital while being furnished care or treatment therein by Veterans' Administration and shall not leave surviving him any spouse, next of kin, or heirs, entitled under laws of his domicile to his personal property as to which he dies intestate, all such property shall immediately vest in and become property of United States as trustee for sole use and benefit of General Post Fund, is not an attempt to regulate and control devolution of property, but is based upon contractual relationships. 38 U.S.C.A. § 5220 et seq.

2. States ⚷=4.6

Statute providing that whenever any veteran shall die while a member or patient in any facility, or any hospital while being furnished care or treatment therein by Veterans' Administration and shall not leave surviving him any spouse, next of kin, or heirs, entitled under laws of his domicile to his personal property as to which he dies intestate, all such property shall immediately vest in and become property of United States as trustee for sole use and benefit of General Post Fund, does not contravene Tenth Amendment to Federal Constitution providing that powers not delegated to United States by Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people. 38 U.S.C.A. § 5220; U.S.C.A.Const. Amend. 10.

3. Armed Services ⚷=107

Where veteran of United States armed services, upon admission to Veterans' Administration hospital, executed a form providing that upon his death leaving no widow, next of kin or heirs, all personal property not disposed of by will or otherwise would become property of United States in accordance with statute to that effect, there was a valid contract between veteran, who died seven days later, and the United States, and such agreement was not unenforceable as being illusory or lacking any required mutuality. 38 U.S.C.A. § 5220 et seq.

4. Wills ⚷=88(2)

Not every instrument which provides for performance of its terms at or after death is testamentary in character.

5. Wills ⚷=88(1)

A "will" is dispositive and is gratuitous, while a contract requires consideration.

See publication Words and Phrases, for other judicial constructions and definitions of "Will".

6. Contracts ⚷=10(1)

Alleged defect of mutuality applies only to executory contracts and it does not apply to an executed contract nor to executed portion of a contract.

7. Frauds, Statute of ⚷=103(1)

Application form executed by veteran of United States armed services upon his admission to Veterans' Administration hospital acknowledging notice of effect of federal law providing that upon his death without a widow, next of kin or heirs all personal property not disposed of by will or otherwise would become property of United States as trustee for General Post Fund was a sufficient memorandum to meet requirements of California law as to a note or memorandum of an agreement which by its terms is not to be performed within lifetime of promisor. 38 U.S.C.A. § 5220 et seq.; West's Ann.Civ.Code, § 1624, subd. 6; West's Ann.Code Civ.Proc. § 1973, subd. 6.

Stanley Mosk, Atty. Gen., John F. Hassler, Herschel T. Elkins, Deputies Atty. Gen., for appellant.

George Cochran Doub, Asst. Atty. Gen., Laughlin E. Waters, U. S. Atty., Los Angeles, Cal., Alan S. Rosenthal, Douglas A. Kahn and William A. Montgomery, Washington, D. C., for respondent.

FOX, Presiding Justice.

This is an appeal by the State of California from a judgment which approved, allowed, and ordered to be paid a claim of $1,015.17 against the estate of George Turner, filed by the United States of America as Trustee of the General Post Fund[1] and objected to by the State of California, claiming the property had escheated to it by virtue of Probate Code, section 231.

The deceased, George Turner, was a veteran of the United States Armed Services. On March 7, 1954, Mr. Turner was admitted to the Veterans' Administration Hospital in Long Beach, wherein he was furnished and accepted care and treatment by the Veterans' Administration until his death, which occurred seven days later on March 14, 1954, while still a patient at said hospital. The decedent died intestate as to his personal property without having otherwise disposed of the same, and left no known surviving spouse, next of kin or heirs entitled under the laws of his domicile (State of California) to his personal property. The decedent was not a minor, nor was he incompetent or under legal disability. Upon entering the hospital, Mr. Turner executed Veterans' Administration Form 10–P–10, "Application for Hospital Treatment or Domiciliary Care." This form, which the decedent signed, provided that "I acknowledge notice of the effect of the law mentioned on the reverse side hereof." On the reverse side of the application the following appeared: "Note—The law provides that upon the death of any veteran receiving care or treatment by the Veterans Administration in any institution leaving no widow (widower), next of kin or heir entitled to inherit, all personal property, including money or balances in bank, and all claims and choses in action, owned by such veteran, and not disposed of by will or otherwise, will become the property of the United States as trustee for the Post Fund."

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[1] The General Post Fund is administered by the Veterans' Administration for the sole purpose of providing recreational and religious programs and equipment for Veterans' Administration hospital patients.

Title 38 United States Code § 17,[2] provides in part as follows:

> "* * * whenever any veteran (admitted as a veteran) shall die while a member or patient in any facility, or any hospital while being furnished care or treatment therein by the Veterans' Administration, and shall not leave surviving him any spouse, next of kin, or heirs entitled, under the laws of his domicile, to his personal property as to which he dies intestate, all such property, including money and choses in action, owned by said decedent at the time of death and not disposed of by will or otherwise, shall immediately vest in and become the property of the United States as trustee for the sole use and benefit of the General Post Fund * * *.
>
> "The foregoing provisions are conditions precedent to the initial, and also to the further furnishing of care or treatment by the Veterans' Administration in a facility or hospital. The acceptance of care or treatment by any veteran admitted as such to any Veterans' Administration facility or hospital after ninety days from December 26, 1941, and as well the continued acceptance of care or treatment * * * after said ninety days by any veteran who is then receiving the same shall constitute an acceptance of the provisions and conditions of this subchapter and have the effect of an assignment, effective at his death, of such assets in accordance with and subject to the terms and provisions of this subchapter * * *."

The Public Administrator of Los Angeles County was duly appointed, qualified and acted as the administrator of the estate of George Turner, deceased, under letters of administration issued to him by the superior court of the State of California. The claim on demand of the United States of America, as trustee of the General Post Fund, pursuant to Title 38 U.S.C. §§ 17–17j, to the personal property left by the decedent was properly served and filed with the public administrator as administrator of the estate and the clerk of the superior court in accordance with existing federal and state laws. The claim of the United States was duly allowed for payment by the public administrator and was approved by the probate commissioner. The public administrator filed his first and final account in which the amount of $1,009.80 was set up for payment to the United States of America. A supplemental account changed this amount to $1,015.17. The trial court found that a contract existed between the decedent and the United States of America that upon his death in the aforementioned hospital, intestate, and not survived by a spouse, next of kin, or heirs, all of his personal property would vest in and become the property of the United States of America as trustee for the General Post Fund.

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[2] The provisions of 38 U.S.C. §§ 17–17j were reenacted with only insignificant changes, by the Act of June 17, 1957, Title XIX, 71 Stat. 149. Additionally, they have been recodified in Supplement V of the 1952 United States Code and now appear as Sections 3920–3929 of Title 38. Since the veteran here involved died prior to the reenactment and recodification, we refer to the statute throughout this opinion as it appeared in the 1952 Code. Now 38 U.S.C. § 5220 et seq.

It is appellant's contention that Title 38 U.S.C. §§ 17–17j, are unconstitutional in that said sections are in direct contravention of the Tenth Amendment to the United States Constitution.[3] Furthermore, it is argued that decedent did not enter into a valid contract upon which the United States could base a claim to his personal property.

[1] Appellant's argument that section 17 is an attempt by the federal government to usurp the exclusive power of the state over the devolution of property within its jurisdiction in violation of the Tenth Amendment to the United States Constitution misconceives the nature of the statute under consideration. This statute is not an attempt to regulate and control the devolution of property, but is based upon contractual relationships. United States v. Gallagher, D.C.S.D.Cal., 97 F.Supp. 1014; In re Witte's Estate, 174 Kan. 360, 255 P. 2d 1039, 36 A.L.R.2d 717; In re Gonsky's Estate, 79 N.D. 123, 55 N.W.2d 60; See United States v. Stevens, 302 U.S. 623, 58 S.Ct. 388, 82 L.Ed. 484; Mauck v. United States, 9 Cir., 94 F.2d 745.

[2] In the Gallagher case it was expressly held that "[t]he statute does not offend Amendment X of the U. S. Constitution * * *." 97 F.Supp. at page 1015. Section 17 has been successfully invoked by the United States in numerous cases other than those to which reference has already been made. See United States v. State of California, D.C.N.D.Cal., 143 F.Supp. 957; United States v. Mid City Nat. Bank of Chicago, D.C.N.D.Ill., 121 F.Supp. 402; United States v. Brown, D.C.S.D.Cal., 110 F.Supp. 370.

[3] The only question, then, is whether there was a valid contract between the decedent and the United States of America for the disposition of the personal property involved in this appeal. We are of the opinion that there was.

In order to avoid any misunderstanding, it should be pointed out from the outset that there is no claim that the decedent executed a valid will or contract to make a will in favor of the United States. The only claim is that he, by contract, agreed that his personal property would vest in the United States under certain contingencies at his death.

[4, 5] Not every instrument which provides for performance of its terms at or after death is testamentary in character. In re Estate of Howe, 31 Cal.2d 395, 398, 189 P.2d 5, 1 A.L.R.2d 1171. "A will is dispositive; a contract promissory. A will is gratuitous; while a contract * * * requires consideration." (Page on Wills, Lifetime Ed., § 83, p. 179.)

The court in In re Witte's Estate, supra, 174 Kan. at pages 367–368, 255 P.2d at page 1044, stated: "The contention seems to be that as Witte retained dominion over his property until he died and under the contract could have given it away or disposed of it in his lifetime, or could have disposed of it by will, the only way it could have gone to the United States would be by testamentary disposition, and the contract was not executed as such. In support appellant quotes excerpts from an abstract of the briefs as shown in the A.L.R. report of Hale v. Wilmarth, 274 Mass. 186, 174 N.E. 232, 73 A.L.R. 980. Reference to that opinion will disclose that while the court did say that an attempted *gift* of property to take effect on the death of the donor without the delivery of the property, control and dominion of which was retained by the donor during his lifetime, was invalid but that the statute of wills did not prevent an owner of property from stipulating by contract for the disposition of his property at the time of his death and that the testatrix did not make a gift, she made a contract supported by a consideration."

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[3] The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Contractual limitations, such as are involved in the instant case, "are expressly recognized as valid in California Probate Code § 220, and have been repeatedly sustained as valid by California and federal court decisions. (Citations.)" United States v. Gallagher, supra, 97 F.Supp. at page 1015; see also Mauck v. United States, supra; In re Witte's Estate, supra. It is readily apparent from a reading of the application form which the decedent signed that he was informed of and agreed to be bound by the terms of section 17 for, having been specifically informed of the substance and effect of such section, he accepted and received care and treatment in the veterans' hospital. It is appellant's position, however, that "the so-called agreement created no obligation on the part of the decedent and was, therefore, a nudum pactum, an illusory agreement." While it is certainly true that during his lifetime Mr. Turner could dispose of his property in any manner he so desired or could have provided for its disposition by will, the important fact remains that he did not do so. There can be no doubt that the decedent received consideration in the form of care and treatment which was sufficient to support any agreement or undertaking on his part. Under the facts of this case, appellant's present position is untenable; the fact that the decedent reserved to himself various options or "outs" which would operate to defeat the respondent's rights does not mean that the agreement undertaken by the decedent need not be performed at all when in fact he did not utilize such options and knowingly received the consideration tendered by the respondent.

In answer to appellant's argument, the following from Professor Williston's treatise on the law of contracts (1 Williston, Contracts, § 106, page 367 (1936 ed.)) is apposite: "If the promise on one side of a bilateral agreement is insufficient as consideration because it promises nothing detrimental to the promisor or beneficial to the promisee, though both promises are consequently invalid, yet if performance is made of the counter-promise and the performance was something detrimental to the promisor or beneficial to the promisee, the promise which was itself insufficient as consideration, thereupon becomes binding, since sufficient consideration has now been received for it, and it is no longer necessary that the promise which was insufficient as consideration should serve as such. This is because only promises need consideration. * * * Unilateral contracts must be supported by consideration only on one side. So in the case supposed, the performance which has been rendered needs no consideration though the promise to give it originally did. Since the performance has been rendered under no mistake of fact, it cannot be recovered, and being received as the consideration for a promise, that promise now becomes binding. It certainly cannot lie in the mouth of the promisor to say that since the promise, which he has made is of such slight value he will not perform it at all though he has been paid for doing so." In Hunter v. Sparling, 87 Cal.App.2d 711, 725, 197 P.2d 807, 815, the court stated in a somewhat similar situation, that "an offer too uncertain to create a bilateral contract if accepted, may, by performance by the offeree, create a unilateral contract."

[6] In all of the cases referred to above where title 38 U.S.C. § 17 (or its predecessor) has been applied, the contract was expressly or impliedly held enforceable yet in each case the decedent retained the same control over his personal property as he did in the instant case. Furthermore, the alleged defect of mutuality applies only to executory contracts; "it does not apply to an executed contract nor to the executed portion of a contract." J. A. Folger & Co. v. Williamson, 129 Cal.App.2d 184, 187, 276 P.2d 645, 647; Vitagraph, Inc. v. Liberty

Theatres Co., 197 Cal. 694, 701, 242 P. 709. The present agreement was wholly executed. The United States performed fully on its part and the decedent was not survived by a wife, heirs or next of kin and had not otherwise disposed of his property. Cases cited by appellant, such as Lawrence Block Co. v. Palston, 123 Cal.App.2d 300, 266 P.2d 856, simply are not applicable to the facts presented in this appeal. We therefore conclude that the agreement is not unenforceable as being illusory or lacking any required mutuality.

[7] Lastly, appellant argues that the agreement is not valid under California law in that it was not in writing or evidenced by a note or memorandum thereof as is required by section 1624, subd. 6, Civil Code. (Section 1973, subd. 6, Code of Civil Procedure, is identical.) This section provides that an agreement which by its terms is not to be performed within the lifetime of the promisor must be in writing or there must be a note or memorandum thereof subscribed by the party to be charged. The application form executed by the decedent stated the precise terms and conditions of the agreement; the parties were designated; the time for performance was specified; and the decedent's signature appeared thereon. No more is or could be required, and far less would suffice. As stated in Gibson v. De La Salle Institute, 66 Cal.App.2d 609, at page 631, 152 P.2d 774, at page 876, quoting from 12 California Jurisprudence 899–900: " 'Under the statute of frauds requiring that the contract "or some note or memorandum thereof," be in writing, the writing essential need not be a formal contract, drawn up with technical exactness, or even one intended by the parties to create an obligation. Indeed, it may be inadequate as a formal contract, and may not, for instance, contain a formal and direct expression of the covenant of one of the parties. A "note or memorandum" of the contract is all that is required.' "

It sufficiently appears, therefore, that the statute in question is not violative of the Tenth Amendment to the Constitution of the United States and that a valid contract, under the laws of the State of California, was entered into by and between the decedent and the United States.

The judgment is affirmed.

ASHBURN and HERNDON, JJ., concur.

Hearing denied; PETERS, J., dissenting.

Sam GOLD and Dolly Bruns, as Executors of the Estate of Nicholas Chouvaldjy, deceased, Plaintiffs and Appellants,

v.

SALEM LUTHERAN HOME ASSOCIATION OF THE BAY CITIES, a corporation, Defendant and Respondent.*

Civ. 18368.

District Court of Appeal, First District, Division 2, California.

July 6, 1959.

Rehearing Denied July 31, 1959.

Hearing Granted Aug. 31, 1959.

Action to recover lump sum payment made under life care contract. The Superior Court, County of Alameda, Richard H. Chamberlain, J., entered judgment for defendant, and the plaintiffs appealed. The District Court of Appeal, Draper, J., held that where applicant for admission to defendant's home for the aged was accepted on a trial basis and applicant entered on August 1 and paid for his care for month of August and on August 31 he paid for his care for month of September, and defendant accepted application and a life care contract, dated October 1, was fully executed and delivered no later than September 26 and defendant had paid in full the lump sum of $8,500, determined by reference to life expectancy tables, as required by the contract, and defendant suffered a stroke on September 27 and died on September 28, the performance of the contract was intended to begin on October 1, and applicant's death prior to that date frustrated object of contract and under doctrine of frustration the applicant's executors could recover the lump sum payment.

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* Opinion vacated 1 Cal.Rptr. 343, 347 P.2d 687.

Reversed with directions.

Kaufman, P. J., dissented.

1. Contracts ⚷311
Executors and Administrators ⚷426

Where applicant for admission to defendant's home for the aged was accepted on a trial basis and he entered on August 1 and paid for his care for month of August and on August 31 he paid for his care for month of September, and defendant accepted application and a life care contract, dated October 1, was fully executed and delivered no later than September 26 and defendant had paid in full the lump sum of $8,500, determined by reference to life expectancy tables, as required by the contract, and defendant suffered a stroke on September 27 and died on September 28, the performance of the contract was intended to begin on October 1, and applicant's death prior to that date frustrated object of contract and under doctrine of frustration the applicant's executors could recover the lump sum payment.

2. Contracts ⚷309(1)
Money Received ⚷6(4)

Where the performance of a promise has wholly lost its value before the time for performance has arrived, the doctrine of "frustration" excuses performance by a promisor, and one who has fully performed is entitled to restitution from the party whose exchange performance is excused.

See publication Words and Phrases, for other judicial constructions and definitions of "Frustration".

3. Contracts ⚷249

Unilateral determination cannot terminate a life care contract.

4. Contracts ⚷303(1)

Enforceability of a life care contract is not affected by the fact that the life of the individual to be cared for extends beyond or falls short of the span predicted by life expectancy tables.

Rodney G. Commons, Wayne M. Hooper, Oakland, for appellants.

Alfred Nelson, Oakland, for respondent.

DRAPER, Justice.

[1] Defendant is a non-profit corporation which maintains a licensed home for the aged. Applicants are admitted for a trial period of two months. At the end of this period, or earlier if defendant's board of directors consents, a contract may be executed under which the home provides care for the applicant for the remainder of his life. For such life care contract the applicant pays a lump sum determined by reference to life expectancy tables.

Plaintiffs are executors of the will of Nicholas Chouvaldjy. Mr. Chouvaldjy applied for admission to the home and was accepted on a trial basis. He entered August 1, 1956. On admission, he paid $130 for his care for the month of August, and on August 31 paid a like amount for the month of September. On September 10 the directors by motion accepted Mr. Chouvaldjy's application for permanent residence and directed that a life care contract be granted upon payment of $8,500. This contract was drawn by defendant and dated October 1. Chouvaldjy signed it September 25 and at the same time delivered to defendant a cashier's check for $8,500. On the same afternoon or the next morning, the authorized officers of defendant signed the contract and Chouvaldjy was notified that a signed copy was available for him in the office. Chouvaldjy suffered a stroke September 27, and died on the afternoon of September 28.

Plaintiff executors brought this action to recover the payment of $8,500, and appeal from adverse judgment entered after nonjury trial.

There can be no doubt that the life care contract was fully executed and delivered no later than September 26, and the court's findings in this particular are fully supported.

The contract requires defendant to furnish food, lodging and care to Mr. Chouvaldjy "for the remainder of his life," but, save for the date it bears, the agreement contains no language specifying the date of commencement of such performance. It is clear, however, that before the contract was drawn Chouvaldjy had paid in full for his care through the month of September. No refund was given or offered to him, either in cash or by way of reduction of the cost of his life care contract, for the portion of September remaining after the life care agreement was executed. Thus the fact that defendant chose to date the life care contract October 1 assumes significance. The only reasonable conclusion is that the parties intended performance of the life care contract to begin October 1.

[2] The crucial question, then, is the effect of Chouvaldjy's death September 28 upon a contract whose performance was to commence October 1. Strictly, there is no impossibility of performance. Defendant had available the quarters, food and care it had agreed to supply. Similarly, there is no literal failure of consideration. However, the performance of defendant's promise had wholly lost its value before the time for performance arrived. The law has developed the doctrine called "frustration" to excuse performance by a promisor in such situations. (6 Williston on Contracts [rev. ed.] 5419–20; Rest., Contracts, § 288.) Where the object of a contract has been frustrated within the meaning of this rule, one who has fully performed is entitled to restitution from the party whose exchange performance is excused. (Rest., Contracts, § 468, subsec. 2.) The general doctrine of frustration has been recognized in California. Johnson v. Atkins, 53 Cal.App.2d 430, 127 P.2d 1027; see also Lloyd v. Murphy, 25 Cal.2d 48, 153 P.2d 47; Dorn v. Goetz, 85 Cal.App.2d 407, 193 P.2d 121.

We find no decision upon the particular facts before us. Superficially comparable is the problem arising under a life care contract providing that either party may, within a limited time, terminate the contract, when the individual dies before expiration of the period for such election, and before either he or the home has given notice of termination. There is some division of authority in such situation (Dodge v. New Hampshire Centennial Home, 95 N.H. 472, 67 A.2d 10, 10 A.L.R.2d 858; First National Bank of Lawrence v. Methodist Home, 181 Kan. 100, 309 P.2d 389), but the prevailing view is that the home may not retain the payment made for the life care contract (see cases cited in 10 A.L.R.2d 874–877). Similarly remote are those cases which turn on the particular language of the contract (Nicolaysen v. Pacific Home, 65 Cal.App.2d 769, 151 P.2d 567), particularly those in which a reasonable construction of the agreement established that one party had assumed the risk of the event claimed to result in frustration (Lloyd v. Murphy, supra; Coyne v. Pacific Mut. Life Ins. Co., 8 Cal.App.2d 104, 47 P.2d 1079). In Coyne, the annuity contract fixed the date for first payment to the purchaser "if then living" (8 Cal.App.2d at page 107, 47 P.2d at page 1080), thus clearly implying that he assumed the risk of his death before commencement of payments. Further, there was evidence that deceased "deliberately chose a form of contract which would give him the highest possible monthly return during his lifetime, with no remainder to his heirs" (8 Cal.App.2d at page 110, 47 P.2d at page 1081). Neither of these circumstances is present in our case, and Coyne therefore is inapplicable to the facts before us.

[3, 4] It is clear that unilateral determination cannot terminate a life care contract. Inderkum v. German Old People's Home, 23 Cal.App.2d 733, 74 P.2d 83. Nor is enforceability of a life care contract affected by the fact that the life of the individual to be cared for extends beyond or falls short of the span predicted by life expectancy tables. Each party

clearly has assumed the risk of variation of the life span from that so predicted. See discussion in Coyne v. Pacific Mut. Life Ins. Co., supra, 8 Cal.App.2d 104, 47 P.2d 1079.

Here, however, Chouvaldjy died before the date defendant was to begin performance of its agreement for his care. It is difficult to imagine a clearer case of frustration of the object of a contract than that of a life care contract where the life ends before the care is to begin.

Judgment reversed, with directions to the trial court to enter judgment for plaintiffs.

DOOLING, J., concurs.

KAUFMAN, Presiding Justice (dissenting).

I dissent: Here the decedent entered into a completed binding contract with respondent home for life care commencing a few days after the contract was signed and delivered. Respondent received the agreed price from decedent and was bound to care for decedent for the rest of his natural life. Prior to the commencement of respondent's duty to care for decedent, the decedent passed away.

The rule of law applicable to these facts is well stated in Coyne v. Pacific Mut. Life Ins. Co., 8 Cal.App.2d 104, 47 P.2d 1079, hearing denied by our Supreme Court. In this case on May 9, 1932, "the defendant issued to Augustine S. Coyne an annuity policy of insurance by which it agreed to pay to him $90.10 on June 9, 1932, if then living, and a like amount on the ninth day of each and every month thereafter so long as he lived. He was then 66 years of age and the policy was issued in consideration of a single premium of $10,000, which amount he paid in cash. He died by suicide on May 26, 1932, and before the first monthly payment became due under the policy. This action was brought by the administrator of his estate to recover the amount paid for the policy. The court found in all respects in favor of the defendant and from the judgment entered the plaintiff has appealed" (8 Cal.App.2d at page 107, 47 P.2d at page 1080).

"The contention that there was no consideration for this contract because the death of the annuitant occurred before any payments to him became due, is entirely without merit. The respondent had agreed to pay $90.10 to him each month so long as he lived and this agreement constituted an ample consideration. The fact that death occurred before any such payments became due does not change the situation and the intestate ran the risk of such an event just as the respondent ran the risk that the contract might turn out to be unprofitable to it in the event the other party thereto outlived his normal expectancy" (8 Cal.App.2d at page 109, 47 P.2d at page 1081).

I would affirm the judgment of the trial court.

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171 Cal.App.2d 682

PEOPLE of the State of California,
Plaintiff and Respondent,
v.
Clyde ETRESS, Defendant and Appellant.
Cr. 6484.

District Court of Appeal, Second District,
Division 1, California.
July 2, 1959.

Prosecution for sale of heroin to a police officer, who testified that balloon containing heroin purchased from defendant was green and that it was taken to central police station, marked and booked as evidence but which upon introduction at trial was blue in color. From adverse judgment of the Superior Court, Los Angeles County, LeRoy Dawson, J., and from an order denying a new trial, the defendant appealed. The District Court of Appeal, White, P. J., held that evidence was sufficient to connect defendant with the crime charged and to sustain his conviction.

Judgment and order affirmed.

1. Polsons ⚿9

In prosecution for sale of heroin to a police officer, who testified that balloon containing heroin purchased from defendant was green and that it was taken to central police station, marked and booked as evidence, but which upon introduction at trial was blue in color, evidence was sufficient to connect defendant with crime charged and to sustain his conviction.

2. Criminal Law ⚿1159(3, 4)

Appellate tribunal may not retry a case, reweigh the evidence or determine the credibility of witnesses, since those functions rest exclusively with the duly constituted arbiter of the facts whose duty it is to resolve conflicts in the evidence.

3. Criminal Law ⚿1144(13)

Reviewing court must assume in favor of verdict existence of every fact which jury could have reasonably deduced from evidence, and then determine whether such facts are sufficient to support verdict, and if circumstances reasonably justify verdict of jury, opinion of reviewing court that those circumstances might also reasonably be reconciled with innocence of defendant will not warrant interference with determination of jury.

4. Criminal Law ⚿260(11)

Where conclusion of trial court is supported by substantial evidence, reviewing court is not authorized to disturb that conclusion.

5. Criminal Law ⚿656(3)

In prosecution for sale of heroin submitted to court on grand jury transcript, comments of trial judge during discussion of request to hear a tape recording made following defendant's arrest for purpose of showing conflicting statements made by officer, who had purchased narcotic from defendant, did not disclose a prejudicial attitude on part of judge toward defendant.

6. Criminal Law ⚿1035(3)

Claim of bias or prejudice on part of judge cannot be raised for the first time on appeal.

◆

Clyde Etress, in pro. per.

Edmund G. Brown, Atty. Gen., William E. James, Asst. Atty. Gen., for respondent.

WHITE, Presiding Justice.

The Grand Jury of Los Angeles County returned an indictment wherein defendant was charged with a violation of Section 11500 of the Health and Safety Code, a felony, in that on or about March 14, 1958, he unlawfully sold a narcotic, to-wit, heroin. A prior felony conviction of the crime of Escape was also alleged. Defendant pleaded not guilty and denied the alleged prior conviction. Trial by jury was duly waived. By stipulation, the People's case was submitted on the transcript of the testimony taken before the grand jury, each side reserving the right to offer additional evidence. After the court had read the grand jury transcript and heard additional evidence, defendant was adjudged guilty of the offense charged in the indictment. His motion for a new trial was denied, and he was sentenced to state prison. No finding was made on the prior conviction of the crime of escape. From the judgment and the order denying his motion for a new trial, defendant prosecutes this appeal.

As to the factual background of this prosecution, the record reveals that at approximately six o'clock on the evening of March 14, 1958, Los Angeles City Police Officer George Renty, attached to the narcotics detail, had a transaction with defendant, when the former met the latter on Central Avenue near 43rd Street in the city of Los Angeles. The officer approached defendant and asked him, "What's happening man?", to which defendant replied, "Man, do I know you?". The officer replied, "Man, you know you've seen me around here on the avenue". At this point, according to the officer's testimony, the defendant "seemed to recognize me" and said, "Oh, yeah, I remember you now. What do you need?" Thereupon, the officer said, "I only have ten dollars, so let me have one of those ten dollar things". Defendant thereupon took a small green balloon from his mouth and Officer Renty gave him $10 in change for it. This balloon was taken to the Central Police Station, marked and booked as evidence. There was white powder in the balloon at the time it was received. Officer Renty initialed the balloon, and placed it, together with its contents, in a small vial container. He placed the vial container in a small manila envelope which in turn was placed in a larger manila envelope marked "Grand Jury Exhibit 49–1". Then, he sealed the envelope with red sealing wax and placed his fingerprint on the seal.

On March 20, 1958, Police Officer Jack Olin Carter, a qualified forensic chemist of the Scientific Investigation Division of the Los Angeles Police Department, received the sealed envelope marked "Grand Jury Exhibit 49–1". He opened it by cutting around the red seal with a pair of scissors and removed the contents, a small manila envelope containing a small glass vial, and within the glass vial a blue balloon tip. The balloon tip was found to contain approximately four grains of a white powder. Officer Carter subjected samples of this powder to a series of chemical and microscopic tests, and as a result of these tests formed the opinion that the white powder contained the narcotic commonly referred to as heroin.

Sworn as a witness in his own behalf defendant testified that at no time did he deliver a blue balloon to Officer Renty at or near Central Avenue and 43rd Street, or to anyone else. He denied he ever saw the officer until April 19, 1958, the day he was arrested. That he was acquainted with the vicinity of Central Avenue and 43rd Street, but went there only occasionally. When defendant was arrested on April 19, 1958, he was taken to the Police Administration Building where he had a conversation with Officer Renty, Officer Frederickson, and other officers. A tape recording of that conversation was played in the courtroom at defendant's request. Defendant testified that the tape recording was incomplete and did not record that one of the officers stated that, "I had an umbrella and I wore boots" and also there was no recording of the statement by one of the officers that a certain Yocum Smith was involved in the transaction. Defendant denied that he ever uses an umbrella or wears boots or that he was acquainted with Yocum Smith.

[1] Appellant first contends that the evidence, consisting of an exhibit (blue balloon containing heroin), is totally insufficient to connect him with the crime charged for the reason that Officer Renty who made the purchase, in his testimony, described the color of the balloon allegedly purchased from appellant as "green", and when the balloon was introduced into evidence, it proved to be "blue" in color. Under cross-examination, Officer Renty admitted testifying that he had purchased a "green" balloon from defendant, and that when produced at the trial, it appeared to be a "greenish-blue". The following further cross-examination ensued:

> "Q. What is the color of this balloon as you see it? A. Blue.
>
> "Q. Blue, that is correct. This is not the balloon you got from Mr. Etress that date? A. Yes, it is.
>
> "Q. You testified the balloon you got from him is green and this one is blue. How do you account for the difference? A. It looked green to me.
>
> "Q. It looked green on that day but today it does not look green; is that right? A. That is correct.
>
> "Q. Why do you indicate it is the same balloon if it looked green on that

day and today it looks blue? A. I initialed the balloon.

"Q. You were working on several cases during that time, were you not? A. Yes.

"Q. This was part of a mass roundup and you initialed several balloons? A. That is correct.

"Q. Some red and blue and green, some orange; is that correct? A. That is correct.

"Q. The only thing, in other words, that connects this balloon in your mind with Mr. Etress is the initials RO? You don't have a date on this balloon, do you, on the balloon itself? A. Not on the balloon itself.

"Q. And you don't have an identification as to the defendant on the balloon, do you? A. No.

"Q. And you said on the day in question the balloon you allegedly received from this defendant was green; that is what you testified to before the Grand Jury, is that correct? A. That is correct.

"Q. Was this balloon that you see here that has been introduced in evidence—this is blue? A. Yes, it looks blue."

[2, 3] An unbroken line of authorities support the statement that an appellate tribunal may not retry a cause, reweigh the evidence or determine the credibility of witnesses. These are functions which rest exclusively with the duly constituted arbiter of the facts whose duty it is to resolve conflicts in the evidence. People v. Flummerfelt, 153 Cal.App.2d 104, 106, 313 P.2d 912. As was said in People v. Newland, 15 Cal. 2d 678, 681, 104 P.2d 778, 780: "We must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence, and then determine whether such facts are sufficient to support the verdict. If the circumstances reasonably justify the verdict of the jury, the opinion of the reviewing court that those circumstances might also reasonably be reconciled with the innocence of the defendant will not warrant interference with the determination of the jury. (Citing cases.)" In the case now engaging our attention, as stated by respondent, "The sole conflict in the evidence consists of the testimony of Officer Renty as to the color of the balloon he purchased and the one which was offered into evidence at the trial. This conflict is immaterial in light of the ample evidence of the proper custody and identification of the envelopes in which the exhibit was contained from the time of the purchase until the time that it was analyzed and brought to the trial. The trial judge resolved this conflict in relying upon the evidence of proper custody and the fact that it was probably an understandable mistake on the part of the witness at the time he made the purchase."

[4] We are satisfied that it cannot be said, in view of the evidentiary features of this case, that the conclusion arrived at in the court below is unsupported by any substantial evidence upon any hypothesis whatever. Therefore, we are not authorized to disturb that conclusion (People v. Mangiameli, 149 Cal.App.2d 642, 645, 308 P.2d 762; People v. Ames, 151 Cal.App.2d 714, 720, 312 P.2d 1111; People v. Woodard, 145 Cal.App.2d 529, 536, 302 P.2d 834).

[5] Appellant's final contention is that the record reveals that the trial judge was "prejudiced against" him. This claim is based upon the following which occurred during the direct examination of Officer Robert F. Frederickson, called as a defense witness. In answer to questions propounded by appellant's counsel, the officer testified he was present at a conversation between himself, Officer Renty and appellant following the latter's arrest on April 19th; that the conversation was recorded, and that the officer had with him in court a tape recording of said conversation. Thereupon, appellant's counsel requested "* * * hearing that tape recording at this time". After further discussion of the purpose for hearing the recording, and the

tape was introduced into evidence as defendant's Exhibit A, the following occurred:

> "The Court: Do you expect to show by this recording a contrary statement made by Mr. Renty?
>
> "Mr. Sweeney: That is correct, to establish it did not happen the way he said it happened before the Grand Jury.
>
> "The Court: I don't care what he said before the Grand Jury. I am not—
>
> "Mr. Sweeney: This was submitted on the Grand Jury transcript so we have to take this testimony here.
>
> "The Court: We will take it as though it were given here today, yes. You are still trying to show that he made a contrary statement; is that what you are trying to do?
>
> "Mr. Sweeney: Yes, sir.
>
> "The Court: Well, I guess we will have to listen to that thing."

[6] We fail to perceive wherein the last-mentioned remark of the trial judge indicates, as urged by appellant, a prejudicial attitude toward him. To us it appears manifest that the remark was merely an indication on the part of the judge that he was not particularly impressed with the evidentiary value of a tape recording. Indeed, appellant himself testified, "I definitely know there is parts of the conversation that did not appear on the tape". A reading of the entire record shows no prejudice upon the part of the trial judge toward appellant at any time during the trial. Furthermore, at no time during the trial was any claim made of bias or prejudice on the part of the judge, and it cannot be raised for the first time on appeal (People v. McClinton, 112 Cal.App.2d 830, 832, 247 P.2d 393). Appellant was fairly tried and justly convicted

The judgment and the order denying defendant's motion for a new trial are, and each is affirmed.

FOURT and LILLIE, JJ., concur.

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171 Cal.App.2d 609

Consuelo DE RUIZ, as administratrix of the Estate of Esther Juarez GARCIA, Deceased, Plaintiff and Respondent,

v.

JACK RUDY TRUCKING COMPANY, a corporation, Defendant and Appellant.

Sara SANDOVAL, Plaintiff and Respondent,

v.

JACK RUDY TRUCKING COMPANY, a corporation, Defendant and Appellant.

Civ. 5884.

District Court of Appeal, Fourth District, California.

June 30, 1959.

Consolidated actions against trucking company for death and injury sustained by occupants of station wagon when wagon was struck in rear by defendant's overtaking tractor-trailer. The Superior Court, Imperial County, Elmer W. Heald, J., entered judgment for plaintiffs, and defendant appealed. The District Court of Appeal, Griffin, P. J., held, inter alia, that evidence sustained finding of defendant's negligence.

Judgments affirmed.

1. Automobiles ⚷244(12)

In actions against trucking company for death and injury sustained by occupants of station wagon when wagon was struck in rear by company's overtaking tractor-trailer, evidence sustained finding of negligence on part of company.

2. Automobiles ⚷245(81)

In actions against trucking company for death and injury sustained by occupants of station wagon when wagon was struck in rear by company's overtaking tractor-trailer, whether plaintiffs were guilty of contributory negligence was question for jury.

3. Automobiles ⚷246(60)

In actions against trucking company for death and injury sustained by occupants of station wagon when wagon was struck in rear by company's overtaking tractor-trailer, evidence warranted giving of plaintiffs' instruction on presumption of due care as to driver of station wagon.

4. Automobiles ⚷246(60)

In actions against trucking company for death and injury sustained by occupants of station wagon when wagon was struck in rear by company's overtaking tractor-trailer, instruction on presumption of due care as to the driver of station wagon was not rendered erroneous by additional statement therein that when a conflict exists it is duty of jury to weigh presumption against contrary evidence and determine which, if either, preponderates, in view of other instructions given on subject of burden of proof.

5. Appeal and Error ⚷1064(1)

In actions against trucking company for death and injury sustained by occupants of station wagon when wagon was struck in rear by company's overtaking tractor-trailer, giving of instruction pertaining to credibility of one witness against a number, although technically incorrect, was not prejudicially erroneous.

6. Appeal and Error ⚷882(12)

Defendant could not complain on appeal of an instruction given at his request.

7. Automobiles ⚷246(26)

In actions against trucking company for death and injury sustained by occupants of station wagon when wagon was struck in rear by company's overtaking tractor-trailer, instructions sufficiently covered issue of contributory negligence.

8. Trial ⚷260(10)

In consolidated actions against trucking company for death and injury sustained by occupants of station wagon when wagon was struck in rear by company's overtaking tractor-trailer, failure to give defendant's requested instruction precluding, in first action, any award for sorrow, mental distress or grief suffered by reason of decedent's death, nor for her suffering prior to death, was not prejudicial error, in view similar instruction, given at defendant's request, respecting right of plaintiff in second action to recover for loss of her child, and in view of court's statement that its instructions applied with equal force in each of the consolidated actions and that the jury, in determining pecuniary loss of plaintiffs, should consider only financial support, if any, and pecuniary value of security, comfort, care, protection and right to receive support, which each plaintiff lost by reason of the deaths.

9. Trial ⚷260(10)

In actions against trucking company for death and injury sustained by occupants of station wagon when wagon was struck in rear by company's overtaking tractor-trailer, court's failure to give defendant's proffered cautionary instruction, to effect that instructions given on measure of damages must not be considered as indicating court's views on issue of liability, was not prejudicial error, where court made it clear, in other instructions given, that any award of damages was contingent upon the jury first finding liability.

10. Automobiles ⚷242(3)

Violation of Vehicle Code constitutes negligence per se, and requires presumption that person so conducting himself was negligent, but such presumption is rebuttable by other evidence showing that, under all circumstances surrounding the event, the conduct in question was excusable, justifiable, and such as might reasonably have been expected from person of ordinary prudence. West's Ann.Vehicle Code, §§ 514, 543, 544.

11. Automobiles ⚷201(1)

Violation of Vehicle Code was of no consequence in automobile collision case unless it was proximate cause or contributed as a proximate cause to any injury or death. West's Ann.Vehicle Code, §§ 514, 543, 544.

12. Appeal and Error ⚷1064(1), 1067

In actions against trucking company for death and injury sustained by occupants of station wagon when wagon was struck in rear by company's overtaking tractor-trailer, any error in giving instruction to effect that if Vehicle Code Section were found to be violated, a presumption of negligence would exist unless overcome, and in refusing defendant's requested instruction to effect that, if driver of wagon violated Code, such conduct would constitute negligence as matter of law, was not prejudicial.

13. Damages ⚷130(1)

Award of $5,000 for injuries to neck, ribs, legs, wrist, and lower back, which injuries precluded injured woman from working for period of one year and three months and were still causing pain at time of trial, was not excessive.

14. New Trial ⚷108(5)

Court did not abuse its discretion in denying defendant's motion for new trial of automobile collision case upon defendant's showing that plaintiff, awarded damages for personal injuries, had sustained injuries prior to the collision which allegedly caused pain complained of after collision.

15. Death ⚷99(3)

Award of $15,000 to mother for death of 8-months-old child was not excessive.

16. Appeal and Error ⚷1004(3)

Where trial court fully weighed question of excessiveness of damages on motion for new trial and concluded that amount of judgment was fair and reasonable, such fact was entitled to considerable weight on such issue on appeal.

17. Death ⚷99(1)

Award of $60,000 for death of woman was not excessive.

◆

Dickenson, Sattinger & McKee, El Centro, for appellant.

Boccardo, Blum, Lull, Niland & Teerlink, by Edward J. Niland, San Jose, for respondents.

GRIFFIN, Presiding Justice.

Defendant and appellant Jack Rudy Trucking Company, a corporation, appeals from judgments rendered against it in these two consolidated actions wherein plaintiff and respondent Consuelo de Ruiz, as administratrix of the estate of Esther Juarez Garcia, deceased, recovered judgment for $75,000, subsequently reduced to $60,000, on a motion for new trial, and the other plaintiff and respondent Sara Sandoval obtained a judgment for $5,000 for her personal injuries and $20,000 for the death of her 8-months-old child, Julian K. Sandoval, which latter judgment was reduced to $15,000 on a similar motion.

The facts, though somewhat in dispute, when viewed in a light most favorable to plaintiff, are that about 4:30 on the morning of January 31, 1955, plaintiffs, together with five other passengers, were riding in a 1948 Chevrolet station wagon in an easterly direction on U. S. Highway No. 99, near its intersection with Riverside Drive, close to the city limits of Rialto, in San Bernardino County. Esther Garcia was driving. The station wagon was owned by Sara Sandoval, who was seated in the middle of the front seat with her 8-months-old child in her lap. To her right was a male passenger. The other three passengers were in the rear seat and their luggage was on the bed of the station wagon behind that seat. The weather was clear and dry. The station wagon had been driven to this spot by Sara and parked off of the two-lane south roadway on the shoulder to change drivers with Esther Garcia. Two police officers, seeing the parked car without lights, came alongside of it in their car between it and the shoulder of the highway and conversed with the occupants and then proceeded on easterly to the near-by intersection. After the police car proceeded about 250 yards the officers looked back and observed headlights coming from the shoulder into the southerly lane of the highway. They saw no other lights. When they looked again a few seconds later the lights had disappeared. They crossed the highway, drove back toward the station wagon, and found that a collision had occurred, and also found that a GMC tractor and Brown trailer 60 feet in length, weighing about 25,000 pounds, had overtaken or collided into the rear portion of the station wagon, and the engine of the truck pushed the body of the station wagon up toward the front seat of the station wagon, pushing it down the highway for a distance of approximately 204 feet. There was no evidence of brake marks of either vehicle prior to impact. The passengers were folded up in the front portion of the station wagon and had to be extricated.

Sara suffered severe injuries and a possible herniated disk injury. Her minor son and Esther Garcia were killed.

The defendant truck driver testified he was traveling easterly on this same highway that night en route to Yuma, Arizona; that when he first saw the station wagon it was parked on the shoulder of the highway, facing east, and it was then approximately 700 to 800 feet in front of him and all of its lights were off; that he was traveling about 45 to 49 miles per hour; that about that time he observed an oncoming truck, approaching on the other side of the highway, which he recognized as a Watson Brothers truck; that the driver of this truck flicked his spot-light toward him as a signal that police officers were near-by; that he returned the signal in the same manner; that when he turned his gaze to the highway the station wagon was directly in front of him (about 5 feet); that he was horror-stricken; that he had no time to apply his brakes before hitting it; that he thought it was pulling onto the highway at an angle and the left front of his truck hit the left rear portion of the station wagon; and that he never saw a taillight on the station wagon. He told the officer after the accident that he did not know whether or not the taillights on the station wagon were burning. He then testified that his own headlights were reflecting on the back of the station wagon; and that he did not mean to imply that he could have avoided striking the station wagon had he seen the taillights at that time. In a signed statement he said:

> "I was traveling east on 99 about 45 to 49 miles per hour. I first noticed car was parked over on the right shoulder with the lights off about 400 or 500 feet ahead. I looked over at a truck coming on the westbound lane and started to give him the light. When I looked back ahead, I was sitting right on him. I mashed down on the brake as soon as I saw him. Then I hit him. My brakes did not take hold."

The driver of the other truck testified he observed the police car and defendant's truck about one-half mile from him; that when defendant's truck was about one-fourth mile from him he signaled with the spotlight as indicated and defendant truck driver responded; that when the lights of plaintiffs' station wagon came on he observed the lights of defendant's truck about 700 feet back of it; that shortly thereafter he observed the lights of defendant's truck catch up to plaintiffs' station wagon and hit it from the rear; that the witness stopped, took the driver of defendant's truck aside and asked what happened; and that defendant driver told him he was looking at the other truck. Evidence of marks on the pavement and debris were indicated by different witnesses. Portions of the station wagon were found up to 150 feet east of the point of impact.

Sara Sandoval testified that after the police car drove away they remained there a short time; that the lights on her car were turned on and she turned to see if any car was approaching from the rear; that she saw two lights from far back, "five big city blocks", and she believed it was safe enough to drive onto the highway; that the taillight on their car was burning; that Esther was driving easterly on the outer lane of the highway about 30 miles per hour and that she then lay back and closed her eyes and soon thereafter the station wagon was struck by the defendant's truck, resulting in the injuries and deaths described.

[1, 2] A mere recitation of the facts fully supports the jury's finding of negligence of defendant trucking company. It cannot be said that plaintiffs were guilty of contributory negligence as a matter of law, as claimed. Anthony v. Hobbie, 25 Cal.2d 814, 818, 155 P.2d 826.

[3, 4] Next, defendant argues that it was prejudicial error to give plaintiffs' instruction on the presumption of due care as to deceased, Esther Garcia. It is apparently made on the claim that the evidence produced by plaintiff was wholly unreconcilable with such a presumption, and therefore it was dispelled. This argument is likewise untenable. Gigliotti v. Nunes, 45 Cal.2d 85, 286 P.2d 809. It is also claimed that the added statement that when a conflict exists it is the duty of the jury to weigh the presumption against the contrary evidence and determine which, if either, preponderates, was error in that it required the jury to find that the presumption must be overcome by defendant by a preponderance of the evidence on all issues, citing Gigliotti v. Nunes, supra. The instruction, as given, is not susceptible of such construction when considered in connection with other instructions given on the subject of burden of proof.

[5] The next instruction questioned involves a similar instruction given, criticized, and found faulty in one respect in Pennington v. Southern Pacific Company, 146 Cal.App.2d 605, 618, 304 P.2d 22; and BAJI 25, based on section 1844 of the Code of Civil Procedure, pertaining to the credibility of one witness against a number. The court in that case held it was not prejudicial error to give it. Plaintiffs concede it is technically incorrect under that decision, but claim no prejudicial error resulted. We have reached the same conclusion. Rideau v. Los Angeles Transit Lines, 124 Cal.App.2d 466, 470, 268 P.2d 772; Alvak Enterprises v. Phillips, 167 Cal.App.2d 69, 334 P.2d 148.

[6, 7] Objection is made to given instructions Nos. 29 and 30 in reference to contributory negligence of the driver of the station wagon. No. 30 was offered by defendant and, although it was limited to the driver of the station wagon and did not cover the question of the claimed contributory negligence of Sara Sandoval, defendant cannot now complain of an instruction offered by it. No. 29 was a proper instruction relating to the driver of the station wagon. The court did give a general instruction to the effect that if Sara Sandoval was herself negligent, she would be barred from any recovery. Contributory negligence, both personal and imputed as to both parties, was sufficiently covered. No prejudicial error resulted.

[8] The court failed to give defendant's added requested instruction in reference to BAJI 175, to the effect that no award should be given to the minor children for sorrow, mental distress, or grief suffered by reason of the death of Esther Garcia, nor for her suffering prior to death. As to Sara Sandoval the court did give, at defendant's request, an instruction to this effect as to the loss of her child. A similar proffered instruction as to plaintiff administratrix was refused as being otherwise covered. Defendant argues that this was an invitation to the jury to consider it in that case. While the instruction might well have been given so as to fully cover both plaintiffs, the court in these consolidated cases did state generally that its instructions did apply with equal force in each of the actions and told the jury that in determining the pecuniary loss of plaintiffs it could consider only the financial support, if any, and the pecuniary value of the security, comfort, care, protection and right to receive support, which each plaintiff has lost by reason of the deaths. We conclude no prejudicial error resulted in the failure to give the proffered instruction.

[9] Another of defendant's proffered instructions (BAJI 180) was refused as covered. In Rasich v. Gladding McBean & Co., 90 Cal.App.2d 241, 202 P.2d 576, it was held error to refuse such an instruction. Defendant admits that perhaps if the failure to give this instruction was the only error, or a different factual situation existed, such failure might not, of itself, be considered prejudicial. The court did, after reciting the factual situation, give an instruction that the jury should first determine the question of liability before undertaking to fix damages, if any. In subsequent instructions the court emphasized the statement in other instructions that "If you find in favor of plaintiffs * * * then you should fix damages, if any". The court further cautioned the jury not to infer from anything said by the court that it was inclined to favor the claims or position of either party. When it is made clear, as in the instant case, based upon the evidence here produced, that any award of damages was contingent upon the jury first finding liability, it cannot be said that the failure to give the proffered cautionary instruction resulted in prejudicial error. Hoagland v. Chargin, 134 Cal.App.2d 466, 286 P.2d 931.

[10-12] Defendant submitted an instruction which was refused. It was to the effect that if Esther Garcia violated sections 514, 543 or 544 of the Vehicle Code such conduct constituted negligence as a matter of law. Defendant claims error in this respect. The trial court did instruct on the provisions of a number of the sections of the Vehicle Code offered by both plaintiffs and defendant, including those above mentioned. It then said that conduct in violation of any of those sections constituted negligence per se, and required a presumption that the person who had so conducted himself or herself was negligent. It then went on to point out that such presumption was not conclusive, but may be overcome by other evidence showing that under all the circumstances surrounding the event, the conduct in question was excusable, justifiable and such as might reasonably have been expected from a person of ordinary prudence, and "in this connection you may assume that a person of ordinary prudence will reasonably endeavor to obey the law and will do so unless causes, not of his own intended making, induce him, without moral fault, to do otherwise." It further provided that a violation of law is of no consequence unless it was the proximate cause or contributed as a proximate cause to any injury or death found by it to have been suffered by plaintiffs.

Defendant argues that under the test enunciated in Satterlee v. Orange Glenn School District, 29 Cal.2d 581, 177 P.2d 279; and Ornales v. Wigger, 35 Cal.2d 474, 218 P.2d 531, there was no evidence of any cause or thing beyond the control of Esther Garcia which would excuse or justify her violation of these sections and therefore it was error to give the instruction in this form. This proposition was fully discussed in the late case of Alarid v. Vanier, 50 Cal. 2d 617, 327 P.2d 897, 898, where the broad statement is made that "the presumption of negligence which arises from the violation of a statute is rebuttable and may be overcome by evidence of justification or excuse." It specifically disapproved the inconsistent language in the Satterlee and Ornales cases relied upon by appellant. The facts of the Alarid case, supra, concern a claimed brake failure. Sections 670 and 679 of the Vehicle Code were involved. Therein the court set forth many cases supporting the general rule pertaining to "ignorance of facts" such as "unlighted taillight" and "brake failure", declaring a violator could have fulfilled his duty if he had exercised ordinary care. The court then set forth what it believed to be the correct test, *i. e.*, "whether the person who has violated a statute has sustained the burden of showing that he did what might be reasonably expected of a person of ordinary prudence acting under similar circumstances, who desired to comply with the law." The trial court, in the instant case, gave a proper general instruction patterned after the holding in the Alarid case. No prejudicial error appears in giving it. Kabzenell v. Stevens, 168 Cal.App.2d 370, 336 P.2d 250; Schoenbach v. Key System Transit Lines, 168 Cal.App.2d 302, 335 P.2d 725.

The jury was told, in effect, that if the Vehicle Code sections involved were found to be violated, that the presumption of negligence did exist, unless overcome, as indicated.

Even assuming, without deciding, that the giving of an instruction including this latter provision was improper as not here being applicable, and assuming further without deciding that there was insufficient testimony concerning justification, we are convinced, under the overwhelming and convincing evidence here produced, such claimed error, if any, in giving that portion of the general instruction and refusing defendant's proffered instruction, was not prejudicially erroneous, justifying a reversal of the case. Curtis v. Q. R. S. Neon Corp., Ltd., 147 Cal.App.2d 186, 196, 305 P.2d 294. Under the general instruction given, defendant, under claimed violations charged against it, was given the benefit of this same provision.

[13–17] Lastly, defendant contends the size of the verdicts rendered and the amounts to which they were reduced, indicates that they were the result of sympathy, passion and prejudice. As to the $5,000 judgment the medical evidence shows Sara Sandoval had injuries to her neck, ribs, legs, wrist, and lower back. A scar was left on her wrist and at the time of trial she was still suffering from pain in her back due to a possible herniated disk, as a result of the accident. She was unable to work for a period of one year and three months. Her claimed loss of earnings, based on $40 a week for a season of eight months amounted to approximately $1300. This award does not appear to be excessive. Connolly v. Pre-Mixed Concrete Co., 49 Cal.2d 483, 488, 319 P.2d 343. There was some showing made on the motion for new trial by affidavit of defendant's counsel that after trial he discovered new evidence. It recites that Sara Sandoval was admitted to the hospital in August, 1957; that its records disclose she was involved in an automobile accident in January, 1955; that she complained of pain in her back for two months after the accident and it then disappeared; and that about August 3, 1957, while working in a restaurant, she lifted a pan of dishes and injured her back. He then alleges these records will show the pains she complained of after the instant accident were directly caused by her previous injuries; and that affiant did not know of this record until January 20, 1958, after the judgment was entered. Error is claimed in this respect. Plaintiffs claim these allegations are pure hearsay and conclusions of the pleader; that there was no sufficient showing of due diligence to discover said new evidence; and that the court was justified in rejecting it. We conclude that the court did not abuse its discretion in denying the motion upon the showing made. Smith v. Schwartz, 14 Cal.App.2d 160, 167, 57 P.2d 1386. As to the $15,000 judgment for the death of Sara's child, this amount does not appear to be excessive. Couch v. Pac. Gas & Elec. Co., 80 Cal.App.2d 857, 867, 183 P.2d 91; Daggett v. Atchison, T. & S. F. Ry. Co., 48 Cal.2d 655, 313 P.2d 557, 64 A.L.R.2d 1283. The trial court fully weighed this question on the motion for new trial and concluded that the amount of the judgment was fair and reasonable. This fact is entitled to have considerable weight. Johnston v. Key System Transit Lines, 167 Cal.App.2d 383, 334 P.2d 243. This same conclusion may be reached in respect to the $60,000 judgment. No prejudicial error appears in this respect.

Judgments affirmed.

MUSSELL and SHEPARD, JJ., concur.

171 Cal.App.2d 582

Eldo S. SLATER and Kathleen Slater, Individually and as husband and wife, Plaintiffs and Appellants,

v.

Antonio CONTI, Joseph Conti and Conti Estates, Inc., a corporation, Defendants and Respondents.

Civ. 18290.

District Court of Appeal, First District, Division 2, California.

June 30, 1959.

Hearing Denied Aug. 26, 1959.

Tenants' action against landlord to recover expenses incurred in improving land, and in defending ejectment action brought against tenants and landlord by city and unlawful detainer action brought by landlord claiming that they were deprived of use of strip of land owned by city rendering remainder of leased land valueless to them. The Superior Court, County of San Mateo, Wayne R. Millington, J., entered judgment for landlord and tenants appealed. The District Court of Appeal, Draper, J., held that the final judgment in unlawful detainer action was a binding determination that tenants were in possession of premises leased as late as the date of commencement of unlawful detainer action and that their possession was terminated by judgment entered in such action and since tenants admitted failure to pay rent for at least one month prior to commencement of unlawful detainer action judgment resulted from their default.

Affirmed.

1. Landlord and Tenant ⚷130(1)

There is an implied covenant securing to tenant quiet possession of leased premises against all persons lawfully claiming the same. West's Ann.Civ.Code, § 1927.

2. Landlord and Tenant ⚷132(1)

Landlord's title is relevant only insofar as its lack leads to disturbance of tenant's possession. West's Ann.Civ.Code, § 1927.

3. Landlord and Tenant ⚷172(2)

When tenant is deprived of beneficial enjoyment of leased premises by his landlord or one acting under his authority, such deprivation amounts to a constructive eviction and supports an award of damages to tenant if tenant so elects and surrenders his possession

4. Landlord and Tenant ⚷290(3)

Actual eviction from a substantial part of leased premises is a defense to an action in unlawful detainer since rent will not be reapportioned and tenant is not removable for failure to pay rental for portion remaining in his possession.

5. Landlord and Tenant ⚷172(2), 290(3)

Where tenant is deprived of beneficial enjoyment of a substantial portion of leased premises he may treat this as constructive eviction, surrender possession, and rely upon eviction as a defense in unlawful detainer, but there can be no constructive eviction if tenant continues in possession of the whole, however much he may be disturbed in the beneficial enjoyment.

6. Landlord and Tenant ⚷290(5)

Even a surrender after commencement of unlawful detainer action permits tenant to assert a claim for damages by way of counterclaim or cross-complaint.

7. Landlord and Tenant ⚷291(17)

Where tenants entered into possession of leased premises and thereafter city commenced an ejectment action which both tenant and landlord defended, and even though tenants claimed that deprivation of use of strip of land owned by plaintiff in ejectment action rendered remainder of leased premises valueless tenants stayed in possession of leased premises until shortly before commencement of landlord's unlawful detainer action, and tenants admitted failure to pay rent for at least a month preceding commencement of unlawful detainer action, possession of tenants was terminated by judgment entered in unlawful detainer action which resulted from tenants' default in payment of rent, and hence tenants could not claim damages from landlord for expenses incurred in improving land, and in defending both ejectment and unlawful detainer actions and loss of profits.

8. Landlord and Tenant ⚷291(17)

Where judgment in favor of landlord in unlawful detainer action had become final and tenants could have pleaded actual or constructive eviction in unlawful detainer action, since such issues could have been raised by tenants they were precluded from asserting such issues in later action against landlord to recover damages because of alleged breach of covenant of quiet possession.

◆

Carter, Terreo & O'Connell, San Francisco, James W. Funsten, San Francisco, for appellants.

Anderson & McMillan, Burlingame (Hugh F. Connolly, Burlingame, of counsel), for respondents.

DRAPER, Justice.

At the outset of non-jury trial, both sides moved for judgment on the pleadings. Defendants' motion was granted and plaintiffs appeal from judgment then entered. The facts hereafter stated are taken from the allegations of the complaint and from stipulations made at pre-trial conference and on argument of the motions for judgment.

Defendants leased land to plaintiffs for a five-year term for use as a golf driving range. Plaintiffs took possession September 1, 1953, the date of commencement of the term. On March 8, 1954, the City and County of San Francisco filed an action in ejectment against both lessors and lessees, claiming title to a strip 132 feet wide which bisects the land leased. Both lessors and lessees contested this action. Lessees continued to pay rent through August 31, 1954. There is no specific allegation of termination of lessees' possession, although it is alleged that by reason of the ejectment action lessees "were compelled to and did cease to operate" their business September 30, 1954. On October 11, 1954 lessors commenced an unlawful detainer action against lessees, who allege that lessors filed such action "knowing that (lessees) * * * were no longer in possession." December 30, 1954 memorandum decision in favor of lessors was filed in the unlawful detainer action, and judgment followed January 13, 1955. Memorandum decision in favor of the City and County was filed in the ejectment action November 29, 1954, and judgment was entered January 14, 1955. No writ of restitution ever issued. Both judgments are now final.

In the case at bar, plaintiff lessees assert that because they were deprived of the use of the strip of land owned by the City and County of San Francisco, the remainder of the leased land became valueless to them. They seek compensation for expenses incurred in improving the land, costs of defense of both ejectment and unlawful detainer actions, and loss of profits. The trial court's order for judgment on the pleadings was based upon the view that plaintiffs' possession and enjoyment of the leased premises was neither interfered with nor disturbed until commencement of the unlawful detainer action. Since that action and the judgment therein was based upon plaintiffs' failure to pay rent, that court concluded that no liability could be imposed upon defendant lessors.

[1] The lease before us contains no express covenant either of title or of quiet enjoyment. However, under our code there is an implied covenant securing to the lessee "the quiet possession" of the leased premises "against all persons lawfully claiming the same" (Civ.Code, § 1927). Plaintiffs argue that, in addition, a lessor impliedly covenants title in himself. Language in some of the older cases (Chandler v. Hart, 161 Cal. 405, 413, 119 P. 516; McAlester v. Landers, 70 Cal. 79, 11 P. 505; La France v. Kashishian, 204 Cal. 643, 269 P. 655) seems to support this view. But none of these cases directly holds that damages may be recovered for breach of such a covenant. Nor do we find any au-

thority permitting recovery for lack of title in the lessor unaccompanied by loss of possession by the lessee. On the contrary, Section 1927 expressly limits the covenant to application as against persons "lawfully claiming" the property. It seems clearly implied that the lessor's title is relevant only insofar as its lack leads to disturbance of the lessee's possession. It is significant that the Field draft of a Civil Code for New York, which was the basis for much of our Civil Code, contains, in Section 981, the exact language which since 1872 has been Section 1927 of our Civil Code. The Field draft, which was intended as a codification of the common law, cites for this section Vernam v. Smith, 15 N.Y. 327. In that case plaintiff lessor sued for the first year's rent. The lessee's answer alleged that plaintiff was not the owner of the leased premises, that defendant lessee was sued in ejectment by a third party shortly after commencement of the term, and that 10 days after expiration of the first year of the term judgment was entered against defendant in the ejectment action. Comparability to the case at bar is clear. But the Court of Appeals affirmed sustaining of demurrer to the answer and judgment in favor of plaintiff lessor. It seems clear that even if execution of a lease implies a covenant of title in the lessor, breach of the covenant is actionable only when possession is interfered with. Thus the question before us is whether appellant lessees' loss of possession resulted from paramount title of the City and County to a substantial portion of the leased land, or from lessees' own failure to pay rent.

[2-6] There is no question that when a tenant is deprived of the beneficial enjoyment of the leased premises by his landlord or one acting under his authority, such deprivation amounts to a constructive eviction, and supports an award of damages to the tenant, if the latter "so elects and surrenders his possession." Riechhold v. Sommarstrom Inv. Co., 83 Cal.App. 173, 177, 256 P. 592, 593. An actual eviction from a substantial part of the leased premises is a defense to an action in unlawful detainer, since the rent will not be apportioned and the tenant is not removable for failure to pay rental for the portion remaining in his possession. Giraud v. Milovich, 29 Cal.App.2d 543, 85 P.2d 182. Similarly, where the tenant is deprived of the beneficial enjoyment of a substantial part of the leased premises, he may treat this as a constructive eviction, surrender possession, and rely upon the eviction as a defense in unlawful detainer. Veysey v. Moriyama, 184 Cal. 802, 195 P. 662, 20 A.L.R. 1363; Agar v. Winslow, 123 Cal. 587, 56 P. 422. But "(t)here can be no constructive eviction if the tenant continues in the possession of the whole, however much he may be disturbed in the beneficial enjoyment." Veysey v. Moriyama, supra, 184 Cal. at page 805, 195 P. at page 663. Even a surrender after commencement of the unlawful detainer action brings defendant within an exception to the general rule applicable in unlawful detainer proceedings, and permits him to assert a claim for damages by way of counterclaim or cross-complaint. (2 Witkin, Calif. Proc. 1573, and cases there cited.)

[7, 8] The complaint before us shows that lessees remained in possession of the leased premises into September. Although alleging that the entire leasehold was "necessary and essential" to the operation of their business, the complaint asserts that plaintiffs were compelled to cease operation "on or about September 30, 1954." Further, since the main objective of an action in unlawful detainer is the recovery of possession, with recovery of rent or damages a mere incident thereto (see cases cited in 30 Cal.Jur.2d, Landlord & Tenant, § 348) the judgment in the unlawful detainer action, now final, is a binding determination that lessees were in possession of the premises at least as late as October 11, 1954, the date of commencement of the unlawful detainer action. It follows that their possession was terminated by the judgment entered January 13, 1955 in the unlawful detainer action. Lessees admit failure to pay rent after August 31,

1954, and stipulate that the judgment in unlawful detainer included an award of unpaid rentals, making clear that this judgment resulted from their default. As previously pointed out, they could have pleaded actual or constructive eviction, the basis of their claims here, in the unlawful detainer action. Since we do not have the benefit of the pleadings, findings and judgment in that action, we cannot determine whether such issues were presented and determined. But since such issues could have been there raised, lessees are precluded from asserting them in this later action.

Judgment affirmed.

KAUFMAN, P. J., and DOOLING, J., concur.

171 Cal.App.2d 497

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Roland Keith GILLETTE and George Thomas Bevins, Defendants,

George Thomas Bevins, Appellant.

Cr. 6215.

District Court of Appeal, Second District, Division 2, California.

June 25, 1959.

As Modified on Denial of Rehearing July 13, 1959.

Hearing Denied Aug. 19, 1959.

Defendant was convicted of armed robbery in the first degree and from a judgment of the Superior Court of Los Angeles County, Beach Vasey, J., the defendant appeals. The District Court of Appeal, Fox, P. J., held that the evidence sustained conviction; that defendant was not denied a fair trial; that prior convictions were properly considered in sentencing the defendant as a habitual criminal and that refusal of the trial court to appoint counsel for defendant on appeal was proper.

Judgment affirmed.

1. Robbery 🔑24(3)

Evidence on identification sustained conviction of robbery in the first degree and the fact that the victim was very much afraid did not necessarily detract from his ability to remember the physical features of his assailant and later to identify him.

2. Criminal Law 🔑317

While the failure of a defendant to testify will not supply a lacuna in the prosecution's proof, such failure may be considered by jury as tending to indicate the truth of the prosecution's evidence. West's Ann.Const. art. 1, § 13.

3. Robbery 🔑24(1)

Evidence established that defendant was armed with a deadly weapon so as to sustain conviction for robbery in the first degree.

4. Criminal Law 🔑636(1)

Defendant was not denied a fair trial because unrecorded conversations were held at the bench between his attorney, the prosecutor and the judge, out of the presence of the jury.

5. Criminal Law 🔑721(1)

Under the Constitution, comment by counsel concerning failure of defendant to testify is authorized and the jury is entitled to consider such circumstances in its deliberations. West's Ann.Const. art. 1, § 13; West's Ann.Pen.Code, § 1323.

6. Criminal Law 🔑722½

Prosecutor's comment that the case called for application of the habitual criminal statute made when defendant was before the court for sentence did not violate the statute that no representation can be made to the court in aggravation of punishment except as provided in the preceding statute, where the prosecutor properly called the attention of the court to prior convictions and he alluded to nothing that was not in the record before the court. West's Ann.Pen.Code, §§ 644, 1204.

7. Criminal Law ⚷728(2)

In robbery prosecution, where Count I charged codefendant alone with robbery upon another occasion and Count II charged defendant and codefendant with robbery with a deadly weapon, presentation of testimony involving automobile used in the robbery by defendant and codefendant in Count II and by codefendant alone in Count I was not improper as connecting defendant with Count I where no motion was made to strike the testimony for failure of the District Attorney to connect it up.

8. Criminal Law ⚷889

In robbery prosecution, defendant was not denied a fair trial on the question of his being armed during the robbery where foreman of jury advised court that jury had not understood that filling out the form of verdicts with regard to whether the parties were armed was necessary but that they had agreed on the issue and the foreman thereupon signed a verdict finding defendant was armed at the time he committed the robbery and the verdict was concurred in by the other jurors.

9. Criminal Law ⚷1031(4)

Where defendant was taken into custody on September 25th but was not arraigned until October 21st and he made no objection in the court below to the timeliness of his arraignment, he could not complain on appeal.

10. Criminal Law ⚷1137(2)

Where date on which verdict was returned, court referred case to probation officer and on date of hearing defendant's counsel requested court for a continuance in order to file an application for probation and defendant personally joined therein, defendant could not claim that there was an improper delay in his sentencing after conviction. West's Ann.Pen.Code, §§ 1191, 1203.

11. Criminal Law ⚷1202(3)

When a defendant has admitted a prior conviction, there is no requirement that the prosecution produce evidence of the nature thereof.

12. Criminal Law ⚷1202(1)

Trial court in adjudicating defendant a habitual criminal was entitled to take into consideration the convictions of defendant in Nebraska and Iowa for burglary and for receiving stolen goods. West's Ann. Pen.Code, § 644.

13. Criminal Law ⚷1202(4)

Where defendant admitted prior convictions, there was no need for the jury to pass upon such issue as basis for finding defendant a habitual criminal.

14. Criminal Law ⚷1077

Where defendant was represented by counsel through all the trial court proceedings including probation hearing and pronouncement of judgment and the trial court found that there was no substantial legal question warranting appellate review, denying defendant's request for appointment of counsel on appeal was proper.

◆

George Thomas Bevins, in pro. per.

Stanley Mosk, Atty. Gen., Jack E. Goertzen, Deputy Atty. Gen., for respondent.

FOX, Presiding Justice.

Appellant Bevins and one Roland Keith Gillette were charged in Count II[1] of an information with robbing Thomas Wood of $4,418 on August 30, 1957. It was alleged that the defendants were armed with a deadly weapon. It was further alleged that Bevins had suffered four prior convictions, for each of which he had served time in a penitentiary. A jury found Bevins guilty of armed robbery in the first degree. On motion of the People, the first alleged prior conviction was stricken. Appellant admitted the other three priors. The court found appellant to be an habitual criminal and sentenced him to imprisonment in the state prison for the term prescribed by law. He has appealed from the judgment.

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[1] Count I charged Gillette alone with robbery upon another occasion.

At approximately 8:55 on the evening of August 30, 1957, appellant and Gillette (who is not involved in this appeal) entered the Safeway Store located at 311 West Pacific Coast Highway in Long Beach. Thomas E. Wood, head food clerk, was in the process of putting the money from the checkstands into the safe preparatory to closing the store at 9:00 o'clock. As he closed the safe and turned toward the checkstands a man approached him and put a gun in his side and told him to open the safe. Wood observed that the gun was a chrome-plated revolver. Upon Wood's opening the safe, appellant held out a bag and told him to put the money into it. Wood began to pull out the drawer which he had just placed in the safe, whereupon appellant said, "No, not that, I want the big money." Wood then started to put the drawer back, but appellant told him that he would take that also. Wood took the drawer out again, removed the currency, and put it into appellant's bag. Wood then opened the combination side of the safe where there was a box about 6 x 8 inches containing currency in $100 bundles. Appellant told Wood that was what he wanted. Wood started to take the money out of the box, but appellant had him put the box and its contents into the sack. Appellant also told Wood he would take all the rolls of money, to wit, half dollars, quarters, dimes, nickles and pennies. Wood started to pick them up one at a time, but appellant told him to hurry; finally, appellant stepped in and took the rolls of money and put them into the bag himself, while Wood stood back. While this was going on, appellant was inquiring of Wood as to the time the police checked the market. Wood informed him that he did not know. After appellant had finished depositing the rolls of money in his sack, he took a crowbar and attempted to get into the key-side of the safe. He made two attempts to open this portion of it, remarking that it did not open very easily. Appellant stated to Wood: "My buddy is standing behind you. Don't try anything funny." At this point, appellant left the store. Wood observed that appellant was wearing a hat, but had no mask. Wood gave a description of appellant to the police when they arrived. Later the police showed Wood some 700 pictures. Appellant's picture, however, was not among them. Later they showed him six more pictures, from which group Wood picked out appellant's photograph.

On September 30th, Wood had occasion to see appellant in a police line-up. He identified appellant as the person who robbed him. Wood testified that he turned around and looked at appellant when they were at the safe; that they were right next to each other while the money was being put into the sack, and that he had no difficulty whatever in recognizing appellant at the police line-up on September 30th. Wood also identified him at the trial.

Appellant did not take the stand nor were any witnesses called on his behalf.

[1] The testimony of the victim, Wood, completely negates appellant's contention that the evidence is insufficient to establish his identification. In support of his contention he argues that Wood "was an unreliable witness" because of his fear of the gun. It was, of course, the function of the jury to evaluate the reliability of Wood's testimony, and their determination is binding on this court. The jury obviously believed him, and the fact that he was "very much afraid" did not necessarily detract from his ability to remember the physical features of his assailant and to later identify him. In this connection, appellant also argues that Wood's testimony was insufficient to establish that his assailant had a gun. He bases this on the theory that Wood only had a momentary glimpse of the weapon. The following questions and answers on cross-examination reflect the fact that Wood had ample opportunity to see the gun:

"Q. Did you observe the gun that you referred to first, or did you feel it? A. I felt it first.

"Q. In other words, it was right up against your person? A. It was.

"Q. Did you look down at it at that time? A. Yes, I did."

Wood then proceeded to describe the gun.

[2] It is not without significance that appellant did not take the stand to deny or explain any of Wood's testimony. "While the 'failure to testify will not supply a lacuna in the prosecution's proof' (People v. Ashley, 42 Cal.2d 246, 268, 267 P.2d 271, 285), '[a] defendant's failure to take the stand "to deny or explain evidence presented against him, when it is in his power to do so, may be considered by the jury as tending to indicate the truth of such evidence, and as indicating that among the inferences that may reasonably be drawn therefrom, those unfavorable to the defendant are the more probable." People v. Adamson, 27 Cal.2d 478, 489, 165 P.2d 3, 9' ibid; [citations]. As pointed out in the Adamson case, supra, '[t]he failure of the accused to testify becomes significant because of the presence of evidence that he might "explain or * * * deny by his testimony" (Art. I, § 13, Cal.Const.), for it may be inferred that if he had an explanation he would have given it, * * *.'" People v. Chapman, 156 Cal.App.2d 151, 157, 319 P.2d 8, 12.

[3] The record discloses ample evidence to sustain appellant's conviction and the determination that he was armed with a deadly weapon under the principles of appellate review stated in People v. Newland, 15 Cal.2d 678, at page 681, 104 P.2d 778, at page 779.

[4] There is no merit in appellant's argument that he was denied a fair trial in violation of his constitutional rights because unrecorded conversations were held at the bench between his attorney, the deputy district attorney and the judge, out of the hearing of the jury. He argues that he was denied the "right to know what was transpiring or being said during his trial." This identical question was raised in People v. Baker, 164 Cal.App.2d 99, 330 P.2d 240, 243, and passed on adversely to the appellant's position. The court there pointed out that defendant's "own counsel took part in the conversation at the bench." Hence, the "record does not disclose a situation where in any practical sense appellant was not present at all times during the trial." 164 Cal.App.2d at page 104, 330 P.2d at page 243. In People v. Justice, 167 Cal.App.2d 616, 334 P.2d 1031, the question is further explored. It is there pointed out (167 Cal.App.2d at page 624, 334 P.2d at page 1036) that since the jury did not hear the off-the-record discussions it could not possibly have been influenced by them. These cases demonstrate the futility of appellant's argument on this point.

Appellant vainly contends that the court failed to properly instruct the jury and left the jurors confused through inadequate instructions. In support of his position he points out that he was only involved in one count, namely, Count II, and that his codefendant, Gillette, was involved in both counts. He argues that the jury was not properly instructed that he was not involved in Count I. However, the record does not sustain his position. Instruction No. 16 concludes as follows: "* * * the defendant Bevins is charged in only one count —Count II." It is thus clear that this contention is not supported by the record.

[5] Appellant charges the prosecutor with misconduct (1) in his argument to the jury; (2) in representing to the court that appellant had four prior felony convictions; (3) in drawing the court's attention to the applicability of the habitual criminal act; and (4) in presenting evidence that inferentially connected him with Count I. Appellant particularly complains that the prosecutor argued to the jury to the effect that if the defendant was not guilty then why did he not take the stand and deny his guilt. In People v. Wilder, 135 Cal.App.2d 742, 287 P.2d 854, the court considered this specific complaint. On pages 746–747 of 135 Cal.App.2d, on page 857 of 287 P.2d the court stated: "There can be no question but that by virtue of article I, section 13, of the California Constitution and Penal Code, section 1323, comment * * * by counsel concerning such failure by a defendant [to testify] is authorized and the jury is entitled to consider such circumstances in its deliberations."

The incident relative to appellant's prior convictions occurred at the time appellant was before the court for sentence. The record does not bear out appellant's claim that the prosecutor represented that he had four prior convictions. The court observed that only the burglary and stolen property convictions could properly be considered on the question of whether to invoke the habitual criminal act in this case. The court also observed that the Dyer Act, 18 U.S.C.A. §§ 2311–2313, prior conviction which appellant had admitted could not be considered in this connection (another alleged Dyer Act conviction had been previously dismissed on motion of the prosecution). The prosecutor agreed with the trial judge's analysis of the prior convictions and made no representation as claimed by appellant.

[6] It is suggested, however, that the prosecutor's comment that this case called for application of the habitual criminal statute (Pen.Code, § 644) was in violation of section 1204 of the Penal Code, which provides, inter alia, that no representation can be made to the court in aggravation of the punishment except as provided in that and the preceding section. It cannot fairly be said that the prosecutor's statement was in aggravation of punishment and violative of section 1204. The reason for the prosecutor's comment was the fact that appellant had two prior convictions that were within the provisions of section 644 and that he had admitted said priors (in addition to one Dyer Act conviction). Thus, on the face of the record, the provisions of section 644 were applicable. The prosecutor was clearly at liberty to call the attention of the court to these priors for in so doing he alluded to nothing that was not in the record before the court.

[7] The evidence which appellant claims inferentially connected him with Count I related to testimony involving the automobile which possibly was used in the robbery by appellant and Gillette in Count II and by Gillette alone in Count I. The testimony was allowed to stand subject to a later motion to strike if the district attorney failed to connect up such testimony. No such motion was ever made. It is clear from the foregoing that the prosecutor was not guilty of misconduct in any of these respects.

[8] Appellant asserts that he was denied a fair trial on the question of his being armed during the robbery. When the jury had concluded its deliberations and returned to the courtroom the judge inquired: "Did you fill out the form of verdicts with regard to whether or not the parties were armed?" The foreman advised the court that the jury had not understood that this was necessary, but that they had in fact reached an agreement upon that issue. Thereupon the foreman signed a verdict finding that appellant was armed at the time he committed the robbery. The verdicts were then read to the jury, all of whom concurred in the correctness of the verdicts as read and, upon being separately polled, all jurors answered in the affirmative. If there were any doubts in the minds of either appellant or his counsel as to the jury's finding they should have been made known before the jury was discharged. Obviously, the matter of signing the verdict as to appellant's being armed at the time of the commission of the offense related to a purely ministerial act and in no way prevented him from having a fair trial.

[9] Appellant argues that his constitutional rights were violated by delay in his arraignment and that the court lost jurisdiction by extending the time for the pronouncement of sentence beyond the time allowed by law. Appellant was taken into custody on September 25, 1957, but was not arraigned until October 21st. He made no objection in the court below to the timeliness of his arraignment. The statement of the court in People v. Newell, 192 Cal. 659, 669, 221 P. 622, 626, is here apposite: "* * it does not appear it was claimed in the court below that the appellant was not seasonably arraigned, and this alone is a sufficient answer to the contention."

[10] Appellant also claims that there was improper delay in his sentencing after conviction. On December 6, 1957, the date

upon which the verdict was returned, the court in the exercise of its discretion (Penal Code, § 1203) referred the matter to the probation officer and set the hearing for January 3, 1958. On the latter date counsel for appellant requested a continuance in order to get an application for probation on file. The appellant personally joined in this request for a continuance. While section 1191 of the Penal Code provides that judgment be pronounced within 21 days after the verdict, it further provides that the judge may extend this time "* * * until the probation officer's report is received and until any proceedings for granting or denying probation have been disposed of." It is thus apparent that these contentions are wholly lacking in substance.

[11, 12] Appellant contends that the court erred in adjudicating him an habitual criminal in that neither the Nebraska conviction for burglary nor the Iowa conviction for receiving stolen property were competent as a basis for this adjudication. Appellant claims that the Nebraska conviction was for second degree burglary, and that this is not mentioned in section 644 of our Penal Code and hence cannot be considered in adjudicating him an habitual criminal. There is nothing in the record to indicate that the conviction alleged was a second-degree burglary. The allegation of the prior conviction, which was admitted by appellant, is that he had been "convicted of the crime of burglary, a felony" and had "served a term of imprisonment therefor in the state prison." When a defendant has admitted a prior conviction, there is no requirement that the prosecution produce evidence of the nature of the conviction. People v. Herod, 112 Cal.App.2d 764, 766, 247 P.2d 127; People v. McConnell, 86 Cal. App.2d 578, 580, 195 P.2d 34. This question was considered in People v. Lyle, 21 Cal. App.2d 132, 68 P.2d 378. The court there pointed out (21 Cal.App.2d at page 137, 68 P.2d at page 381) "* * * the information contained a full and complete description of the prior offenses, the courts wherein judgments of conviction were pronounced, the dates of said judgments, and the fact that in each instance as punishment therefor appellant served a term in a designated penal institution. Appellant expressly admitted the three prior convictions of felony which were thus described. Under these circumstances if appellant considered that evidence was required to acquaint the trial court with the nature of the previous crimes which he had committed, the duty was imposed upon him then to submit such evidence. This he failed to do and it is now too late to complain for the first time on this appeal that evidence in which he alone was interested and which he should have presented was not submitted."

Relying on People v. Morton, 41 Cal.2d 536, 261 P.2d 523, appellant points out that before his burglary conviction in Nebraska could properly be considered in adjudging him an habitual criminal the crime of burglary in Nebraska must have substantially the same elements as the crime of burglary in California. He argues that the elements of the crime are not the same in the two jurisdictions. But a comparison of the statutes defining burglary in the two states clearly refutes his argument. What has been said about appellant's burglary conviction in Nebraska applies generally to his conviction in Iowa for receiving stolen property. There can be no doubt that the trial court was entitled to take both of these admitted felonies into account in adjudging appellant an habitual criminal under Penal Code section 644.

Appellant makes the unmeritorious contention that "the judgment did not include the adjudication of habitual criminal." The complete answer to this contention is found in the following excerpt from the Reporter's Transcript:

> "The Court: * * * I am impressed with the fact that it is just such a case as this that the legislature had in contemplation in passing the habitual criminal statute, and I think it is applicable in this case. Therefore, I will find that the defendant—
>
> "The Defendant: Don't make me a habitual criminal.

"The Court: I find the defendant is a habitual criminal and is to be sentenced to the state prison."

Further, the minutes of the trial court in which the judgment is recorded contain the following: "The court finds the defendant is an habitual criminal."

[13] In view of appellant's admission of the alleged prior convictions there is patently no basis for his contention that the jury should have passed upon such issue.

Appellant asserts that he "was never rearraigned." The minutes of the court state that "Defendant Bevins withdraws his denial of the second, third and fourth allegations of prior convictions and admits the said allegations." There is nothing in the record which indicates that appellant was not properly arraigned.

[14] Appellant contends that his constitutional rights have been violated by reason of the fact that he has not been represented by counsel since the "verdict was returned." The record discloses that appellant was represented by counsel through all the proceedings of the trial court including the probation hearing and pronouncement of judgment. He apparently refers to the refusal of this court, upon his application, to appoint counsel to represent him on this appeal. After an examination of the record, this court, on August 13, 1958, entered the following minute order: "It appearing that there is no substantial legal question warranting appellate review herein, defendant's request for appointment of counsel is denied." This procedure and order is in harmony with the later declaration of policy in such matters by the Supreme Court in People v. Hyde, 51 Cal.2d 152, 331 P.2d 42.

It is apparent from the foregoing that there is no merit whatever in any of appellant's contentions.

The judgment is affirmed.

ASHBURN and HERNDON, JJ., concur.

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171 Cal.App.2d 662

Catherine A. SULLIVAN, Plaintiff and Cross-Defendant and Respondent,

v.

George DUNNIGAN, Individually and as Administrator of the Estate of Elizabeth Sullivan, deceased, Marian Dunn, Edward F. Donovan, et al., Defendants and Cross-Complainants and Appellant.

No. 18281.

District Court of Appeal, First District, Division 1, California.

July 2, 1959.

Rehearing Denied July 30, 1959.

Action to set aside a deed conveying plaintiff's undivided half interest in home to her son and daughter-in-law reserving to herself a life estate in home in which plaintiff lived with her son and daughter-in-law, who enjoyed plaintiff's trust and confidence and who procured execution of deed by plaintiff, who because of poor eyes could not read and who testified that paper was represented to her as accomplishing something entirely different than it actually did. From adverse judgment of the Superior Court, City and County of San Francisco, Chester W. Morris, J., the defendants appealed. The District Court of Appeal, Wagler, J. pro tem., held that evidence was sufficient to sustain finding of fraud.

Judgment affirmed.

1. Appeal and Error ⚷931(1)

When reviewing court is called upon to review record to ascertain whether there is sufficient evidence to support findings of trial court, all conflicts must be resolved in favor of respondent and all legitimate and reasonable inferences must be indulged in to uphold the judgment.

2. Appeal and Error ⚷996

When two or more inferences can reasonably be deduced from the facts, the reviewing court is without power to substitute its deductions for those of trial court.

3. Appeal and Error ⚷989

When finding of fact is being attacked as unsupported by evidence, power of reviewing court begins and ends with a determination as to whether there is substantial evidence, contradicted or uncontradicted, which will support conclusion reached by trial court.

4. Appeal and Error 🔑994(3)

In action to set aside on ground of fraud a deed conveying plaintiff's undivided half interest in home to plaintiff's son and daughter-in-law, reserving to plaintiff a life estate, credibility of plaintiff was a question solely for trial court.

5. Deeds 🔑211(3)

In action to set aside a deed conveying plaintiff's undivided half interest in home to her son and daughter-in-law, reserving to plaintiff a life estate in home in which plaintiff lived with her son and daughter-in-law who enjoyed plaintiff's trust and confidence and who procured execution of deed by plaintiff, who because of poor eyes could not read and who testified that paper was represented to her as accomplishing something entirely different than it actually did, evidence was sufficient to sustain finding of fraud.

6. Cancellation of Instruments 🔑4

Claim by plaintiff that she signed a writing merely to insure that undivided one-half interest held in joint tenancy by her son and daughter-in-law in a house would pass to daughter-in-law upon death of son, and her testimony that she received no money from son and daughter-in-law for executing writing which in fact conveyed her undivided one-half interest to them and that she was not indebted to them at any time, rendered deed void and subject to cancellation rather than rescission. West's Ann.Civ.Code, § 1691.

7. Limitation of Actions 🔑37(4)

The only statute of limitations relevant to an action to set aside a deed on ground of fraud is section requiring that action be brought within three years from discovery of facts constituting the fraud. West's Ann.Code Civ.Proc. § 338, subd. 4.

8. Fraud 🔑36

Negligence in discovering falsity of a statement is no defense when misrepresentation is intentional rather than negligent.

9. Records 🔑19

Purpose of recording acts is to afford protection to bona fide purchasers not to those making fraudulent misrepresentations, and plaintiff, who sought to set aside deed conveying her one-half interest in property to her son and daughter-in-law on ground of fraud, was not held to constructive notice of fraud on ground that deed was a matter of record.

10. Deeds 🔑70(2)

Fact that an investigation of public records would have disclosed falsity of representation as to interest plaintiff was conveying in execution of a deed did not bar her right to have deed set aside on ground of fraud.

11. Deeds 🔑70(6)

Where a confidential relationship existed between plaintiff, who had an undivided one-half interest in house, and her son and daughter-in-law, who owned other half in joint tenancy, plaintiff was under no duty to investigate to discover falsity of representation under which she was induced to execute a deed conveying her interest in property to son and daughter-in-law.

12. Limitation of Actions 🔑100(10)

Action to set aside 1948 deed on ground of fraud which was not discovered until December 30, 1955, was not barred by statute of limitations when action was commenced in June of 1956. West's Ann. Code Civ.Proc. § 338, subd. 4.

13. Cancellation of Instruments 🔑34(3)

Action commenced in 1956 to set aside deed executed in 1948 conveying plaintiff's undivided one-half interest in home to her son and daughter-in-law was not barred by laches when plaintiff did not learn true facts as to effect of deed until December 30, 1955.

14. Cancellation of Instruments ⚿34(1, 3)

Availability of laches as a defense to an action to set aside deed on ground of fraud is largely a question of fact, and in determining what length of time constitutes laches, consideration will be given to circumstances that may have justified delay, to nature of case, and to possible existence of prejudice to defendant or other interested parties.

15. Trial ⚿404(4)

Finding that each and every allegation set forth in stated paragraphs of defendants' answer was untrue was sufficiently broad to include both affirmative averments and denials.

16. Trial ⚿404(4)

Court's finding that all of plaintiff's material allegations were true, necessarily included a denial of truth of defendants' denials with reference to those same allegations.

17. Appeal and Error ⚿843(2)

Where evidence supported court's findings, denial of nonsuit presented a question that was moot and need not be considered by reviewing court.

18. Appeal and Error ⚿1135

If a motion for nonsuit has been properly denied, reviewing court will not reverse merely to give counsel an opportunity to make an argument.

19. Witnesses ⚿270(1), 282½

A trial court has duty to supervise conduct of trial to the end that it may not be unduly protracted, and that other litigants too may have their day in court, and in carrying out that duty, court may confine cross-examination within reasonable limits and may curtail cross-examination which relates to matters already covered, or which are irrelevant.

20. Appeal and Error ⚿971(3)
Witnesses ⚿267

Curtailment of cross-examination is a matter within discretion of trial court and only a manifest abuse thereof will require a reversal.

21. Witnesses ⚿282½

In action to set aside deed conveying plaintiff's undivided one-half interest in home to her son and daughter-in-law on ground of fraud, court did not abuse its discretion in limiting cross-examination of plaintiff as to honesty of her deceased son after several questions and answers relating to that point.

◆

Phil F. Garvey, San Francisco, for appellants.

Eugene S. Clifford, Alvin H. Baum, Jr., Heller, Ehrman, White & McAuliffe, San Francisco, for respondent.

WAGLER, Justice pro tem.

This is an appeal from a judgment setting aside a deed on the ground of fraud. Appellants attack the findings as unsupported by the evidence; they also complain of alleged errors occurring at the trial which they contend denied them a fair trial.

Appellants are the heirs-at-law of the deceased widow of respondent's deceased son, George Sullivan.

[1–3] When an appellate court is called upon to review the record to ascertain whether or not there is sufficient evidence to support the findings of the trial court, all conflicts must be resolved in favor of the respondent and all legitimate and reasonable inferences must be indulged in to uphold the judgment. When two or more inferences can reasonably be deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court. Crawford v. Southern Pacific Co., 3 Cal.2d 427, 45 P.2d 183. When a finding of fact is being attacked as unsupported by the evidence, the power of the appellate court begins and ends with a determination as to whether or not there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the trial court. In re Estate of Bristol, 23 Cal.2d 221, 143 P.2d 689; In re Estate of Teel, 25 Cal.2d 520, 154 P.2d 384; Rieger v. Rich, 163 Cal.App.2d 651, 329 P.2d 770.

When viewed in the light of the foregoing rule there can be no doubt that the findings under attack are adequately supported by the record.

Respondent-plaintiff was 75 years of age at the time of the execution of the deed in question and 85 at the time of the trial. Her husband died in 1906, leaving her a "nice little bit of money." She thereafter supported herself, and her two minor sons, George and John, by a few nursing jobs and by taking in boarders. She suffered from defective vision all her life and left school in the second grade because she "couldn't see the books, or read." She had cataracts for many years which were operated on in October 1948. Her son George lived with her all his life and after his marriage his wife Elizabeth also came to reside with respondent.

Respondent successively owned several parcels of real property. In March 1948 she acquired an undivided one-half interest in a house located at 4101 Balboa Street, San Francisco, the property involved in this litigation. The same deed conveyed to her son George and his wife Elizabeth Sullivan the other half, as joint tenants. George and Elizabeth resided with respondent at the Balboa Street address until the death of George in January 1949, and of Elizabeth in December 1955.

Immediately prior to the acquisition of this property, the three had resided for a short time in a house on Kirkham Street, title to which was apparently in the name of all three as joint tenants. Proceeds from the sale of the Kirkham Street property were applied on the purchase of the property in question. Prior to the acquisition of the Kirkham Street property respondent had owned other real estate as sole owner. Respondent testified that she had the names of George and Elizabeth put on the Kirkham Street deed but that they did not contribute toward the purchase price and she did not understand that the effect thereof was to give them a present interest in the property. She did the same thing when the Balboa Street property was acquired but again she did not understand that they were acquiring a present interest therein or that all of it would go to George and Elizabeth if she died. She testified further that her other son John had made the down payment on the latter property amounting to $500 and she intended that both sons should share in the property in the event of her death.

It appears from the record that the relations between respondent and George and Elizabeth were always amiable. When their names were put on the Balboa Street property they kissed her and Elizabeth said to George, "What a grand mother you've got." Elizabeth read respondent's letters for her and continued to reside with her after George's death and until her own demise. It thus appears that both George and Elizabeth enjoyed respondent's trust and confidence throughout the lifetime of each.

The deed in question was executed on March 31, 1948. By it respondent conveyed her undivided half-interest to George and Elizabeth reserving to herself a life estate. It was prepared at the request of Elizabeth by an attorney who was employed by the company which also employed her. It was acknowledged before a notary public who went to the Sullivan residence, also at the request of Elizabeth, for that purpose.

[4, 5] Respondent testified as to the events surrounding the execution of the deed substantially as follows: She first heard of the "paper" just before 6 p. m. on March 31, when George, who had undergone a major operation, returned unexpectedly from the hospital. George was very sick at the time and "could hardly talk"; he told her to sign the paper to take his name off of her property. "Elizabeth wanted to take his name off. * * *" (George died about 10 months thereafter.) She could not read the paper and the notary did not read it to her. It looked like a "piece of plain paper." She also

testified at some length concerning her poor eyesight at the time and that she received no money from George or Elizabeth and that she was not indebted to them at the time. Although the record indicates that at times respondent became somewhat confused her account appears to have been quite consistent. In any event, her credibility was a question solely for the trial court. Hurley v. Behnke, 212 Cal. 761, 300 p. 820.

Under the circumstances above set forth, it would appear that the finding that the deed was procured without consideration is supported by substantial evidence. This fact coupled with the confidential relationship of the parties, the activity of the grantees in procuring the execution of the deed and the physical condition of respondent would give rise to a presumption that the deed was procured by fraud. Campbell v. Genshlea, 180 Cal. 213, 180 P. 336; Herbert v. Lankershim, 9 Cal.2d 409, 71 P.2d 220; Pleasants v. Hanson, 48 Cal. App. 626, 192 P. 183; Longmire v. Kruger, 80 Cal.App. 230, 251 P. 692; Mead v. Mead, 41 Cal.App. 280, 182 P. 761. Add to this presumption the direct testimony of respondent that the "paper" was represented to her as accomplishing something entirely different than it actually did, and the conclusion that the finding of fraud is supported by substantial evidence becomes inescapable. Rieger v. Rich, 163 Cal.App.2d 651, 329 P.2d 770.

[6] As special defenses to the instant action appellants pleaded the defense of laches, numerous sections of the Code of Civil Procedure, relating to the limitation of actions, and section 1691 of the Civil Code, which requires that an action for rescission be brought promptly.

It should first be noted that the instant action is not one for rescission under Civil Code, section 1691, but rather an action to cancel a void instrument. In her complaint respondent alleged that she signed the writing merely to insure that the undivided one-half then held in joint tenancy by George and Elizabeth would pass to Elizabeth upon the death of George. Her testimony heretofore summarized would support the finding that she had no present intention to part with title to the interest purportedly conveyed. Hence the deed in question would be void and subject to cancellation rather than rescission. Zakaessian v. Zakaessian, 70 Cal.App.2d 721, 161 P.2d 677. In Zakaessian (decided on demurrer), the court held at pages 724, 725, of 70 Cal.App.2d at page 679 of 161 P.2d, that the allegation that grantor did not intend to vest title in grantee was equivalent to an allegation of nondelivery and that therefore plaintiff was seeking to cancel a deed that was void. The theory that a purported deed signed by the grantor under a misapprehension that the document was something other than a deed, is "not delivered" and therefore wholly void was adopted also in the well-reasoned case of Sparks v. Mendoza, 83 Cal.App.2d 511, 189 P.2d 43; see also Cutler v. Fitzgibbons, 148 Cal. 562, 83 P. 1075.

[7] Since the instant action is one for relief on the ground of fraud the only relevant statute of limitations is that set forth in Code of Civil Procedure, section 338, subdivision 4. Zakaessian v. Zakaessian, 70 Cal.App.2d 721, 161 P.2d 677, supra. This section requires that such an action be brought within three years from "The * * discovery * * * of the facts constituting the fraud * * *." Respondent testified in this regard that the deed was not mentioned to her until after Elizabeth's death when her son John discussed it with her. Its purport took her quite by surprise.

[8–12] Appellants argue that respondent was negligent in not discovering the fraud sooner and that since the deed was a matter of record she should be treated as if she had done so. This argument is not supported by legal authority. Negligence in failing to discover the falsity of a statement is no defense when the misrepresentation is intentional rather than negligent. Prosser, Torts, pp. 402, 748; Rest., Torts, § 540; Seeger v. Odell, 18 Cal.2d 409, 115 P.2d 977, 136 A.L.R. 1291; Security-First National Bank of Los Angeles v. Earp, 19 Cal.2d 774, 122 P.2d 900; Hobart v. Hobart Estate Co., 26 Cal.2d 412, 159 P.2d 958. Respondent is not held to constructive notice of the public records because the purpose of the recording acts is to afford protection to bona fide purchasers not to those making fraudulent misrepresentations. Seeger v. Odell, 18 Cal.2d 409, 115 P.2d 977. Nor does the fact that an investigation would have revealed the falsity of the representation bar respondent's right to recover. In view of the confidential relationship existing between the parties, respondent was under no duty to investigate. (23 Cal.Jur.2d 80; Kane v. Mendenhall, 5 Cal.2d 749, 56 P.2d 498; Prosser, Torts, pp. 750, 751.)

[13, 14] The finding that respondent was not guilty of laches is also supported by substantial evidence. Laches is largely a question of fact and in determining what length of time constitutes laches, consideration will be given to the circumstances that may have justified the delay, to the nature of the case and to the possible existence of prejudice to the defendant or other interested parties. Swart v. Johnson, 48 Cal. App.2d 829, 120 P.2d 699; Roberts v. Roberts, 81 Cal.App.2d 871, 185 P.2d 381. Circumstances which justified the delay in discovery of the fraud in question have already been discussed. Respondent learned the true facts as to the effect of the deed on December 30, 1955. She filed the instant action in June 1956. It appears therefore that respondent acted with reasonable diligence after the discovery. See Cella v. Cosgro, 115 Cal.App.2d 816, 253 P.2d 57; Brown v. Oxtoby, 45 Cal.App.2d 702, 114 P.2d 622. Since respondent did not discover the true facts until *after* the *death* of both George and Elizabeth, no change in circumstances (after the discovery) detrimental to appellants was shown. See Dabney v. Philleo, 38 Cal.2d 60, 237 P.2d 648.

[15, 16] Appellants also attack the judgment on the ground that the court failed to make findings on all material issues. They base this contention on the fact that the court found that each and every *allegation* set forth in stated paragraphs of defendants' answer was untrue but failed to make an express finding with reference to the *denials* contained therein. We consider the term allegation to be sufficiently broad to include both affirmative averments and denials. See Cecchini v. Ridinger, 136 Cal. App.2d 8, 288 P.2d 146. Furthermore, the court's finding that all of plaintiff's material allegations were true, necessarily included a denial of the truth of defendants' denials with reference to those same allegations. Popescu v. Popescu, 46 Cal.App.2d 44, 115 P.2d 208.

Finally, appellants contend that the judgment should be reversed because the trial court (1) erroneously denied their motion for nonsuit, (2) denied them the privilege of arguing in support thereof, and (3) unreasonably curtailed their cross-examination of respondent.

[17] Since the evidence submitted to the court supports its findings, the denial of the nonsuit presents a question that is now moot and need not be considered. Burrows v. Burrows, 136 Cal.App. 323, 28 P.2d 1072.

[18] In Garcia v. San Gabriel Ready Mixt, 155 Cal.App.2d 568, 318 P.2d 145, relied upon by appellants (a jury negligence case), a judgment was reversed because of the court's refusal to permit counsel to argue with respect to a second cause of action and to submit the second cause of action to the jury. The case is not in point here where only a motion for a nonsuit was involved. If the motion was properly decided, and we so find, we would not reverse merely to give counsel an opportunity to make an argument. See Nicholson v. Nicholson, 174 Cal. 391, 163 P. 219.

[19–21] Appellants' complaint that their cross-examination was unreasonably restricted is also without merit. The only curtailment of cross-examination to be found in the record relates to questions addressed to respondent concerning the honesty of her deceased son, George. After several questions and answers relating to this point the court indicated that it had heard enough and instructed counsel to desist. A trial court has a clear duty to supervise the conduct of the trial to the end that it may not be unduly protracted and that other litigants too may have their day in court. In carrying out this duty the court may confine cross-examination within reasonable limits and may curtail cross-examination which relates to matters already covered, or which are irrelevant. These are matters clearly within the court's discretion and only a manifest abuse thereof will require a reversal. Melvin v. Berendsen, 7 Cal.App.2d 389, 46 P.2d 189. We cannot say that the record discloses any abuse of discretion or that as a reasonable probability the facts sought to be elicited would have affected the result.

The judgment is affirmed.

BRAY, P. J., and TOBRINER, J., concur.

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171 Cal.App.2d 761

Ramiro M. RODRIGUEZ, Plaintiff and Respondent,

v.

CITY OF LOS ANGELES, a municipal corporation; Marcus Meisel, Doe One, Doe Two and Doe Three, Defendants,

City of Los Angeles, a municipal corporation, Appellant.

Civ. 23494.

District Court of Appeal, Second District, Division 3, California.

July 7, 1959.

Action against city and owner of property abutting on sidewalk for injury sustained by pedestrian when he slipped on a clump of ice plant which had grown through fence onto the sidewalk and fell and struck his eye on a wire prong on top of the fence, which was on city's sidewalk easement, wherein district inspector for street inspection testified as to prior complaints concerning ice plant and fence. From adverse judgment of the Superior Court, Los Angeles County, Edward R. Brand, J., the city appealed. The District Court of Appeal, Vallée, J., held that whether there was a causal connection between failure of city to cause ice plant and fence to be removed and pedestrian's injury was for the jury.

Judgment affirmed.

1. Appeal and Error 🔑1033(5)

In action against owner of property abutting on a sidewalk and against city for injuries sustained by pedestrian when he slipped on a clump of ice plant which had grown through fence onto sidewalk, city could not complain of overemphasis of its liability in instructing the jury when the instructions were favorable to the city. West's Ann.Gov.Code, §§ 53050 and (b, c), 53051 and (a, b).

2. Municipal Corporations 🔑822(2, 4)

In action against owner of property abutting on sidewalk and city for injuries sustained by pedestrian when he slipped on a clump of ice plant which had grown through boundary fence onto sidewalk, instructions on proximate cause of injury, contributory negligence of pedestrian, and duty of city to keep sidewalk in a reasonably safe condition correctly stated the law. West's Ann.Gov.Code, §§ 53050(b, c), 53051(a, b).

3. Appeal and Error 🔑699(4)

Appellant was in no position to complain of instructions when appellant furnished a record which did not disclose the source of any of the instructions.

4. Municipal Corporations 🔑821(19)

In action against city and owner of property abutting on sidewalk for injury sustained by pedestrian when he slipped on a clump of ice plant which had grown through fence onto sidewalk and fell and struck his eye on a wire prong on top of fence, which was on city's sidewalk easement, wherein district inspector for street inspection testified as to prior complaints concerning ice plant and fence, whether there was causal connection between failure of city to cause ice plant and fence to be removed and pedestrian's injury was for the jury. West's Ann.Gov.Code, §§ 53050 and (b, c), 53051 and (a, b).

5. Municipal Corporations ⚷762(2)

The city is under a duty to keep sidewalks in safe condition and it is directly liable to pedestrians for failing to correct dangerous condition of which it has notice, and it is not relieved of its responsibility merely because condition was created or maintained by a property owner who might also be liable to pedestrians for injuries resulting therefrom.

6. Trial ⚷142

Where different inferences may reasonably be drawn from the same evidence, the decision must be left to the triers of fact.

7. Appeal and Error ⚷1001(1)

Conclusion of jury will not be disturbed on appeal if some substantial evidence or reasonable inference lends support thereto.

8. Negligence ⚷136(25)

Want of proximate cause does not exist as a matter of law unless the only reasonable hypothesis is that such want exists.

9. Negligence ⚷136(25)

Before it can be held as a matter of law that want of proximate cause exists, the evidence must point unerringly to that conclusion.

10. Municipal Corporations ⚷766

A city is not liable for a trivial defective condition in a sidewalk that could not reasonably be anticipated to result in accidents. West's Ann.Gov.Code, §§ 53050, 53051.

11. Appeal and Error ⚷989

Whether a defective condition in a sidewalk is so trivial as to not reasonably lead one to anticipate that it would result in an accident and thereby to relieve city of liability will be determined by a reviewing court irrespective of the finding of the trier of fact. West's Ann.Gov.Code, §§ 53050 and (b, c), 53051 and (a, b).

12. Municipal Corporations ⚷821(8)

In action against city and owner of property abutting on sidewalk for injury sustained by pedestrian when he slipped on a clump of ice plant which had grown through fence onto sidewalk and fell and struck his eye on a wire prong on top of fence, which was on city's sidewalk easement, wherein district inspector for street inspection testified as to prior complaints concerning ice plant and fence, it could not be said as a matter of law that defective condition was trivial and that city was thereby relieved of liability. West's Ann. Gov.Code, §§ 53050 and (b, c), 53051 and (a, b).

13. Municipal Corporations ⚷806(2)

In absence of notice or knowledge to the contrary, a pedestrian making normal use of public sidewalk has right to assume that it is in reasonably safe condition, and while he must use ordinary care for his personal safety and make reasonable use of his faculties to avoid injury to himself, he is not required to keep his eyes fixed on the ground or to be on a constant lookout for danger, and even if defect is one which might be visible to a person who is looking for such a condition, it does not follow that pedestrian is guilty of negligence as a matter of law in failing to see and avoid it.

14. Municipal Corporations ⚷819(7)

In action against city and owner of property abutting on sidewalk for injury sustained by pedestrian when he slipped on a clump of ice plant which had grown through fence onto the sidewalk and fell and struck his eye on a wire prong on top of fence, which was on city's sidewalk easement, wherein district inspector for street inspection testified as to prior complaints concerning ice plant and fence, evidence was sufficient to support implied finding that pedestrian was not contributively negligent. West's Ann.Gov.Code, §§ 53050 and (b, c), 53051 and (a, b).

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Roger Arnebergh, City Atty., Bourke Jones, Asst. City Atty., and William E. Still and Weldon L. Weber, Deputy City Attys., Los Angeles, for appellant.

Leo Shapiro, Beverly Hills, for respondent.

VALLÉE, Justice.

Plaintiff Ramiro M. Rodriguez brought this suit against the City of Los Angeles and Marcus Meisel for damages for personal injuries. The jury returned a verdict against both defendants. The City of Los Angeles appeals from the judgment. Meisel did not appeal. The suit against the city was under the Public Liability Act. Gov. Code, §§ 53050 and 53051.

The accident occurred about 10:15 p. m. on November 11, 1956 in front of the corner house at Fourth Street and Brooks Avenue in Venice. Meisel owned the property, numbered 402 Brooks Avenue. Plaintiff lived at 412 Brooks Avenue, two houses away from the place of the accident. He had been to his brother's home about 2½ blocks away and was returning home at the time of the accident.

In 1951 a 3 to 3½ foot high wire mesh fence was installed in front of the Meisel property by a former owner. The fence encroached one foot on the dedicated sidewalk area along the entire front of the Meisel property a distance of 50 feet. There was an area 4 inches wide between the fence and the paved portion of the sidewalk. The usable paved portion of the sidewalk was between 8 and 9 feet wide.

A clump of ice plant had grown through the fence onto the sidewalk. The ice plant was about 40 feet from the curb at the corner of Fourth and Brooks. It was about 20 to 24 inches around, 6 to 8 inches high, and extended between 12 and 14 inches onto the concrete portion of the sidewalk.

Plaintiff walked from the corner of Fourth and Brooks east on Brooks. The fence was on his right. As he walked, the right side of his body was about a foot from the fence. He was looking directly ahead; not down on the sidewalk. As he was walking he did not see anything on the sidewalk in front of him. After he passed a gate in the fence he slipped on the ice plant. On slipping, he fell to his right onto the fence. A wire prong in the fence pierced his right eye. He lost the eye. Photographs in evidence show numerous wire prongs protruding from the top of the fence.

An ordinance of the city provided that no person owning any lot "shall allow, keep or maintain any tree, bush or vegetation growing upon any lot or premises, abutting any street or sidewalk or upon any street or sidewalk so that the limbs, twigs, leaves or parts of such tree, bush or vegetation interfere with or obstruct the free passage of pedestrians or vehicles along or upon said streets or sidewalks."

[1] The city's first specification of error is that the court erred prejudicially in instructing the jury in that liability of the city was overemphasized and the city's liability under the Public Liability Act was confused with the liability of an abutting property owner for obstructing a sidewalk in violation of an ordinance of the city as negligence per se. It is said the court instructed the jury three separate times in respect to the liability of the city and provisions of the Public Liability Act; that such emphasis was clearly unnecessary and could only serve to prejudice the jury against the city's case. There is no contention that the instructions did not correctly state the law.

[2] There were thirteen instructions of which the city complains. They include

sections 53050 and 53051 of the Government Code,[1] read verbatim, and other instructions elucidating the requirements of section 53051 and telling the jury plaintiff could not recover unless all the requirements were met. These instructions were favorable to the city.[2] Repetition of the elements necessary in order that the jury find liability on the part of the city could only serve to emphasize in the minds of the jurors the necessity that these elements be established. If there was any overemphasis, the city cannot complain. Three other instructions complained of are set forth in the margin.[3]

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[1] Section 53050: "As used in this article:

* * *

"(b) 'Public property' means public street, highway, building, park, grounds, works, or property.

"(c) 'Local agency' means city, county, or school district."

Section 53051: "A local agency is liable for injuries to persons and property resulting from the dangerous or defective condition of public property if the legislative body, board, or person authorized to remedy the condition:

"(a) Had knowledge or notice of the defective or dangerous condition.

"(b) For a reasonable time after acquiring knowledge or receiving notice, failed to remedy the condition or to take action reasonably necessary to protect the public against the condition."

[2] Examples of instructions criticized are:

"In determining what constitutes a reasonable time after notice within which a municipality must remedy, or take action to protect the public against a dangerous or defective condition in or on its sidewalk, in order to avoid liability for injury, you should consider all the circumstances involved; the cause and nature of the condition, the practical problem presented, the amount of work required, the resources in men and money available to cope with the problem, and in general the necessities and size of the effort."

"A dangerous or defective condition, as denoted by the use of that term in these instructions, means a condition on or of the sidewalk in question that would have caused it to be not reasonably safe for persons who, with ordinary care for their own safety, used said sidewalk, or might have used it for the purpose intended, or as expressly or impliedly invited, or as permitted by the controlling authority."

"A municipality is not a guarantor of the safety of persons using its streets and sidewalks. It may not be held liable for minor defects or imperfections not involving danger such as just described. It is not required to keep its sidewalks in an absolutely safe or perfect condition or free from other defect that possibly might lead to injury, unless any condition short of perfection is a dangerous condition, as I have defined the term."

"The law just read to you is the only authority under which this action can be maintained, if at all, against the defendant City of Los Angeles; and it follows that before the plaintiff may be entitled to your verdict against the City of Los Angeles, you must find from a preponderance of the evidence:

"First: That plaintiff suffered an injury of which a proximate cause was some dangerous or defective condition in or on the sidewalk in front of the premises at 402 Brooks Avenue, Venice, California.

"Second: That before the accident in question, the legislative body of the City of Los Angeles, or whatever board, officer, or person was authorized to remedy the dangerous or defective condition, had knowledge or notice thereof.

"Third: That before the accident in question, such board, body, officer, or person had a reasonable time after receiving such notice to remedy the condition or to take such action as was reasonably necessary to protect the public against it, and failed to do either."

[3] These instructions are:

"If you should find to have existed all the conditions I have mentioned as being a requisite to establish liability against the defendant City of Los Angeles, it is not necessary that the dangerous or defective condition in question was the sole proximate cause of the injury. If it was a proximate cause, and the other requisite elements were present, said defendant will not be permitted to avoid liability by proof that some other circumstance was a concurring cause of the injury."

"A pedestrian is entitled to the free and unobstructed use of the entire sidewalk for the purposes of travel. The fact that the plaintiff was walking close to the fence does not in and of itself constitute negligence or contributory negligence on his part."

"It was the duty of the City of Los Angeles to keep the sidewalk involved in a reasonably safe condition. If you find that a dangerous or defective condition existed, of which it had notice, it is not relieved of its responsibility merely

They were correct statements of the law, not repetitious, and applicable to the facts. Moreover, the court told the jury, "If in these instructions any rule, direction or idea be stated in varying ways, no emphasis thereon is intended by me, and none must be inferred by you."

[3] Furthermore, the city is in no position to complain. It has furnished a record which does not disclose the source of any of the instructions—whether given at the request of plaintiff or at its request, or on the court's own motion. Paxton v. County of Alameda, 119 Cal.App.2d 393, 414, 259 P.2d 934.

It is asserted the instructions were given in an order which confused the statutory liability of the city under the Public Liability Act with the liability of a property owner who maintains something on a sidewalk which endangers pedestrians. We have examined the 85 instructions given and find no basis for the assertion. The court expressly told the jury that the order in which the instructions were given had no significance. Nowhere in the instructions was there even a remote suggestion that the city could be liable under the provisions of the ordinance of the city applicable to owners of property abutting on sidewalks. It was clearly and repeatedly stated that the city's liability, if any, could only be under section 53051 of the Government Code. Our observations in Nungaray v. Pleasant Valley, etc., Ass'n, 142 Cal.App.2d 653, 300 P.2d 285, are pertinent. In Nungaray we said (142 Cal.App.2d at page 661, 300 P.2d at page 290):

> "The instructions are to be considered as a whole, and the court so instructed the jury. The sequence in which instructions are given is a matter in the sound discretion of the trial court, and a very strong showing of prejudice must be made before a reviewing court will hold its discretion abused. Manuel v. Calistoga Vineyard Co., 17 Cal.App.2d 377, 382, 61 P.2d 1204. The point '"borders on the realm of psychology, wherein the law seems loath to enter."' Ritchey v. Watson, 204 Cal. 387, 390, 268 P. 345, 347. The instructions gave the jury a well balanced statement of the essential legal issues. If defendants were dissatisfied with the sequence in which the instructions were given, it was their duty to say so at the time and thus give the court an opportunity to remedy the claimed defect. They did not do so and they are precluded from raising the question on review."

So, here, if the city was dissatisfied with the sequence in which the instructions were given or if its counsel felt the jury might be confused, it was his duty to say so at the time. Counsel did not do so. It is too late to complain.

Pittam v. City of Riverside, 128 Cal.App. 57, 16 P.2d 768, relied on by the city, is not in point. In Pittam the city was the only defendant. Instructions were given on the law of general negligence when the only possible liability of the city was under the Public Liability Act. The court correctly held that the instructions on general negligence conflicted with an instruction on the Public Liability Act, that the contradictory instructions might well have confused the minds of the jurors, and that on the evidence the conflict was prejudicial. We have no such state of facts at bar.

[4] The city's only other specification of error is that there was no evidence that its failure to cause the ice plant and the fence to be removed from its sidewalk was a proximate cause of plaintiff's injury, and that there is no evidence that it, in the exercise of due care, could have reasonably foreseen that injury would likely occur.

The city does not challenge the implied findings of the jury that it had knowledge of the condition of the ice plant and the fence, and that after acquiring knowledge it failed to remedy the condition. Gov.Code, § 53051.

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because the condition was created or maintained by a property owner who might also be liable to pedestrians for injuries resulting therefrom."

The district inspector for street inspection for the city's board of public works in Venice held that position about 10 years. His duties "consisted of anything dangerous to the public, like streets, sidewalks * * * hanging wires. * * * We had to watch out for that stuff. * * * We patrolled and complaints came into the office." He patrolled the area in which the accident occurred two or three times a week over a period of about eight years prior to the accident. Prior to the accident he had received complaints concerning the fence. In April 1956 a woman complained that the sleeve of her coat had been torn by one of the prongs that was "hanging out" on the top of the fence. He investigated and found about 15 prongs. "Those are prongs that stick up from the top of the wire fence. They cut them off in half—they cut them in half and they leave the two prongs sticking up there." The tips of the prongs were sharp. "They looked like they were dangerous." A photograph in evidence shows the prongs referred to protruding toward the sidewalk. The ice plant was on the sidewalk. He had had complaints about the ice plant growing on the sidewalk by the fence in "the last three or four years, five years." In August 1956 one of the prongs went through a boy's hand. The boy's mother complained and he investigated. He saw blood on the sidewalk. The prongs were bent out. Every time he stopped he bent "back about fifteen or twenty of them." In August 1956 the ice plant extended between 12 and 14 inches onto the concrete portion of the sidewalk. It was about "20 inches around, 24 inches," and between 4 and 5 inches high. He knew, as long as 4 or 5 years before November 1956, that the fence was on the city's sidewalk easement. He so informed the chief inspector and was told "not to issue any notices or complaints for violations unless a complaint was made by somebody."

[5–9] "The city is under a duty to keep sidewalks in safe condition, it is directly liable to pedestrians for failing to correct a dangerous condition of which it had notice, and it is not relieved of its responsibility in this regard merely because the condition was created or maintained by a property owner who might also be liable to pedestrians for injuries resulting therefrom." Peters v. City and County of San Francisco, 41 Cal.2d 419, 429, 260 P.2d 55, 61. Whether there was a causal connection between the failure of the city to cause the ice plant and the fence to be removed and plaintiff's injury was for the jury. Where different inferences may reasonably be drawn from the same evidence, the decision must be left to the triers of fact. The conclusion of the jury will not be disturbed on appeal if some substantial evidence or reasonable inference lends support thereto. Nichols v. Mitchell, 32 Cal.2d 598, 606, 197 P.2d 550. Want of proximate cause does not exist as a matter of law unless the only reasonable hypothesis is that such want exists; reasonable or sensible men could have drawn that conclusion and none other. Where there are differences that may be drawn, one for and one against, the one against will be followed. Before it can be held as a matter of law that want of proximate cause exists, the evidence must point unerringly to that conclusion. Smith v. Schwartz, 14 Cal.App.2d 160, 164, 57 P.2d 1386; Traylen v. Citraro, 112 Cal.App. 172, 175, 297 P. 649; Rovegno v. San Jose Knights of Columbus Hall Ass'n, 108 Cal. App. 591, 595, 596, 291 P. 848. If the conditions stated in section 53051 of the Government Code "are shown to exist, a city is liable for the dangerous and defective condition of a sidewalk resulting in injury to a pedestrian." Gentekos v. City and County of San Francisco, 163 Cal.App.2d 691, 696, 329 P.2d 943, 948. "When a pedestrian, in the darkness of night, while exercising ordinary care falls over an obstruction in a sidewalk existing by reason of the negligence of the city, the municipality is liable." Redmond v. City of Burbank, 43 Cal.App.2d 711, 713, 111 P.2d 375, 377. On the evidence the jury could reasonably conclude that the city's failure to cause the ice plant and the fence to be removed was a proximate cause of plaintiff's injury. Eastlick v. City of Los Angeles, 29

Cal.2d 661, 673, 177 P.2d 558, 170 A.L.R. 225; Jones v. City of South San Francisco, 96 Cal.App.2d 427, 433, 216 P.2d 25. And the evidence was such that the jury could fairly conclude that the city, in the exercise of due care, could have reasonably foreseen that injury would likely occur. Jones v. City of South San Francisco, 96 Cal.App.2d 427, 435–438, 216 P.2d 25. In fact, numerous complaints had been received by the city and injury had occurred.

[10–12] It is asserted the defective condition was trivial and that as a consequence it was not a proximate cause of plaintiff's injury. A city is not liable for a trivial defective condition that could not reasonably be anticipated to result in accidents. Gentekos v. City and County of San Francisco, 163 Cal.App.2d 691, 697, 329 P.2d 943. Whether a defective condition was trivial will be determined by a reviewing court irrespective of the finding of the trier of fact. Barrett v. City of Claremont, 41 Cal.2d 70, 73, 256 P.2d 977. We think it manifest that in the case at bar it cannot be said as a matter of law that the defective condition was trivial. The testimony of the city inspector together with our study of the photographs preclude our so determining. Cf. Gentekos v. City and County of San Francisco, 163 Cal.App.2d 691, 329 P.2d 943; Adams v. City of San Jose, 164 Cal.App.2d 665, 330 P.2d 840; Reinach v. City & County of San Francisco, 164 Cal.App.2d 763, 331 P.2d 1006.

[13, 14] It is intimated that plaintiff was contributively negligent as a matter of law. "It is well settled that, in the absence of notice or knowledge to the contrary, a pedestrian making normal use of the public sidewalk has a right to assume that it is in reasonably safe condition, and while he must use ordinary care for his personal safety and make reasonable use of his faculties to avoid injury to himself, he is not required to keep his eyes fixed on the ground or to be on a constant lookout for danger. [Citations.] Even if a defect is one which might be visible to a person who is looking for such a condition, it does not follow that a pedestrian is guilty of negligence as a matter of law in failing to see and avoid it. [Citations.] Whether plaintiff made reasonable use of her faculties and whether she should have observed the condition which caused her injury were questions of fact." Peters v. City and County of San Francisco, 41 Cal.2d 419, 424, 260 P.2d 55, 59. The evidence was clearly sufficient to support the implied finding of the jury that plaintiff was not contributively negligent. Cf. Eastlick v. City of Los Angeles, 29 Cal.2d 661, 674, 177 P.2d 558, 170 A.L.R. 225.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

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171 Cal.App.2d 599

Irving S. TUSHNER, Louis Harry Ragins and Steven Jay Lanet, Plaintiffs,

v.

F. W. GRIESINGER, Real Estate Commissioner of the State of California; Division of Administrative Procedure, a State Agency of the State of California; and Alfred J. McGuire, Hearing Officer of the State of California, Defendants.

Irving S. TUSHNER and Louis Harry Ragins, Appellants and Cross-Respondents,

v.

F. W. GRIESINGER, Real Estate Commissioner of the State of California; Division of Administrative Procedure, a State Agency of the State of California; and Alfred J. McGuire, Hearing Officer of the State of California, Respondents and Cross-Appellants.

Civ. No. 23373.

District Court of Appeal, Second District, Division 3, California.

June 30, 1959.

Action by licensed real estate brokers to have defendants enjoined from proceeding further with hearing on accusations that licensees were violating certain code provisions relative to negotiating loans as agents of borrowers and to have such code provisions declared unconstitutional. The Superior Court of Los Angeles County, John Gee Clark, J., denied injunctive relief and declared the code provisions constitutional, and plaintiffs appealed. The defendant appealed from that portion of the judgment holding that the Superior Court had jurisdiction to determine constitutionality of code provisions. The District Court of Appeal, Parker Wood, J., held that any damage resulting from filing or prosecuting of accusations would not constitute kind of damage that would bring plaintiffs' case within exception to rule that administrative remedies must be exhausted before resorting to court action.

Judgment reversed and Superior Court instructed to dismiss action.

1. Injunction ⚷108

In action by licensed real estate brokers to have defendants enjoined from proceeding further with hearing on accusations that licensees were violating certain code provisions relative to negotiating loans as agents of borrowers and to have such code provisions declared unconstitutional, any damage resulting from filing or prosecuting of accusations would not constitute kind of damage that would bring plaintiffs' case within exception to rule that administrative remedies must be exhausted before resorting to court action. West's Ann.Civ. Code, §§ 3081.2(a), 3081.3(a, c), 3081.92.

2. Appeal and Error ⚷843(2)

In action by licensed real estate brokers to have defendants enjoined from proceeding further with hearing on accusations that licensees were violating certain code provisions relative to negotiating loans as agents of borrowers and to have such code provisions declared unconstitutional, issue on appeal regarding injunctive relief became moot when administrative proceeding was completed and licenses were revoked. West's Ann.Bus. & Prof.Code, §§ 10176 (a, i), 10176.1, 10177(a, b, d, f, j); West's Ann.Civ.Code, § 3081.1; U.S.C.A.Const. Amend. 14; West's Ann.Const. art. 1, §§ 11, 21.

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Alvin Hirsch and A. Becker, Los Angeles, for appellants and cross-respondents.

Stanley Mosk, Atty. Gen., Lee B. Stanton, and Neal J. Gobar, Deputies Atty. Gen., for respondents and cross-appellants.

PARKER WOOD, Justice.

This is an action for declaratory relief and for an injunction.

Plaintiffs Tushner and Ragins were licensed real estate brokers and were partners doing business as such licensees under the partnership name of Union Mortgage Company. That company was also licensed as a real estate broker. (It was licensed to act through the members of the partnership.) Plaintiff Lanet, also a licensed real estate broker, was an employee of the partnership.

In two accusations, filed by a deputy real estate commissioner, the licensees were charged with violating certain code provisions relative to negotiating loans as agents of borrowers. In the prayers of those accusations, it was asked that the matters be set for hearing and, upon proof of the charges, that the commissioner suspend or revoke the licenses.

The licensees filed defenses to the accusations, including the special defenses of lack of jurisdiction and the unconstitutionality of code provisions. After those special defenses had been overruled, and while a further hearing on the accusations was pending, three of the licensees (Tushner, Ragins, and Lanet) commenced this present action in the superior court seeking to enjoin the Real Estate Commissioner, the Division of Administrative Procedure, and the hearing officer from proceeding further with the hearing on the accusations. The plaintiffs also sought a declaration that the code provisions (alleged to have been violated) were unconstitutional. The court denied the injunction; and declared that the code provisions were constitutional. Plaintiffs Tushner and Ragins appeal from the judgment. (Plaintiff Lanet did not appeal.)

The defendants (commissioner, Division of Administrative Procedure, and the hearing officer) filed a notice of appeal in which they state that they appeal "from that portion of the Judgment * * * which holds that the Superior Court had jurisdiction to determine the constitutionality * * * of the statutes and rules involved * * *."

The two accusations were filed on April 4, 1957. In one accusation the Union Mortgage Company, a partnership, and Tushner and Ragins, as members of the partnership, were accused of violating certain provisions of the Real Property Loan Brokerage Act (Civ.Code, §§ 3081.2(a), 3081.3(a), 3081.3(c) and 3081.92), and certain provisions of the Business and Professions Code (§§ 10176(a), 10176(d), 10176(i), 10176.1, 10177(d), 10177(f), 10177(j)), and certain provisions of the Administrative Code (§§ 2843 and 2844, Title 10). In one count of that accusation Tushner was charged with violating sections 10177(a) and 10177(b) of the Business and Professions Code.

In the other accusation the Union Mortgage Company, Tushner, Ragins, and the employee Lanet were charged with violating certain provisions of said brokerage act (Civ.Code, § 8031.1, apparently intended to be § 3081.1) and certain provisions of the Business and Professions Code (§§ 10176(a), 10176(i), 10176.1 and 10177(f)).

The Union Mortgage Company, Tushner, and Ragins filed defenses to the accusation first above referred to, and they alleged therein, among other things, that the said code provisions which they were accused of violating were unconstitutional, and therefore the commissioner was without jurisdiction to proceed in the matter. They also alleged in their defenses that numerous other brokers were conducting their businesses in the same general manner as said licensees were conducting their business; the commissioner knew that said licensees had conducted their business in accordance with the general practice in the industry; the commissioner had not filed any formal accusation against any other person or firm; the said licensees were singled out for an intentional discriminatory application of the law in violation of the equal protection clauses of the Constitution of the United States, U.S.Const. Amend. 14, and the Constitution of California, Const. Art. 1, §§ 11, 21; the prosecution of the accusation was causing irreparable injury to the reputation, credit, and business of the licensees.

The four licensees (including Lanet) filed defenses to the other accusation, and they alleged therein, among other things, that the said code provisions which they were accused of violating were unconstitutional, and therefore the commissioner was without jurisdiction to proceed in the matter. (In their defenses to this accusation, they did not allege discriminatory application of the law.)

On July 22, 1957, a hearing on the special defenses (lack of jurisdiction and unconstitutionality of code provisions) was held before a hearing officer of the Division of Administrative Procedure. At the conclusion of the hearing, the hearing officer made orders which stated, among other things, that the defenses based upon the unconstitutionality of the code provisions were overruled. Thereafter the accusations were set for a hearing to be held on October 7, 1957.

On September 20, 1957 (while the hearing was pending), this present action was commenced.

In the first cause of action, it was alleged: That plaintiffs were licensed real estate brokers and were engaged primarily in the business of negotiating loans as agents for borrowers. On April 4, 1957, the Real Estate Commissioner filed accusations charging plaintiffs with certain violations of the Business and Professions Code, Civil Code, and provisions of Title 10 of the Administrative Code. Copies of the accusations were attached to the complaint. Plaintiffs filed notices of their defenses to the accusations. Copies of their defenses were attached to the complaint. Thereafter the commissioner requested in writing that a preliminary hearing be held before a hearing officer assigned by the Division of Administrative Procedure for the purpose, among other things, of determining and making a preliminary ruling "binding the respondents [the accused] herein" with respect to their defenses as to the constitutionality of the statutes, and as to the jurisdiction of the commissioner. Pursuant to said request a hearing was held on July 22, 1957, before a hearing officer. At the hearing, the hearing officer stated that he was without jurisdiction to rule upon the constitutionality of said statutes or to rule upon the question of the jurisdiction of the commissioner "as affected by the unconstitutionality of said statutes"; and he said that he would not rule upon such issues. The hearing officer permitted the parties to present argument and authorities with respect to such issues. About July 23, 1957, the hearing officer made an order in each accusation, overruling plaintiffs' defenses. Copies of the orders were attached to the complaint. By reason of said orders plaintiffs are greatly aggrieved and "will be required to go to hearing" on the accusations which are based on statutes which are unconstitutional and void, and by reason thereof the commissioner is without jurisdiction. At said preliminary hearing the hearing officer stated that he would retain jurisdiction and conduct hearings on the merits of the accusations at a future date. Plaintiffs will be compelled to submit to hearings before a hearing officer who has stated that he will not rule upon the defenses pertaining to unconstitutionality or jurisdiction. Plaintiffs have received notices that a hearing on the accusations will be held on October 7, 1957. Unless the defendants are restrained, they intend to proceed with the hearing on October 7, 1957.

The complaint refers to the code provisions which are mentioned in the accusations; and the complaint alleges that each of those provisions is unconstitutional upon certain grounds (therein specified).

The complaint alleges further that the filing and prosecuting of the accusations have caused and will cause plaintiffs irreparable damage in that such filing and prosecuting will impair the credit, reputation, and good will of the plaintiffs and their business; and that plaintiffs have no plain, speedy, or adequate remedy at law. The complaint alleges that, as a result of the filing and prosecuting of the accusations, plaintiffs have suffered irreparable damage in that many of their advertising agencies have refused to accept their advertising, and various lenders refuse to make loans, and the earnings of the plaintiffs have been greatly reduced.

The complaint also alleges that "the entire Administrative Procedure Act being Chapter 5 of Part I of Division 3 of Title 2 of the Government Code, more particularly identified as Sections 11500 to 11529 inclusive, of the government code" is unconstitutional upon certain grounds (therein specified).

In the second cause of action of the complaint, it is alleged that the acts of plaintiffs as set out in the accusations were in accord with the practices existing throughout the industry in southern California; and the commissioner has singled out plaintiffs for prosecution notwithstanding that he knew that numerous other loan brokers were conducting business in the same manner as plaintiffs were conducting their business; that such discriminatory application of said statutes against plaintiffs is unconstitutional.

The prayer is for a declaration that said statutes are unconstitutional; and for an injunction restraining defendants from enforcing said statutes against the plaintiffs.

Defendants demurred to the complaint on the grounds that the court had no jurisdiction of the subject matter of the action, and that the complaint does not state facts sufficient to constitute a cause of action. The demurrer was overruled.

Defendants, in their answer, denied that the code provisions were unconstitutional; denied that plaintiffs had been or would be irreparably damaged by the administrative proceedings; and denied that the commissioner was proceeding with intentional discrimination in enforcing the law against plaintiffs. Defendants alleged that the complaint fails to state a cause of action in that it appears therefrom that the administrative proceedings had been commenced against plaintiffs and, by reason thereof, plaintiffs had failed to exhaust their administrative remedies.

The court stated, in its findings, that the code provisions are constitutional; the defendants had acted within the scope of their jurisdiction; the administrative hearings on the merits of the accusations had not been completed; the only injury suffered by plaintiffs was "the loss of some clients and an advertiser, which is no more than that normally incident to the publicity arising from such proceedings." The court stated, in its conclusions of law, that the court had "jurisdiction to determine the constitutionality of statutes prior to a final ruling by an agency on that issue, where the agency is conducting an administrative hearing which is in progress when the statutes under which the administrative agency is proceeding are alleged to be unconstitutional; that under such circumstances neither the primary jurisdiction rule nor the doctrine of the exhaustion of administrative remedies are applicable."

As above stated, the court denied injunctive relief; and declared that the code provisions were constitutional.

Defendants (respondents) contend on appeal that the plaintiffs failed to exhaust their administrative remedies before commencing the present action.

Plaintiffs (appellants) contend, in effect, that they had exhausted their administrative remedies. They contend further to the effect that, even if they had not exhausted such remedies, their case comes within an exception to the rule that administrative remedies must be exhausted before resorting to court action. With respect to their contention that they had exhausted such remedies, they argue to the effect that their said special defenses of unconstitutionality and lack of jurisdiction as alleged in the administrative proceedings, and the ruling of the hearing officer that he did not have jurisdiction to determine those issues, show that the plaintiffs had exhausted their administrative remedies. With respect to their contention that their case comes within said exception to the rule regarding exhaustion of remedies, appellants argue to the effect their said defenses of unconstitutionality and lack of jurisdiction as alleged in the administrative proceedings, and their said allegations therein that they had been and would be irreparably damaged, bring them within the exception.

As above stated, it was alleged in the complaint in the present action that the hearing officer said that he was without jurisdiction to rule upon the constitutionality of the statutes, or to rule upon the jurisdiction of the commissioner as affected by the unconstitutionality of the statutes, and that he would not rule upon those issues. It is to be noted, however, that the complaint herein also alleges that the hearing officer permitted the parties to present argument and authorities with respect to such issues, and that thereafter the hearing officer overruled plaintiffs' defenses. It thus appears that the hearing officer did rule upon those issues regarding unconstitutionality and jurisdiction. The complaint also alleged that at the preliminary hearing (on July 22, 1957—relative to the special defenses of unconstitutionality and lack of jurisdiction) the hearing officer said that he would retain jurisdiction and conduct hearings on the merits of the accusations at a future date. The complaint also alleged that plaintiffs were notified that a hearing would be held on October 7, 1957. It thus appears that, prior to the commencement of the present action, an administrative hearing had been held, and an order had been made therein overruling the defenses as to unconstitutionality and lack of jurisdiction, and plaintiffs had been notified of the date set for a further hearing.

In United States v. Superior Court, 19 Cal.2d 189, at page 194, 120 P.2d 26, at page 29, it was said: "It is now firmly established in this state that a litigant must invoke and exhaust an administrative remedy provided by statute before he may resort to the courts. Jurisdiction to entertain an action for judicial relief is conditioned upon a completion of the administrative procedure." It was also said therein at page 195 of 19 Cal.2d, at page 29 of 120 P.2d: "[I]t lies within the power of the administrative agency to determine in the first instance, and before judicial relief may be obtained, whether a given controversy falls within the statutory grant of jurisdiction [citations]. And even where the statute sought to be applied and enforced by the administrative agancy is challenged upon constitutional grounds, completion of the administrative remedy has been held to be a prerequisite to equitable relief [citations]."

In United Insurance Co. of Chicago, Ill. v. Maloney, 127 Cal.App.2d 155, 273 P.2d 579, the appeal was from an order granting a preliminary injunction restraining the insurance commissioner from hearing accusations against the plaintiffs (an insurance company and its agents). In that case the plaintiffs alleged that irreparable damage had accrued and would accrue if the hearing was had. Plaintiffs therein contended that the proceeding came within the exception to the rule which requires the exhaustion of administrative remedies where irreparable damage is threatened by illegal administrative action. In that case the court said, at page 165 of 127 Cal.App.2d, at page 585 of 273 P.2d: "[T]he order fixing hearing and the hearing proposed here are not the types of action to bring plaintiffs within the exception to the exhaustion rule mentioned in * * * [citations], nor is the type of damage to be suffered by plaintiffs from the holding of the proposed hearing the type of damage considered irreparable within the exception rule, and because of plaintiffs' failure to exercise their administrative remedy, the trial court had no discretion in the matter and should have refused to issue a preliminary injunction."

In Chapman v. Division of Real Estate, 153 Cal.App.2d 421, 314 P.2d 773, the appeal was by the defendants from a judgment in favor of plaintiffs in an action for declaratory relief and for an injunction prohibiting the defendants from taking any further proceedings upon an order to show cause which was then pending before the Division of Real Estate. The plaintiffs had been ordered to show cause (before the commissioner) why they should not be prohibited from selling certain lots in a subdivision in alleged violation of the Subdivision Law. In that case, the plaintiffs claimed that certain provisions of the Subdivision Law and of the Administrative Code were unconstitutional, and that plaintiffs would sustain irreparable damage if defendants were not enjoined from proceeding with the administrative hearing. In reversing the judgment in that case, the court said (153 Cal.App.2d at page 432, 314 P.2d at page 779) that the plaintiffs "are bound by the rule requiring the exhaustion of administrative remedies before being able to obtain relief in the present action."

[1] In the present case, plaintiffs' allegation with reference to irreparable damage was that the filing and prosecuting of the accusations have caused and will cause plaintiffs irreparable damage. Any damage resulting from the filing or prosecuting of the accusations would not constitute the kind of damage that would bring plaintiffs' case within the exception to the rule that administrative remedies must be exhausted before resorting to court action. In United Insurance Co. of Chicago, Ill. v. Maloney, supra, 127 Cal.App.2d 155, at page 161, 273 P.2d 579, at page 582, it was said: "That the publicity attendant upon an administrative hearing does not constitute such damage as to entitle one to interference by the courts is shown in Mortgage Finance Corp. v. Watson, 104 Cal.App.2d 640, 232 P.2d 54, where the court pointed out that, as here, 'publicity has already been given to the charges and to the fact that a hearing is being held * * *.' 104 Cal.App.2d at page 641, 232 P.2d at page 55. Plaintiffs fail to point out how their

claimed damage from the fact of a hearing is different in kind from those which in the cases hereinbefore cited have been held not to constitute irreparable damage. They attempt to do so by claiming that the action of the commissioner is unconstitutional and discriminatory and that such action itself constitutes irreparable damage. But as shown by the cases herein discussed, it never has been held that the mere holding of a hearing comes within the rule of irreparable damage [citation]." It is to be noted that the trial court herein found, in effect, that plaintiffs had not suffered irreparable damage. The finding was, as above shown, that the only injury suffered by plaintiffs was the loss of some clients and an advertiser, which is no more than that normally incident to the publicity arising from such proceedings.

In the present case, it is apparent from the complaint that the plaintiffs had not exhausted their administrative remedies. It does not appear that plaintiffs' case is within an exception to the rule that administrative remedies must be exhausted before resorting to court action. The trial court should not have proceeded with the trial of the present action. The exhaustion of administrative remedies was a jurisdictional prerequisite to resort to court action. In Abelleira v. District Court of Appeal, 17 Cal.2d 280, at page 293, 109 P.2d 942, at page 950, 132 A.L.R. 715, it was said: "Bearing in mind the analysis of jurisdiction which has heretofore been made * * we are necessarily led to the conclusion that exhaustion of the administrative remedy is a jurisdictional prerequisite to resort to the courts." It thus appears that the judgment should be reversed.

[2] Furthermore, it appears that, since the filing of the present action and while this appeal has been pending, further hearings have been had in the administrative proceeding, that the administrative proceeding has been completed, that an order has been made therein revoking the licenses, that the licensees have filed in the superior court a petition for a writ of mandate regarding the order of the commissioner, and that the petition is set for hearing on July 21, 1959. (This information as to the termination of the administrative proceeding and the petition for a writ of mandate is shown in a document filed herein by appellants, which document is titled "Chronological List of Events and Proceedings Filed Pursuant to Leave of Court.") In the document so referred to, it was said, among other things, that "After the filing of the Superior Court action for Declaratory Relief and Injunction [the present action], the said action proceeded concurrently with the Administrative proceedings." It thus appears that the issue on appeal regarding injunctive relief has become moot.

The judgment is reversed, and the superior court is instructed to dismiss the present action.

SHINN, P. J., and VALLÉE, J., concur.

52 Cal.2d 517

Ada E. DAVIS et al., Appellants,
v.
R. R. KENDRICK, Respondent.
L. A. 25433.

Supreme Court of California,
In Bank.
July 10, 1959.

Action to recover damages for wrongful death allegedly caused by an assault committed by defendant policeman while engaged in his regularly assigned duties as member of the police department of the City of Los Angeles. A summary judgment was entered in favor of the defendant in the Superior Court, Los Angeles County, Kenneth N. Chantry, J., and the plaintiffs appealed. The Supreme Court, Gibson, J., held that failure to file claim for damages was not a prerequisite to suit against the officer.

Judgment reversed.

McCOMB, J., dissented.

Vacating opinion 336 P.2d 247.

1. Municipal Corporations 🔑189(1)

Under common law, policemen and other peace officers are not immune from liability for wrongful acts causing personal injury or death.

2. Municipal Corporations 🔑741(1)

Los Angeles police officer engaged in his regularly assigned duties as such was not an "officer" of the city within meaning of charter provisions making the filing of a claim or demand for money or damages a prerequisite to suit thereon against the city or any officer thereof.

See publication Words and Phrases, for other judicial constructions and definitions of "Officer".

3. Municipal Corporations 🔑741(1)

Action for wrongful death resulting from assault and battery allegedly committed by Los Angeles police officer engaged in performance of his regularly assigned duties as such was not barred as against the officer by failure to file claim or demand with city clerk as required by the city charter.

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Simmons & Simmons and Herbert W. Simmons, Jr., Los Angeles, for appellants.

Roger Arnebergh, City Atty., and William B. Burge, Deputy City Atty., Los Angeles, for respondent.

GIBSON, Chief Justice.

This action was brought to recover damages for wrongful death allegedly caused by an assault and battery committed by defendant policeman while engaged in his regularly assigned duties as a member of the police department of the city of Los Angeles. A summary judgment was entererd in favor of defendant because plaintiffs had not filed a claim with the city clerk.

Section 376 of the Los Angeles City Charter provides that no suit shall be brought on any claim for money or damages against the city "or any officer or board of the city" until a demand has been presented in the manner provided in the charter, and section 363, with certain exceptions not relevant here, requires that every claim shall be filed with the city clerk.[1] Section 5 of the charter provides that the "officers of the city" shall be certain specified officials and such "other officers as shall be named by ordinance."[2] Policemen are not included among the officials enumerated in section 5, and there is no claim that they have been designated as officers of the city by any ordinance.

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[1] Section 376 of the Los Angeles City Charter provides in part: "No suit shall be brought on any claim for money or damages against the City of Los Angeles, or any officer or board of the city, until a demand for the same has been presented, as herein provided, and rejected in whole or in part * * *."

Section 363 of the Los Angeles City Charter states in part: "Every claim for money or damages against the city, or any officer, board or department thereof * * * shall be filed with the City Clerk, * * *."

[2] Section 5 of the Los Angeles City Charter provides: "The officers of the

[1] Under common law policemen and other peace officers are not immune from liability for wrongful acts causing personal injury or death (Appier v. Hayes, 51 Cal.App.2d 111, 124 P.2d 125; note, 60 A.L.R.2d 873, 879–883), and a charter provision requiring the filing of a claim as a condition precedent to suit would constitute a limitation of common law liability if made applicable to them with respect to such acts. Sections 363 and 376 should not be interpreted as having this effect unless an intent to impose the limitation clearly appears.

[2, 3] In order to ascertain the meaning of the term "officers of the city" as used in the charter, the sections which require the filing of a claim against such persons must be read with the provisions of section 5 which specify the officials who come within that term. Section 5 is obviously in the nature of a definition, and, in determining who come within the term as used in the sections which require the filing of a claim, a litigant is entitled to look to section 5 as setting forth the persons referred to in the claim sections. When the three sections are read together, it is clear that a policeman was not intended to be an officer of the city within the meaning of sections 363 and 376 and that the filing of a claim was not a condition precedent to the maintenance of plaintiffs' action.

Defendant relies on decisions holding that an officer, as distinguished from a mere employee, exercises a part of the sovereign power of the state and that policemen, in view of their powers and duties, have the status of public officers. Logan v. Shields, 190 Cal. 661, 664–665, 214 P. 45; Michel v. Smith, 188 Cal. 199, 201, 205 P. 113; Estrada v. Indemnity Ins. Co., 158 Cal.App.2d 129, 134, 322 P.2d 294; City of Oakland v. Lyckberg, 95 Cal.App. 71, 72–73, 272 P. 606; Noble v. City of Palo Alto, 89 Cal.App. 47, 52, 264 P. 529; cf. Brown v. Boyd, 33 Cal.App.2d 416, 422, 91 P.2d 926; Coulter v. Pool, 187 Cal. 181, 187, 201 P. 120. These cases, however, must be considered in the light of the problems there involved, and none of them dealt with charter provisions like those under consideration here. The fact that a policeman may be deemed a public officer for some purposes is not decisive of our problem, which is whether a policeman is an officer of the city within the meaning of sections 363 and 376 of the charter. Cf. Pockman v. Leonard, 39 Cal.2d 676, 683, 249 P.2d 267; Martin v. Riley, 20 Cal.2d 28, 35, 123 P.2d 488; Spreckels v. Graham, 194 Cal. 516, 530, 228 P. 1040; Schaefer v. Superior Court, 113 Cal.App.2d 428, 436, 437, 248 P.2d 450.

Willmon v. Powell, 91 Cal.App. 1, 9, 266 P. 1029, furnishes no support for defendant's position. In that case mandamus was granted to compel the treasurer of the city of Los Angeles to sign bonds which the municipal housing commissioners sought to have issued in the name of the city. One of the arguments made by the treasurer was that the commissioners, who were not named in section 5 of the charter, were not public officers but a private group. In rejecting this argument, the court held that the commissioners were public officers in view of their powers and duties. The case did not involve the effect to be given to section 5 in construing provisions of the charter containing the words "officers of the city." Thus the decision is of no assistance where, as here, the determinative consideration is whether a person is entitled to conclude that section 5 governs the scope of the term "officers of the city" when used, without indication of a different meaning, in other sections of the charter

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City shall be: A Mayor, The Members of the Council, A City Attorney, A City Clerk, A Controller, A City Engineer, A City Administrative Officer, A Purchasing Agent, A Secretary of the Board of Public Works, A Treasurer, The Members of the Board of Education, A City School Superintendent, The Members of the Boards of the Departments and the Chief Administrative Officer of each Department. Such other officers as shall be named by ordinance."

such as those relating to the filing of claims.

The cases of Whitson v. LaPay, 153 Cal.App.2d 584, 586, 588–589, 315 P.2d 45, Klimper v. City of Glendale, 99 Cal.App.2d 446, 452, 222 P.2d 49, and Slavin v. City of Glendale, 97 Cal.App.2d 407, 409, 217 P.2d 984, are clearly distinguishable, since they involved ordinances which, unlike the charter provisions here, barred an action against any city employee unless a claim was filed.

The judgment is reversed.

SHENK, SCHAUER, SPENCE, and PETERS, JJ., concur.

McCOMB, Justice.

I dissent. I would affirm the judgment, for the reasons expressed by Mr. Justice Herndon in the opinion prepared by him for the District Court of Appeal in Davis v. Kendrick, —— Cal.App.2d ——, 336 P.2d 247.

52 Cal.2d 507

AMERICAN AUTOMOBILE INSURANCE COMPANY (a Corporation), Respondent,

v.

REPUBLIC INDEMNITY COMPANY OF AMERICA (a Corporation) Appellant.

L.A. 25367.

Supreme Court of California,
In Bank.
July 8, 1959.
Rehearing Denied Aug. 5, 1959.

Action for declaratory judgment determining obligations of two insurance companies whose policies were issued to owner of automobile and to customer who had borrowed it and was driving when accident occurred. The Superior Court, Los Angeles County, John J. Ford, J., rendered judgment that owner's insurer was obligated to satisfy whole judgment which had been obtained against owner and customer for injuries sustained in the accident, without being subrogated to any right of owner against customer, and owner's insurer appealed. The Supreme Court, Gibson, C. J., held that under the policies, which provided for prorating when there was other insurance except that when named insured was driving automobile not owned by himself, insurance would be excess over all other insurance, owner's insurer was primarily liable for entire judgment to extent of limit of policy, and customer's insurer's coverage was excess.

Affirmed.

Opinion, 334 P.2d 266, vacated.

1. Insurance 🔑435.8

Under statutory provisions that motor vehicle liability policy shall insure person named therein and any other person using or responsible for use of motor vehicle with express or implied permission of insured, and that owner of motor vehicle is liable, within limited amounts, for damage caused by negligence of person operating automobile with owner's consent, policy endorsement which purported to exclude coverage of customer of owner was contrary to public policy and invalid. West's Ann.Vehicle Code, §§ 402, 415.

2. Insurance 🔑4

Where 1957 amendment made material change in phraseology of statute which provides requisites of motor vehicle liability policies, amendment was not retroactive and did not affect action for declaratory judgment determining obligations of insurers on policies which were issued to driver and to owner of automobile and were in force when automobile was involved in accident before 1957. West's Ann.Vehicle Code, § 415.

3. Statutes 🔑230

Ordinarily, material change in phraseology of section of statute shows intention to change meaning of provision rather than to interpret it.

4. Insurance ⚷512½

Under motor vehicle liability policies which provided for prorating when there was other insurance except that when named insured was driving automobile not owned by himself, insurance would be excess over all other insurance, where accident occurred while customer, who had borrowed owner's automobile, was driving, owner's insurer was liable for entire judgment against customer and owner, to extent of limit of policy, and customer's insurer's coverage was excess. West's Ann. Vehicle Code, § 415.

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Wyman & Finell and Marvin Finell, Beverly Hills, for appellant.

Bledsoe, Smith, Cathcart, Johnson & Phelps and Wilbur J. Russ, San Francisco, amici curiae on behalf of appellant.

Parker, Stanbury, Reese & McGee and Raymond G. Stanbury, Los Angeles, for respondent.

Weinstock, Anderson, Maloney & Chase, San Francisco, amici curiae on behalf of respondent.

GIBSON, Chief Justice.

This is an appeal from a declaratory judgment determining the obligations of two insurance companies whose policies, respectively, were issued to the driver and the owner of an automobile involved in an accident. On March 27, 1956, John M. Steinberg, who was insured by American Automobile Insurance Company, was driving a car which, as a customer, he had borrowed from Max Barish, Inc., an automobile dealer and garage company insured by Republic Indemnity Company of America. The persons injured in the accident recovered by stipulation a judgment of $5,000 against both the driver and the owner of the car.

The limits of each of the two policies are sufficient to cover the loss. The policy issued by Republic to the owner provides in its body for extension of coverage to any person using an automobile of the owner with permission, but affixed to the policy is Special Endorsement No. 4 which provides: "It is agreed that, with respect to any automobile used with the permission of the named insured by a customer of the named insured, such insurance as is provided by the policy applies only to the named insured." The policy issued by American to the driver insures him when using the automobile of another with permission. Both policies contain clauses to the effect that if the insured has other insurance covering the loss the company shall not be liable for a greater proportion of the loss than the limit recited in the policy bears to the applicable limit of all valid and collectible insurance against the loss, but that with respect to coverage for the driving of a car not owned by the insured the insurance under the policy shall be excess over any other valid and collectible insurance.[1]

[1] The trial court concluded that Special Endorsement No. 4 was contrary to public policy and invalid, that Republic's policy covered the driver as an additional insured and provided primary insurance whereas the policy issued by American provided excess insurance only, and that Republic was obligated to satisfy the whole judgment without being subrogated to any right of the owner against the driver. Republic has appealed from this judgment.

The conclusion that Special Endorsement No. 4 is invalid is supported by Wildman v. Government Employees' Ins. Co., 48 Cal. 2d 31, 37–40, 307 P.2d 359. In that case the court held that an endorsement which restricted the coverage of an automobile liability insurance policy to accidents occurring when the car was being driven by

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1. The "other insurance" clause in American's policy contains a further provision, not present in Republic's policy, relating to insurance issued at lower premium as excess insurance over disclosed prior insurance of the named insured. This provision is not relevant here and nothing that will be said about the "other insurance" clauses or the excess provisions in them is intended to relate to it.

the named insured or members of his immediate family was contrary to the public policy expressed in sections 402 and 415 of the Vehicle Code and therefore invalid.[2] It was expressly held that section 415 as it then read must be considered part of every automobile liability insurance policy. The section specifically required coverage of any person using the car with permission as well as coverage of the named insured, and it follows that Special Endorsement No. 4, which purports to exclude coverage of a customer of the owner, is invalid under the rule of the Wildman case. The fact that here, unlike the situation presented in that case, the injured persons were afforded protection by the coverage of the derivative liability of the owner and by the policy carried by the driver is immaterial because the operation of section 415 was not limited to the situation where the injured persons were not protected by other insurance.

[2, 3] Republic urges us to reconsider the Wildman case in view of an amendment of section 415 enacted in 1957 after the date of that decision.[3] The new legislation, according to Republic, was intended to clarify the meaning of the section by showing that the requirements there set forth were not a necessary part of every automobile liability policy. The 1957 enactment does not affect the present case or the correctness of our holding in the Wildman case. The amendment is not retroactive and therefore has no direct application to the accident involved here, which took place prior to 1957. It makes a material change in the phraseology of the section, and such a change is ordinarily viewed as showing an intention on the part of the Legislature to change the meaning of the provision rather than interpret it. Whitley v. Superior Court, 18 Cal.2d 75, 79, 113 P.2d 449; In re Estate of Todd, 17 Cal. 2d 270, 274–275, 109 P.2d 913.

Since Special Endorsement No. 4 of Republic's policy must be disregarded, Steinberg, who was driving the automobile, was an additional insured under the terms of the policy issued by Republic to the owner. Thus the policies of both insurers covered the driver's liability, and each insurer would have been obligated to satisfy the whole judgment against Steinberg if the other insurance had not existed. The next question is whether the loss must be borne by one of the two insurers or apportioned between them.

[4] The language of the "other insurance" clauses contained in both policies is substantially the same. The clauses consist of two parts; the first provides generally for prorating where there is other insurance covering the loss, and the second provides, as a specific exception, that when the named insured is driving a car not owned by him the insurance will be excess over all other insurance. Because American's named insured, Steinberg, was driving

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[2] Section 402, insofar as pertinent here, provides that the owner of a motor vehicle is liable, within limited amounts, for damage caused by the negligence of a person operating the car with the owner's consent.

Section 415, as it read at the time of the events involved in both the Wildman case and the present action (1954–1956), provided in part: "Requisites of Motor Vehicle Liability Policy. (a) A 'motor vehicle liability policy,' as used in this code means a policy of liability insurance issued by an insurance carrier authorized to transact such business in this State to or for the benefit of the person named therein as assured, which policy shall meet the following requirements: * *. (2) Such policy shall insure the person named therein and any other person using or responsible for the use of said motor vehicle or motor vehicles with the express or implied permission of said assured * * *."

[3] As amended by Stats.1957, ch. 1654, p. 3034, section 415 reads in part: "Requisites of Motor Vehicle Liability Policy. (a) A 'motor vehicle liability policy,' *as used in this chapter* means an owner's policy or an operator's policy, or both, of liability insurance, *certified as provided in section 414 as proof of ability to respond in damages*, issued by an insurance carrier authorized to transact such business in this State to or for the benefit of the person named therein as assured." (Italics added.)

another person's car, American's insurance falls within the exception specified in its policy if the insurance of Republic is treated as other insurance. On the other hand, Republic's insurance comes under the prorate provision in its policy if American's insurance is treated as other insurance.[4]

Where "other insurance" clauses of this type appear in the automobile liability policies of both the driver and the owner, the cases have generally given effect to the excess provision in the policy of the driver and have held that the insurer of the owner is primarily liable and must bear the whole loss, within the limits of its policy. Pleasant Valley Lima Bean Growers and Warehouse Ass'n v. Cal-Farm Ins. Co., 142 Cal.App.2d 126, 136, 298 P.2d 109; General Insurance Co. of America v. Western Fire & Casualty Co., 5 Cir., 241 F.2d 289, 295; Farm Bureau Mut. Auto. Ins. Co. v. Preferred Acc. Ins. Co., D.C., 78 F.Supp. 561, 565; Citizens Casualty Co. of New York v. Allied Mutual Ins. Co., 217 Md. 494, 144 A.2d 73.

These cases are based on the reasoning that the policy of the owner is other insurance within the meaning of the excess provision of the driver's policy and that therefore this provision is effective; they do not consider the driver's policy as other insurance within the meaning of the prorate provision of the owner's policy and accordingly treat the prorate provision as not operative. Although this reasoning has been referred to as circular, depending on which policy one happens to read first (see Oregon Auto. Ins. Co. v. United Fidelity & Guar. Co., 9 Cir., 195 F.2d 958, 960), we have concluded that the result reached in the cases cited above is correct.[5] When the "other insurance" clauses are construed in accordance with their purpose, the prorate clause in the owner's policy, as we shall see, is not applicable to a situation like the one involved here.

The "other insurance" clause in American's policy is identical with that contained in the "National Standard Automobile Policy," used by the great majority of casualty insurers in the United States. See Faude, The 1955 Revision of the Standard Automobile Policy, Coverage: Insuring Agreements and Exclusions, 1955 Proceedings of the Section of Insurance Law of the American Bar Association, p. 48. Although Republic did not use the standard form, its "other insurance" clause is substantially the same as that appearing in the standard policy. That policy as well as the policies involved here extends coverage to the named insured when he drives a car other than his own and also to any other person when driving the car of the named insured. For that reason there will be dual insurance when an accident is caused by a person not driving his own car and both the driver and the owner are insured under a standard policy. Clearly the excess provision of the "other insurance" clause is intended to show how the loss should be borne in this frequently recurring situation. It is impossible, and could not have been intended, that the excess provision would govern with respect to the insurance of the driver and that at the same time the prorate provision would control with respect to the insurance of the owner because proration of the loss and treating the driver's insurance as excess over the insurance of the owner obviously lead to inconsistent results. The only construction of the "other insurance" clause under which both its parts will be meaningful is that the *excess* provision alone controls in every situation which falls within its terms, such as when a person is driving the car of another and both the driver and the owner have insurance, and that the *prorate* provision alone governs in all other situations, for example, when more than one policy has been issued to the same person. When the driver's insurance is excess, it necessarily follows that the insurance of the owner is primary, and therefore the owner's insurer must bear the entire loss to the extent of the limits of the policy.

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[4] **The excess provision in Republic's policy is not applicable here because the accident was caused by a car owned by Republic's named insured, and the prorate provision in American's policy is not applicable because the excess provision in that policy is operative and controlling.**

[5] **In the Oregon Auto. Ins. Co. case the "other insurance" clause in the owner's policy differed from the one involved here in that it wholly excluded coverage of a driver other than the named insured when that driver had other insurance.**

The judgment is affirmed.

SHENK, SCHAUER, SPENCE, McCOMB and PETERS, JJ., concur.

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52 Cal.2d 467

PEOPLE of State of California, Respondent,
v.
Caryl CHESSMAN, Appellant.
Cr. 5006.

Supreme Court of California.
In Bank.
July 7, 1959.
Rehearing Denied Aug. 5, 1959.

Defendant was convicted of seventeen felonies including first degree robbery and kidnapping for robbery with infliction of bodily harm. The Superior Court of Los Angeles County, Charles W. Fricke, J., rendered judgment and sentenced defendant to death and he appealed. The Supreme Court, 38 Cal.2d 166, 238 P.2d 1001, affirmed. Subsequently, the United States Supreme Court, 354 U.S. 156, 77 S.Ct. 1127, 1 L.Ed.2d 1253, on certiorari in federal habeas corpus proceedings, held that manner of preparation of transcript from notes of deceased reporter had denied defendant procedural due process of law and vacated judgment disallowing writ and remanded proceedings with instructions to allow California reasonable time for review of conviction upon a properly settled record. After the transcript was resettled by Judge Walter R. Evans, assigned to the Los Angeles Superior Court, the Supreme Court, Schauer, J., held that transcript could be properly prepared by reporter undertaking to read and transcribe notes of deceased reporter if transcribing reporter could transcribe notes with substantial accuracy, that evidence sustained trial court's findings that reporter transcribing deceased reporter's notes had done so with substantial accuracy and that record incorporating the settled transcript revealed no prejudicial error.

Affirmed.

1. Criminal Law 🔑1104(6)

Where procedure for preparation of reporter's transcript in event of reporter's death was not expressly delineated by statute or rule, it was court's power and duty to create a procedure.

2. Constitutional Law 🔑271
Criminal Law 🔑1104(6)

At "re-resettlement" hearing, on transcript completed by reporter other than one who took notes, held to allow defendant to contest changes in transcript previously made by judge without notice or hearing, judge could have merely stated that he proposed to make such changes, in accord with previous informal determinations, in open court where defendant could contest them, and judge's refusal to testify at such hearing as fully as requested by defendant, on such changes, did not deny due process of law to defendant who, after judge refused to go on with testimony, declined judge's suggestion to make record on proposed questions and declined to present further evidence or arguments. West's Ann.Code Civ.Proc. § 1883.

3. Criminal Law 🔑1028, 1177

Judgment of conviction could not be reversed because of asserted errors of judge below in making changes in transcript where defendant in open court, below, refused to show specifically the matters on which he asserted, before reviewing court, he wished to be heard and where such changes were immaterial to disposition of case on merits.

4. Criminal Law 🔑1104(6)

Although not in literal compliance with Rules on Appeal, procedure whereby transcript is prepared by court reporter who undertakes to read and transcribe notes of deceased reporter is proper where it results in production of a fair transcript, adequate to review and resolution of material issues, even in a death penalty case.

5. Criminal Law 🔑1189

Supreme Court has inherent power to order new trial in appropriate circumstances where, without fault of appellant, no adequate record can be produced.

6. Criminal Law 🔑1104(6)

In proceeding for settlement of transcript completed, after death of reporter who took notes at trial, by another official reporter, evidence supported findings that reporter who completed transcript was able to decipher deceased reporter's notes, that he transcribed them fairly and in a substantially accurate manner, that changes made therein by judge in no way affected substance and nature of either People's case or defense, and evidence supported conclusion that corrected transcript was sufficiently accurate and complete to permit fair review.

7. Criminal Law 🔑1104(6)

The question of whether one court reporter can read and transcribe a deceased court reporter's notes with substantial accuracy so that a proper transcript may be settled is one of fact to be determined in each case in which it may arise. West's Ann.Gov.Code, § 69943.

8. Criminal Law 🔑1177

Where nunc pro tunc minute order appointing reporter who had transcribed undictated notes of deceased trial reporter as expert witness in proceedings for resettlement of transcript had no bearing on merits of resettlement proceedings and no effect on defendant's rights, defendant could not successfully predicate error upon entry of such order.

9. Criminal Law 🔑641(1)

Defendant was entitled to be afforded opportunity to have counsel but was not entitled to have services of any particular attorney.

10. Criminal Law 🔑1166(8)

Conviction was not subject to reversal for trial court's denial of continuance allegedly depriving of opportunity to obtain counsel of his choice, a defendant who had been offered services of deputy public defender but who had stated that he wished to defend himself, retaining deputy public defender merely as adviser.

11. Indictment and Information 🔑130

Counts charging defendant with perpetration of robberies and robber-kidnapings and with revolting crimes in which sex offenses were connected could be properly joined in single prosecution, though the counts did not relate to same transaction and offenses were committed at different times and places and against different victims, where single element of intent to obtain feloniously property of others ran as a thread through all offenses. West's Ann. Pen.Code, §§ 288a, 954, 969, 969a, 969c.

12. Criminal Law 🔑781(6), 1172(2)

Instruction, stating that confession, even if false, was nevertheless evidence for jury's consideration, following court's instructions on false statements, was one which could be dangerously misleading but which was not, under circumstances of case, prejudicially erroneous.

13. Criminal Law 🔑1168(2), 1170½(1)

Record failed to reveal prejudice to the defendant resulting from prosecution's introduction of his asserted incriminating statements as impeachment of defendant's testimony and as rebuttal rather than as part of case in chief, where, after prosecutor asked defendant, on cross-examination, whether he had made a certain incriminating statement, he was allowed to continue inquiry, prosecutor was required to lay foundation by showing that statements were voluntary and defendant introduced evidence to contrary.

14. Criminal Law 🔑683(1)

The fact that asserted incriminating statements made by defendant were not introduced until he had taken stand did not result in such statements being available only to impeach defendant rather than as part of People's case.

15. Criminal Law ⚿1137(8)

Where defendant, choosing technique of defense which might conceivably impress jury by its boldness, sought to incite prosecutor to conduct which might lead to holding of reversible error and deliberately failed to interpose objections to prosecutor's conduct, such conduct could not form ground for reversal of judgment of conviction.

16. Criminal Law ⚿796

Jury has right to know actual, possible effect of their determination as to punishment and instruction stating that one sentenced to life imprisonment without possibility of parole might be released by pardon or retrospective changes in the law was proper.

17. Criminal Law ⚿1209

As the penal code proscribes double punishments rather than double convictions, where single act constituting an essential element of two separately charged crimes results in initial conviction of both crimes, only the more serious will be punished. West's Ann.Pen.Code, § 654.

18. Criminal Law ⚿1177

Though defendant convicted for both kidnaping female victims for purpose of robbery, with infliction of bodily harm, for which he was sentenced to death, and also for sex offenses which formed basis of findings of bodily harm could not be punished for both the kidnapings and for the underlying sex offenses, as kidnaping convictions carried death penalty, convictions for less serious offenses would not be reversed. West's Ann.Pen.Code, §§ 209, 288a, 654.

19. Kidnapping ⚿1

The 1951 amendment to Penal Code requires some asportation of victim, though not for any particular distance, for offense of kidnaping for purpose of robbery. West's Ann.Pen.Code, § 209.

20. Criminal Law ⚿1186(4)

In view of constitutional provision stating that no judgment shall be set aside or new trial granted on ground of misdirection of jury unless court is of opinion that error complained of has resulted in miscarriage of justice, where in prosecution for kidnaping for purpose of robbery, evidence compelled conclusion that defendant's expressed intention to rob, his asportation of victims and infliction of bodily harm upon them constituted one continuing transaction, judgment of conviction carrying death penalty could not be reversed on ground that jury could have convicted defendant without finding asportation for purpose of robbery, under instructions, though amendment to penal code, subsequent to trial, required some asportation of victim. West's Ann.Pen.Code, § 209; West's Ann.Const. art. 6, § 4½.

21. Criminal Law ⚿1213

That defendant was detained for more than 11 years pending execution of death sentence, while his appeal and habeas corpus proceedings were being disposed of, did not make his confinement unconstitutionally cruel or inhuman or entitle him to discharge from custody.

22. Judges ⚿39

Where candidate for Justice of Supreme Court meets requirements of constitutional section requiring candidates for such position to be admitted to practice before Supreme Court for a period of five years immediately preceding election, and qualifies by taking oath, legislature cannot properly require, by way of additional qualification, anything, such as residence requirement, which has no reasonable relation to the performance of duties and statute providing that justices shall keep their offices in city of Sacramento, if not complied with by a justice, does not deprive him of jurisdiction to perform duties of office. West's Ann.Const. art. 6, § 23; art. 20, § 3; West's Ann.Gov.Code, § 1060.

◆

Caryl Chessman, in pro. per., for appellant.

Edmund G. Brown and Stanley Mosk, Attys. Gen., Clarence A. Linn, Chief Asst. Atty. Gen., Arlo E. Smith and Preble Stolz, Deputy Attys. Gen., for respondent.

SCHAUER, Justice.

Defendant appeals from judgments of conviction of 17 felonies, rendered pursuant to jury verdicts, and from an order denying his motion for new trial. Upon two counts (kidnaping for robbery with infliction of bodily harm) the punishment was fixed at death. Defendant argues that the trial judge required him to go to trial without opportunity to obtain counsel of his choice, to prepare and to effectively represent himself. He presents contentions as to asserted prejudicial errors of the trial judge and prejudicial misconduct of the prosecuting attorney at the trial on the merits. He attacks the sufficiency and correctness of the reporter's transcript on appeal, and the propriety and constitutionality of proceedings in which that record was produced, settled, and resettled. Defendant further urges that California, since the rendition of the judgments of conviction on June 25, 1948, has denied him equal protection and punished him cruelly and unusually by restraining him pursuant to such judgments while the various matters of which defendant complains were being litigated and relitigated. And he contends that the justices of this court are "jurisdictionally foreclosed from discharging their duties." We have concluded that these and his other contentions hereinafter described are without merit.

For convenience in ensuing discussion we again adopt the numbering of the crimes of which defendant was convicted which we employed in People v. Chessman (1951), 38 Cal.2d 166, 171–172, 238 P.2d 1001. Each paragraph indicates, and identifies by date and description, a separate general criminal enterprise, in each of which one or more offenses were committed. Defendant was identified by victims of the various criminal enterprises, except the victim of crime (2).

January 3, 1948: (1) First degree robbery of McCullough, clerk in a store where shoes were sold, by defendant (armed with a .45 caliber automatic pistol) and another man.

January 13, 1948: (2) Grand theft of an automobile with a spotlight. This car was taken in the owner's absence. A car of similar description was used in perpetrating subsequent crimes. Defendant was fleeing in the stolen car when he was apprehended.

January 18, 1948: (3) First degree robbery of Bartle. Bartle and a young woman were driving along the Coast Highway when they were stopped by defendant, who drove a car with a red spotlight which he flashed on Bartle's car. Defendant was armed with a .45 automatic. (The car stolen in crime (2) had a spotlight with a clear rather than a red lens. Defendant himself, as he admitted on cross-examination, introduced a possible explanation of the red spotlight into the proceedings when he asked Bartle, at the preliminary examination, "Well, had there been some cellophane around the spotlight?" to which Bartle replied, "That I would not know.")

January 18, 1948: (4) First degree robbery of Ballew, who was parked at an isolated place with a woman companion. Defendant drove up, flashed a red spotlight which was mounted on the car he drove, displayed a .45 automatic, and used a small flashlight.

January 19, 1948: (5) First degree robbery of Lea. (6) First degree robbery of Regina. (7) Kidnaping Regina for robbery, with infliction of bodily harm; punishment fixed at death. (8) Violation of Penal Code, section 288a committed against Regina. Mr. Lea and Regina were parked in an isolated place. Defendant approached in a car, from which he flashed a red spotlight, and threatened the victims with a .45 automatic.

January 20, 1948: (9) First degree robbery of Stone, who was parked in an isolated place with a girl. Stone testified that he "would suspect" that defendant was the robber. The robber approached in a car from which he flashed a red spotlight, displayed a .45 automatic, and used a small flashlight.

January 22, 1948: (10) Attempted robbery of Hurlburt. (11) Kidnaping Mary for robbery, with infliction of bodily harm; punishment fixed at death. (12) Attempted rape of Mary. (13) Violation of Penal Code, section 288a committed against Mary. In these crimes, too, the victims were parked at an isolated place. Defendant flashed a red spotlight mounted on the car which he drove, produced a .45 automatic, and used a flashlight. Mary testified that after he had forced her into his car, driven her some distance to another isolated place, and sexually assaulted her, defendant went to the spotlight of the car and she heard a click, a rustling, and the sound of defendant placing something metallic in the back seat and in the glove compartment of his car.

January 23, 1948: (14) First degree robbery of Waisler. (15) First degree robbery of Lescher. (16) Kidnaping Waisler for robbery, with infliction of bodily harm; punishment fixed at life imprisonment without possibility of parole. (17) Kidnaping Lescher for robbery. Defendant and David Knowles, one armed with a .45 automatic and one with a toy gun, "held up" the clothing store in which Waisler, the proprietor, and Lescher, a clerk, were working, and committed the crimes described in People v. Knowles (1950), 35 Cal.2d 175, 217 P.2d 1.

About two hours after the commission of the last mentioned group of crimes defendant, driving the stolen car with Knowles as a passenger, saw two police officers in a distinctively marked traffic car apparently observing defendant's car. (The officers had received a radio call to look out for a car of the description of the one driven by defendant.) Even before the officers turned on their red light and sounded their siren, defendant fled. After a wild chase the car driven by defendant went out of control, the officers rammed it, defendant attempted to flee on foot, and he and Knowles were captured. As defendant left the car a .45 automatic fell to the pavement. In defendant's pocket, among other things, was change wrapped in a manner similar to change which had been stolen from Waisler's store. In the stolen car were clothing and a wallet which had been stolen from Waisler and Lescher.

The jury found that defendant was armed with a deadly weapon at the time of the commission of each of the above crimes except that numbered (2), and at the time of his arrest. (Pen.Code, § 969c provides for allegations and findings as to these matters.) The jury further found that defendant had suffered previous convictions of two robberies and of assault with a deadly weapon. Pen.Code, §§ 969, 969a, require that the prosecution charge prior felony convictions. Defendant was also charged with and acquitted of one count of burglary.

Upon the record there is no substantial question of sufficiency of proof. The evidence of the commission of the offenses was not contradicted. When defendant was apprehended he was driving the automobile which was the subject of crime (2); he was identified by the victims as the perpetrator of the other crimes of which he was convicted; and he was connected with such crimes by real evidence in his possession at the time of his capture. Defendant testified that he did not commit the charged crimes and introduced testimony of alibi witnesses as to some of them.

At no time since the original reporter's transcript of the trial was prepared has defendant made it appear that the transcript does not adequately and substantially reflect the nature of the People's case and of his defense. But since rendition of the judgments of conviction on June 25, 1948, he has sought to avoid their execution, and to secure a new trial, on the theory (among others) that under California's statutory provision for automatic appeal from judgments of death (Pen.Code, § 1239, subd. (b)), its constitutional provisions for supreme court review of the record of proceedings leading to such judgments (Cal.Const. art. VI, §§ 4, 4½), and its Rules on Appeal providing for preparation of such record, he was denied due process and equal protection because, after the trial but before the transcript had been completed, the official court reporter died and transcription of the notes of the oral proceedings was completed by another official reporter. In state and federal courts he has iterated and reiterated charges (in substance or effect) that the transcript does not present a reasonably accurate and complete record of the evidence and other oral proceedings but is a fabrication of falsities constructed through the fraudulent and conspiratorial collaboration of the trial judge, the prosecuting attorney, and the substitute reporter, concocted in an *ex parte* proceeding wherein the state did not permit defendant to participate either in person or by counsel. His charges that the record is inadequate, prejudicially inaccurate, and fraudulent have been found to be false by every court which has passed on the facts. Pursuant to remand of the United States Supreme Court in Chessman v. Teets (1957), 354 U.S. 156, 77 S.Ct. 1127, 1 L.Ed. 2d 1253, and implementing orders and proceedings obedient to the remand, all as hereinafter more particularly recounted, the matter is now before us both on the original appeal from the judgments of conviction to be resolved on the resettled transcript, and for review of the resettlement of transcript proceedings.

History of the Disputed Reporter's Transcript of the Trial. The verdicts were returned on May 21, 1948. Mr. Ernest R. Perry, the official court reporter who had reported the trial, died unexpectedly of acute coronary thrombosis on June 23, 1948, before transcription of his shorthand notes had been completed. On June 25, 1948, the trial judge, the Honorable Charles W. Fricke, denied defendant's motion for a new trial, pronounced judgments, and denied defendant's motion to set aside the judgments on the ground of Mr. Perry's death.

[1] The procedure for preparation of a reporter's transcript in the event of the reporter's death was not expressly delineated by statute or rule and it was, therefore, the court's power and duty to create a procedure. (See Swift v. Superior Court (1952), 39 Cal.2d 358, 364 [9], 247 P.2d 6; People v. Jordan (1884), 65 Cal. 644, 646–647, 4 P. 683; Code Civ.Proc. § 187.) Therefore, on June 25, 1948, Judge Fricke made the following order: "It appearing to the Court that there is a necessity, * * * in the proper administration of justice and to the limit of human beings in their use of human ingenuity, that the entire record of this trial be prepared in as complete a manner as possible so that full justice may be done this defendant, the Clerk of this Court * * * is directed to request the County Board of Supervisors to provide for such service and adequate compensation therefor, to the end that this record may be as full and complete as possible, and to include everything that occurred during the course of the trial up to and including the verdict."

One week after rendition of judgment, defendant was taken to San Quentin State Prison as required by law. (Pen.Code, §§ 1202a, 3600.)

Under direction of Judge Fricke, Mr. J. Miller Leavy, the deputy district attorney who had prosecuted the case, found another official reporter, Mr. Stanley Fraser, who said that he was able to read Perry's notes, and Mr. Fraser, under contract with the board of supervisors, prepared a transcript of the portion of the notes which had not been dictated by Mr. Perry and typed by the transcriber who had been employed by Perry. The ensuing transcript comprises 2,102 pages, of which 646 were dictated by Perry before his death.

In November, 1948, defendant filed and this court denied without opinion a petition for prohibition (Crim. 4950) attacking the method by which the reporter's transcript was being prepared. The petition is in propria persona, but the affidavit of mailing is by Attorney Rosalie S. Asher. (As hereinafter appears, since the summer of 1948 defendant has had the legal services of Miss Asher, sometimes as adviser and sometimes as attorney of record.)

On June 3, 1949, Judge Fricke certified the transcript after proceedings (more fully recounted in People v. Chessman (1950), 35 Cal.2d 455, 458–467, 218 P.2d 769, 19 A.L.R.2d 1084) in which defendant appeared by in propria persona documents. The judge did not grant defendant's request to leave the prison[1] and be present in person in those proceedings; defendant did not ask appointment of counsel; and the judge did not require appointment of counsel on his behalf.[2] The judge accepted and incorporated in the transcript about 80 of the some 200 specific suggestions urged by defendant in propria persona.

Defendant attacked the transcript by motions in this court. In a brief filed on September 15, 1949, he commended Miss Asher for her "generous advisory interest * * * and well-rendered service" on his behalf. On September 21, 1949, at defendant's request, this court appointed Miss Asher as counsel for defendant, and on September 23, 1949, at his further request, we relieved her of the appointment. In People v. Chessman (1950), supra, 35 Cal.2d 455, 467 [15], 218 P.2d 769, we concluded that under the law of this state and the circumstances of this case defendant was not entitled to be personally present in the settlement proceedings before Judge Fricke.[3]

On June 10, 1957, in Chessman v. Teets (1957), supra, 354 U.S. 156, 77 S.Ct. 1127, on certiorari after the federal district court discharged a writ of habeas corpus and the court of appeals affirmed, the United States Supreme Court held that "If California chose to deny petitioner's request to appear in those proceedings [the settlement proceedings before Judge Fricke in 1949] *in propria persona*, it then became incumbent on the State to appoint counsel for him" (at page 162 of 354 U.S., at page 1131 of 77 S.Ct.) and remanded the case to the district court "with instructions to enter such orders as may be appropriate to allow California a reasonable time within which to take further proceedings not inconsistent with this opinion, failing which the petitioner shall be discharged" (at page 166 of 354 U.S. at page 1133 of 77 S.Ct.).

Resettlement of Transcript Proceedings. Pursuant to the opinion and direction of the United States Supreme Court and orders of the district court and this court obedient thereto, new hearings as to the rejection or resettlement of the reporter's transcript were had. Prior to these hearings the Los Angeles superior court granted defendant's motion that he be removed from San Quentin prison to the Los Angeles county jail. From September 23, 1957, through November 22, 1957, defendant in the flesh appeared before the Los Angeles superior court on 12 occasions and orders enabling defendant to prepare for the resettlement hearings were made; e. g., defendant was furnished an office and personal access to law books and records and it was ordered that defendant "be allowed to confer freely and privately with his counsel, witnesses, expert witnesses, investigators, and other responsible persons connected with * * * the preparation of this matter on any day between * * * 9:00 a. m. and 3:00 p. m., * * * 3:30 p. m. and 5:00 p. m., and * * * 6:00 p. m. and 9:00 p. m."

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[1] At all times here concerned Penal Code, section 3600, mentioned supra, has provided that "Every male person, upon whom has been imposed the judgment of death, shall be delivered to the warden of the California state prison designated by the department [formerly the state board of prison directors] for the execution] for the execution of the death penalty, there to be kept until the execution of the judgment." Likewise at all times concerned San Quentin has been the prison designated for the detention (and execution) of male prisoners under sentence of death.

[2] It will be remembered that the settlement of the transcript was a duty devolving on the judge as a result of the preceding trial in which the defendant had repeatedly and obdurately insisted on representing himself, and the court had been of the view that it could not compel defendant to accept counsel.

[3] Further history of the first nine years of defendant's attacks on the transcript in state and federal courts is recounted in People v. Chessman (1950), supra, 35 Cal.2d 455, 458–467, 218 P.2d 769; In re Chessman (1954), 43 Cal.2d 391, 393–404, 408, 274 P.2d 645; In re Chessman (D.C.1955), 128 F.Supp. 600, 601–602; Chessman v. Teets (1957), supra, 354 U.S. 156, 77 S.Ct. 1127, see also dissenting opinion of Justice Douglas, p. 166, and appendix thereto, p. 173 of 354 U.S., 77 S.Ct at pages 1133, 1136; and Appendix II to this opinion, post, p. 701.

Defendant's objections to the transcript, filed November 18, 1957, fully state the matters which he proposed to, and did, present at the resettlement hearings. Beginning on November 25, 1957, the Honorable Walter R. Evans, judge assigned to the Los Angeles superior court, for 42 court days heard testimony and received documentary evidence concerning the legibility of Perry's notes, the ability of Fraser to transcribe them, and the correctness of the reporter's transcript (both the 646 pages which had been dictated by Perry before his death and the 1,456 pages prepared by Fraser). The witnesses included, among others, persons who had been at the trial (Judge Fricke, his former courtroom clerk, Deputy District Attorney Leavy, Attorney Al Matthews, who was defendant's court-appointed legal adviser during the trial, defendant, jurors and witnesses), the substitute reporter Mr. Fraser, and shorthand experts who had studied and appraised Perry's notes and Fraser's transcript (Bessie Lill, court-appointed expert who testified for the People, Frank Hanna, court-appointed expert who testified for the defendant, Mrs. Mollie Kalin, court-appointed expert who was relieved of her appointment at her request and assisted and testified for defendant). During the resettlement hearings defendant was allowed both to actively represent himself and to be represented by counsel of his choice. On February 14, 1958, after two days of oral argument, following the 42 days of taking evidence, the matter was submitted.

On February 28, 1958, Judge Evans by minute order denied defendant's motions (made and submitted on December 20, 1957, and February 13, 1958) that the court "reject the present reporter's transcript in entirety," "find that no usable or adequate reporter's transcript can be prepared from Ernest R. Perry's shorthand notes," and "If the Court remains in doubt as to whether a usable and adequate reporter's transcript can or cannot be prepared from Ernest R. Perry's shorthand notes, to appoint an impartial expert to study the notes and then to appear in court and demonstrate whether or not the notes can be transcribed with any reasonable degree of accuracy and certainty." By written order Judge Evans found that Perry's notes were decipherable; that Fraser was competent to and did transcribe them "fairly and in a substantially accurate manner"; that defendant's claims that the transcript was fraudulently prepared are baseless; that some 2,000 changes (listed in Exhibit A to the order) should be made in the transcript but that "individually or collectively, [these changes] in no way change the substance and nature of either the People's case or the defendant's defense." All defendant's objections to the transcript except those included in Exhibit A were disallowed and the clerk was ordered to make the listed changes. When the written order of February 28, 1958, was filed the judge said in open court that "We may find some typographical errors * * * because of the fact that we rather rapidly tried to get it typed." Subsequent developments suggest prescience in the quoted remark.

Defendant was returned to San Quentin. Typists employed by the clerk to prepare the corrected reporter's transcript discovered that because of apparent typographical or clerical errors in the preparation or typing of Exhibit A, 90 of the ordered changes could not be made, or, if they had been made, would have produced unintelligibility or manifest incorrectness. Without notice, adversary hearing, or order of record, Judge Evans upon consideration of the difficulty instructed the typists that some of these 90 changes ordered on February 28 should be made in different manner and others should not be made, and this was done.

On May 1, 1958, Judge Evans certified a corrected reporter's transcript of the trial. Such transcript, and the transcript of the resettlement proceedings, were sent to defendant in San Quentin. He mailed to the superior court his "Objections, Proposed Corrections, and Application for a Hearing," which were, so far as is here material, denied. On July 2, 1958, defendant sought mandate from this court to compel the superior court, among other things, to grant a hearing as to the 90 changes. On October 2, 1958, we ordered the superior court "to explicitly grant petitioner an opportunity to be heard in person or by counsel in opposition to its action with respect to its [90] changes in the 'Order re Hearing on Objections' filed February 28, 1958." (Chessman v. Superior Court, 50 Cal.2d 835, 843, 330 P.2d 225.) Our order was made on the express assumption (not a holding) that in view of Chessman v. Teets (1957), supra, 354 U.S. 156, 164, note 12, 77 S.Ct. 1127, 1132, "lack of a hearing as to the 90 changes cannot be excused upon the basis of a determination that such changes are immaterial."

"Re-Resettlement" Hearing. Pursuant to superior court order of October 10, 1958, defendant was returned to the Los Angeles county jail. By written objections filed in the superior court on November 18, 1958, he stated, among other things, that at the "re-resettlement" hearing he would stipulate to 26 of the 90 changes;[4] he would show that some of the other changes ordered on February 28, 1958, could not be made literally because that order contained typographical errors as to page and line numbers and he would supply the correct numbers;[5] and he proposed to show that still others of the 90 changes involved judicial determinations or redeterminations.[6] Defendant's objections of November 18, 1958, further state that "at the hearing he will be prepared to accept the burden of proof and put into the record the competent, relevant and material evidence he has gathered to support * * * his position" that Judge Evans made judicial determinations without notice to defendant.

At the "re-resettlement" hearing on November 24 and 25, 1958, defendant, with consent of the superior court and the deputy district attorney, appeared before Judge Evans in propria persona; he had the services of a legal adviser of his choice.

Defendant called Judge Evans as a witness.[7] In answer to defendant's question, "Did your Honor ever check the corrections and changes you ordered made in Exhibit A to determine whether they actually could be made before making the order [of February 28, 1958]?" Judge Evans testified, "I did not check each and every item in Exhibit A. * * * I took the documents which were in evidence, referring to People's 2 [report of expert Lill listing proposed corrections in the transcript], and * * * defendant's Y [report of expert Hanna listing such corrections] * * * and first where there was any conflict as to any of the items set out in those exhibits, which conflict was developed during the hearing, then they were gone into and dovetailed with all of the other evidence * * * and the Court came up with what the Court deemed was the proper finding. Where there was no conflict * * the Court took a good many of those without ever checking them * * * [W]e ran across a few typographical errors—that is, what we deemed typographical errors—in the exhibits and tried to properly correct them. That is, before the February 28th order. Whether we got all of them, I don't know."

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[4] For example, Exhibit A of the February 28 order states, "[page] 117 [line] 3 'Q: It was not a club coupe?' (Insert 'not')." Page 117, line 3, of the original reporter's transcript reads, "A: Yes." But at page 117, line 23, appears "Q: It was a club coupe?" and the ordered correction was made there.

[5] For example, Exhibit A reads "[page] 49 [line] 9 For 'taking the recess' read 'going with the.'" This correction could not be made on page 49 because the words "taking the recess" do not appear on that page. Defendant in his supplementary opening brief points out that this ordered correction was "omitted * * * completely" and suggests that there may have been simply a typographical error in the page number, since the words "taking the recess" appear at page 48, line 9. (It may be noted, however, that the ordered substitution, if it had been made at page 48, would not make sense.)

[6] For example, Exhibit A states, "[page] 249 [line] 8 After 'A' insert 'come up.'" This correction was not made. The typist who prepared page 249 of the corrected transcript testified, "I questioned that. I took it up with Judge Evans and he said to leave it as in the original transcript, which is 'Stick them up.' * * * [I]t sounded like in the original transcript 'stick them up,' would be more natural after referring to having guns, and so forth, would sound more logical than 'come up.'" Defendant in his supplementary opening brief says that he "should have been allowed to determine if Judge Evans had directed that the ordered correction be ignored because of a typist's 'logic.'"

[7] Code Civ.Proc. § 1883: "The judge himself * * * may be called as a witness by either party; but in such case it is in the discretion of the court or judge to order the trial to be postponed or suspended, and to take place before another judge * * *"

The judge further testified that after the making of the February 28 order, when the typists called the 90 apparent errors in Exhibit A to his attention, "I did my best to go over them and determine whether they were typographical in my opinion, or what they were, and ordered the insertion at the place that I deemed proper under the situation. * * * [W]e attempted first to check the transcript to see if we could determine that there had been a typographical error and have the correction made as it should have been made. Where we couldn't determine that, of course, there was nothing else we could do than just order the change deleted." Defendant said that he would ask "specific questions dealing with specific changes, your Honor," but requested and was allowed to first take the testimony of the clerk.

Then Judge Evans said, concerning his further appearance as a witness, "I have no desire to hide or to try to hide anything that I have any knowledge of, but I am just afraid the thing might get out of hand and * * * I don't want to * * * be testifying. I don't think there is anything that is primarily within my mind that is not within anyone else's, except the fact, of course, these changes were made in what I assumed were typographical errors in citation and page and line numbers. * * * I think what we had better do is possibly have you [defendant] make a record on what you had in mind asking, and I will just make the record that I * * * refuse to testify." In further colloquy Judge Evans said, "I don't want to walk into a situation where I am testifying on the merits of the thing that I am going to have to decide. * * * [I]n order to avoid that possibility, I think at this point we had better terminate my appearance as a witness. * * * I don't know what questions are to come. I don't want to be faced with them and then decide." The judge suggested that defendant "make your record on the questions that you anticipated asking" and defendant suggested that this would be "futile in view of the position taken by the Court that it is not going to answer any questions."

The typists who had prepared the corrected transcript then testified that when they found corrections listed in Exhibit A which could not literally be made (i. e., where the ordered changes directed the alteration of a stated word at a stated page and line although such word did not appear there), or when the ordered changes appeared unintelligible, they called the matters to Judge Evans' attention and he gave them the instructions which resulted in the 90 changes.

The colloquy concerning the judge's dual role as court and witness resumed. Judge Evans persisted in his position that he had explained the "mechanics" of the 90 changes, that he would not answer any more questions, and that he had made that decision before he knew what the further questions might be. Defendant persisted in his refusal to make a record of the questions which he wished to put to the judge.

Judge Evans denied defendant's motion that the court suspend the proceedings and either "ask for the assignment of another judge * * * in order that I may call Judge Evans * * * as a witness" or "permit me to go by some appropriate writ immediately to the California Supreme Court" for a ruling as to whether Judge Evans had "jurisdiction" to refuse to testify further and to continue to preside at the "re-resettlement."

Defendant then declined to present any further evidence or argument. Over defendant's objection "to all of the changes and also to the fact that the Court is proceeding now" Judge Evans disallowed the objections to each of the 90 changes (except the 26 to which defendant stipulated) and ruled that each change should stand.

The People called defendant as a witness, directed his attention to Judge Evans' repeated suggestions that defendant make of record the questions which he had intended to ask the judge, and asked whether "you refuse to file any such list of questions." Defendant replied, "It is my position now that the Court is without jurisdiction." Further pressed for an answer defendant said, "I do not choose to answer."

Defendant by petition to this court for mandate and prohibition attacked the "re-resettlement" order of November 25, 1958. The petition was denied without opinion. (Chessman v. Superior Court, L.A. 25261.) On December 12, 1958, Judge Evans, in defendant's presence, again certified the corrected reporter's transcript of the trial. Defendant was returned to San Quentin. This newly corrected reporter's transcript, certified on December 12, 1958, and the proceedings which produced it, are presently before us for review.

[2] *Defendant's Attack on the "Re-Resettlement" Proceeding.* Defendant urges that Judge Evans' refusal to testify further concerning the 90 changes in the some 2,000 changes ordered on February 28, 1958, denied defendant due process. But there was no occasion for Judge Evans to testify at all. When defendant, pursuant to our mandate (Chessman v. Superior Court (1958), supra, at pages 843–844 of 50 Cal.2d at page 230 of 330 P.2d), was produced in court, the judge could merely have announced that he had theretofore informally decided (as he obviously must have decided before he certified the corrected reporter's transcript on May 1, 1958) that the February 28, 1958, order should be changed in 90 respects and that he proposed to order in open court that such February 28 order be corrected in accord with his previous informal determinations; and if defendant had any objections to any of the proposed 90 changes he could then present them and the judge could rule on them. Whether the 90 changes, or any of them, were judicial or clerical in character would in those circumstances be immaterial. The judge, acting as a judge, would have been simply correcting the records of the court and completing the settlement of the transcript in defendant's presence. (Such correction and settlement, of course, are ordinarily performed by the judge in chambers, without the presence of parties or counsel; it is only because of the peculiar circumstances of this case that defendant was present in open court; see at pages 841–842 [3, 4] of 50 Cal.2d, at page 228 of 330 P.2d.)

If defendant had any complaints that the correction of the February 28 order and the "re-resettlement" of the transcript were not supported by the evidence at the previous resettlement hearings, he could have presented those complaints. Since defendant was present in court, with opportunity to be heard, there was no occasion for the judge to undertake an explanation of whether his original, informal action as to the 90 changes was solely clerical or in part judicial, or of why and how the changes were made. Inasmuch as our mandate reopened the resettlement proceedings insofar as the making of the 90 changes was concerned, and inasmuch as the trial court had defendant before it and gave him full opportunity to object to those changes, whether judicial or clerical, there was no denial of due process.

Whatever effect might otherwise be given to the fact that Judge Evans assumed and then declined to continue in the role of witness is overcome by the further fact that defendant in turn refused to continue in the role of questioner or objector and sat silent (except for his general objection to the judge's proceeding to act) while Judge Evans ruled that each of the 90 changes should stand. Thus defendant in this respect deliberately declined to be heard and refused to make a record defining any error in the making of the 90 changes.

[3] Even if there were no other basis for our conclusion as to this phase of defendant's arguments it would be impelled by this consideration: Because defendant in open court refused to show specifically the matters on which he now asserts that he wished to be heard as to the 90 changes, and because those changes, as is apparent from inspection of the reporter's transcript and the judge's findings, are in any event immaterial to the disposition of the cause on its merits, we cannot accept defendant's contention that Judge Evans' refusal to testify was either a denial of due process or prejudicial error.

Defendant further argues that he was prepared to show, at the "*re-resettlement*" hearing, that the whole of the reporter's transcript, and the whole of Mrs. Lill's evidence in support of it and suggested corrections of it, should have been rejected. But the matter was not then before Judge Evans for any such re-examination; it was at that time before him for a hearing as to the 90 changes only.

[4] *Defendant's Attacks on the Resettlement Proceedings.* Defendant renews his argument that in a death penalty case any reporter's transcript prepared by a reporter who undertakes to read and transcribe the notes of a deceased reporter is improper. For the reasons stated in People v. Chessman (1950), supra, 35 Cal.2d 455, 459–462 [1–10], 218 P.2d 769, 19 A.L.R.2d 1084, we hold that such method of preparing a record, although not in literal compliance with the Rules on Appeal, is proper where it results in the production of a fair transcript, adequate to review and resolution of the material issues. As defendant points out, we vacated a portion of the order of this court reported in the above cited 1950 opinion, and vacated the judgment in People v. Chessman (1951), supra, 38 Cal.2d 166, 238 P.2d 1001. But this action on our part was taken, obedient to the decision in Chessman v. Teets (1957), supra, 354 U.S. 156, 77 S.Ct. 1127, 1 L.Ed.2d 1253, to enable defendant to appear at the resettlement proceedings in person or by counsel as he might choose; it does not mean, as defendant suggests, that we repudiated our conclusion that a completely fair and adequate transcript might properly be made. The preparation of a transcript by a substitute reporter is not unprecedented; the evidence at the resettlement hearings discloses that in other cases one court reporter has transcribed another's shorthand notes. In fact, corroborative of the close professional association and *inter se* technical abilities of the two reporters here concerned, it appears that in 1945 Perry transcribed Fraser's notes of a two-week criminal trial had in 1932; Fraser thereafter examined the transcript which Perry had prepared and found it "very true and accurate."[8]

[5, 6] Defendant urges that this court has inherent power to order a new trial in appropriate circumstances where, without fault of appellant, no adequate record can be produced. With this last stated contention we have no quarrel. But Judge Evans found that an adequate record could be and had been produced and our review of the resettlement proceedings leads us, as hereinafter explained, to reject defendant's contention that this finding is not supported by the evidence.

It is true that the corrected reporter's transcript certified by Judge Evans does not include a transcription of many symbols which appear in Perry's notes and that it does include words added by Fraser (as presumably Perry would have done) to "smooth out" portions of Perry's notes that were, characteristically of the normal procedures of some, if not all, court reporters, "skeletonized." And not only are there conflicts in the expert evidence as to how some of the symbols should be read, but also there is a sharp difference of expert opinion as to whether the notes as a whole are sufficiently legible to permit any adequate transcription by anyone.

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[8] See In re Byrnes (1945), 26 Cal.2d 824, 828 [3], 161 P.2d 376 [in which this court determined that the defendant in the 1932 trial should be afforded opportunity to seek relief from default in perfecting his appeal]; People v. Byrnes (1949), 84 Cal.App.2d 72, 190 P.2d 290 [in which such appeal was heard and decided on the Perry transcript of Fraser's notes].

[7] Concerning Judge Evans' resolution of the conflicting evidence we mention the following considerations of which we spoke in People v. Chessman (1950), supra, 35 Cal.2d 455, 461 [6], 218 P.2d 769: It is to be expected that, at least ordinarily, a reporter can read his own notes better than those of another reporter, but this does not mean that in no case can one good reporter read and transcribe another's notes with substantial accuracy. Particularly is this true when the reporters are familiar with each other's work. The question is one of fact to be determined in each case in which it may arise. The minimum statutory requirements for court reporters (immediate transcription of matter dictated at the rate of 150 words a minute for five minutes; Gov.Code, § 69943) obviously do not insure that all or any official reporters can produce complete and entirely accurate transcriptions of all matter reported under courtroom conditions.

Strikingly apparent from the reporter's transcript of the resettlement proceedings (when all in the courtroom were very conscious of the questions of reporting) are the obvious facts that persons make mistakes in speaking, reporters make mistakes in hearing or inscribing, and typists make mistakes in transcribing.

It seems pertinent to mention also some simple facts, developed by the experts at the resettlement hearings, concerning the type of Pitman shorthand which Perry wrote. A given shorthand symbol, correctly written, does not represent one and only one word.[9] A given word or phrase can be correctly written in more than one way. Different reporters use different expedients and contractions. Reporters making notes under courtroom conditions do not write "copybook" shorthand.

No useful purpose would be served by setting forth particular conflicts in the evidence of the shorthand experts and the other witnesses which, defendant argues, should cause the reviewing court to conclude that Judge Evans should have resolved those conflicts in defendant's favor. We quote in Appendix I, post, p. 700 at some length from the judge's written order of February 28, 1958, which shows that he considered the conflicting evidence and went through a normal fact-finding procedure.

Defendant urges that Judge Evans should have appointed an "independent," "impartial" shorthand expert on defendant's motions of December 20, 1957 (in the middle of the resettlement hearings), and February 13, 1958 (almost at the end of the resettlement hearings). It does not appear that such appointment would have accomplished anything but further prolongation of the hearing. Except for Mr. Fraser, who naturally might have had a motive to defend his own work, the experts who testified were "independent." Each of the experts, having expressed an opinion, naturally was disposed to defend it. Their differences of opinion were only such differences as are often developed by witnesses, expert or lay, as to any disputed question of fact. The objectivity and weight of their reasons for their opinions, of course, were for the trial judge.

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[9] E. g., Mrs. Kalin, illustrating, wrote a symbol which represents "pawn," "pin," "pine," "upon," "pain," "pane," "pen," "pun," "open," "punish," or "happen" and which "By closing this little 'n' hook" represents "pawns," "pins," "pines," "pin his," "pin us," "pawn his," "pawn us," "pence," "pains," "opens," "pounce," "punishes," "punishment," "punish his," "punish us."

After our own review of both the original record and the resettled record, together with the record of the resettlement and "re-resettlement" proceedings, we find amply supported, and we accept, Judge Evans' findings that "the shorthand notes of Mr. Perry were decipherable and that Mr. Frazier [sic] was competent and qualified to transcribe and did so transcribe those notes fairly and in a substantially accurate manner. * * * Mr. Perry's notes could be and were transcribed with substantial accuracy * * * As regards the claim by the defendant that during the time the jury was deliberating and when they returned to the courtroom for further instructions Judge Fricke instructed them that the defendant was one of the worst criminals he had had in his court, and that the jury should bring in the death penalty, this is purely a figment of the defendant's imagination which was conceived several years after the time of his trial, and it is the opinion of this Court that many of the other claimed omissions and errors are of a similar nature.[10] * * * While the changes to be made as listed in Exhibit 'A' attached hereto are many in number, a study of these changes makes it very clear that, considering them either individually or collectively, they in no way change the substance and nature of either the People's case or the defendant's defense." We conclude also that the corrected reporter's transcript is substantially accurate and sufficiently complete in every respect to permit a fair review of the appeal from the judgments of conviction, and we reject defendant's arguments that our acceptance of such transcript denies him constitutional rights.

[8] Defendant renews his attack, rejected in Chessman v. Superior Court (1958), supra, 50 Cal.2d 835, 840–841, 330 P.2d 225, on the minute order of March 13, 1958, which without notice *nunc pro tunc* amended the November 27, 1957, minute order to appoint Mr. Fraser under Code of Civil Procedure, section 1871 to testify as a shorthand expert. As we there pointed out, defendant and his counsel during the resettlement proceedings expressly recognized the obvious fact that Fraser "has been brought by the State as an expert"; "the People have offered Mr. Fraser as * * * an expert in transcribing shorthand notes, especially Mr. Perry's notes." Defendant and his counsel sought to show that Fraser was not qualified for that role. As we further pointed out, the appointment which enabled the court to compensate Fraser as a court-appointed expert did not retrospectively bestow expertise on him. We again hold that defendant cannot complain of the *nunc pro tunc* order which does not affect him.

We now turn to a consideration of defendant's arguments that the judgments of conviction cannot stand because of claimed prejudicial errors and denials of constitutional rights in the proceedings which resulted in such judgments.

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[10] Note the similarity to the findings of the federal district judge, after adversary hearing, in Chessman v. Teets (D.C. 1956), 138 F.Supp. 761, 765–766:

"Deputy District Attorney Leavy did not engage in any fraudulent or unlawful conduct in the preparation of the transcript * * * Shorthand reporter Perry was not unable to properly record the trial proceedings * * * Fraser was exceptionally and specially competent to transcribe Perry's notes and did so with fairness and competently. * * * Leavy made no misrepresentations of any kind to the trial judge as to the accuracy or correctness of the transcript as prepared by Fraser. * * *

"The instructions given by the trial judge to the jury on May 21, 1948 were correctly and accurately reported in the transcript as prepared by Fraser. * * The allegation * * * that the trial judge stated to the jury on May 21, when instructing them, that 'this defendant is one of the wors[t] criminals I have had in my court' is false and perjurious. * * *

"It is not true that the transcript prepared by Fraser had been materially or otherwise altered through the connivance of said Fraser and Leavy * * * [N]ot only Fraser and Leavy, but the trial judge as well, endeavored to and did arrange for and completed the transcript in Chessman's case in the best of good faith and with diligence and fairness, so that a fair and correct record could be provided the Supreme Court of California upon Chessman's automatic appeal to that court."

Denial of Defendant's Motion for Continuance and Application for Foreign Subpoenas on April 29, 1948. On April 29, 1948, defendant appeared in propria persona for trial before Judge Fricke and moved for a continuance on the ground, among others, that he had been denied opportunity for effective preparation because his jailers applied to him the jail rules applicable to prisoners and would not give him the freedoms of an attorney. He stated, "I wish to point out that it is my intention to act in propria persona at this time and to continue to do so until such time as it is legally established that I am not qualified to do so, and that I will not accept a court-appointed attorney." Defendant filed his affidavit in support of an application for subpoenas addressed to witnesses who resided out of the county and for subpoena duces tecum. Judge Fricke denied a continuance and the application for subpoenas. The judge urged defendant to accept the services of Mr. Al Matthews, deputy public defender, as counsel or legal adviser, or to obtain counsel or an adviser of his own choosing. Defendant said that he wanted and had been unable to obtain an adviser of his own choice. On April 30, 1948, before selection of the jury began, defendant requested and received appointment of Mr. Matthews as legal adviser.[11]

Defendant now renews and elaborates his attacks on the denial of the application for subpoenas and of a continuance. The pertinent facts[12] and the applicable law as to those rulings of Judge Fricke are the same as they were when we considered the matter from another point of view in People v.

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[11] We have since ruled that due process does not require that any defendant be furnished with counsel to act as a mere "legal adviser" or in any subservient capacity. (People v. Mattson (1959), 51 Cal.2d 777, 336 P.2d 937.)

[12] The following facts are today, as they were in 1949, when the original transcripts were filed in this court, of undisputed record:

After the filing of the original informations on February 18, 1948, defendant, represented by Morris Lavine, a private attorney, appeared on February 20, 1948. On March 5 and 6, 1948, defendant, represented by V. L. Ferguson, a private attorney, appeared; on the latter date Mr. Ferguson was relieved.

On March 12, 1948, defendant appeared before the master calendar judge for plea. The public defender stated that he had been relieved. Defendant insisted upon representing himself, although the judge strongly advised him against this course. He pleaded not guilty. Both before and after the pleas the judge explicitly and repeatedly told defendant that he must be prepared for trial on the date set and could not expect a continuance on the ground that he or any attorney who might appear for him was not prepared. Defendant waived statutory time for trial. Trial was set for April 26, 1948, on informations which accused both defendant and David Knowles (of People v. Knowles (1950), supra, 35 Cal.2d 175, 217 P.2d 1), and for April 29 on an information against defendant alone.

"Some time during the middle of March" Deputy Public Defender Al Matthews visited defendant and offered to represent him. Defendant refused his services.

On April 26, 1948, defendant appeared in propria persona for trial on the informations which accused both him and Knowles. On defendant's motion his cause was severed from that of Knowles and continued to April 29, 1948.

Also on April 26, 1948, defendant delivered to a deputy sheriff a list of the names and addresses of 20 witnesses whom he wished subpoenaed. Two of these witnesses (an official of Folsom State Prison and the chairman of the Adult Authority) resided outside Los Angeles county. On the list appeared a note that the Department of Corrections' "Case record of #66565–A Chessman" was "to be produced in court" by the Folsom officer "and to be submitted as evidence by the defense."

With defendant's permission the deputy sheriff delivered the list to Mr. Leavy. Mr. Leavy at once wrote to defendant that the subpoenas for local witnesses would be prepared and delivered to the sheriff for service (and this was done); that to obtain foreign subpoenas defendant must show by affidavit or under oath in court "the necessity of such witnesses as well as the materiality of the testimony."

The affidavit for foreign subpoenas and subpoena duces tecum filed by defendant when he appeared for trial on April 29, 1948, showed a legal theory which de-

Chessman (1950), supra, 35 Cal.2d 455, 465 [14], 218 P.2d 769, 19 A.L.R.2d 1084, and when we decided People v. Chessman (1951), supra, 38 Cal.2d 166, 174 [1, 2], 238 P.2d 1001. The trial judge's rulings were correct.

[9, 10] We note also that defendant relies on the following evidence developed at the resettlement proceeding to show that Judge Fricke's denial of a continuance on April 29, 1948, deprived him of counsel of his choice: Mr. William Roy Ives, an attorney, visited defendant in jail during the latter part of March and the months of April, May, and June, 1948. Defendant wished to employ Ives but Ives would not actively associate himself with the case until arrangements for his fee were made. When, before trial, it became apparent that defendant could not arrange for the fee in time to enable Ives to hire an investigator and prepare, Ives asked Leavy to consent to a request for a continuance. Leavy refused. At about this time Ives represented defendant in a collateral proceeding concerning one of his prior convictions. Defendant testified at the resettlement proceedings that Mr. Ives was in court on April 29, 1948, when a continuance was denied. The foregoing evidence does not change the situation. Defendant was entitled to and was afforded opportunity to have counsel but he was not entitled to the services of a particular attorney. (See People v. Manchetti (1946), 29 Cal.2d 452, 458, 175 P.2d 533.)

[11] *Consolidation of Counts, Requirement that Defendant Remain at Counsel Table, Denial of Defendant's Motion for Daily Transcript, Refusal to Permit Both Defendant and Mr. Matthews to Argue.* The corrected reporter's transcript and the testimony at the resettlement proceedings do not materially change the picture of Judge Fricke's rulings as to the foregoing matters which was presented in People v. Chessman (1951), supra, 38 Cal.2d 166, 175 [3], 176–177 [5, 6], 188 [28, 29], 238 P.2d 1001. Having reconsidered our then holdings, we reiterate them.

Concerning the consolidation of counts we further observe that the ruling thereon, even if the record showed an express objection of defendant thereto, would be within the discretion of the trial court. Section 954 of the Penal Code (as it read at the time of trial) provided that "An indictment * * * may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes * * *, under separate counts, and if two or more indictments * * * are filed in such cases the court may order them to be consolidated. * * *" The automobile stolen in crime (2) was used in the perpetration of crimes (3) through (13). Crimes (3) through (13) were committed in similar fashion (i. e., by use of an automobile spotlight and a pistol to affright persons in isolated areas at night). The store robberies and related kidnapings ((1) and (14) through (17)) were of the same "class" of crimes as the "spotlight" robberies and kidnapings. It appears that the situation here comes within the holdings of cases which permit joinder of offenses, even though they do not relate to the same transaction and were committed at different times and places and against different victims, where

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fendant proposed to advance; i. e., that he did not commit the alleged sex offenses because he did not have the disposition to commit such offenses (see People v. Jones (1954), 42 Cal.2d 219, 223–225 [5–11-, 266 P.2d 38). But it also showed that defendant proposed to prove this, not by admissible expert psychiatric testimony or by evidence of reputation for lack of sexual abnormality in a heterosexual "community," but by testimony of penological officials who had known defendant in prison and by hearsay documents. We are not impressed by defendant's arguments that he had no opportunity to obtain and present in proper fashion the asserted evidence of his lack of disposition to commit sex crimes. In this connection we observe that from April 30 through the trial defendant had the services of Mr. Matthews and an investigator employed by the public defender.

there is a common element of substantial importance in their commission. (See In re Pearson (1947), 30 Cal.2d 871, 873–874 [1, 2], 186 P.2d 401; People v. Scott (1944), 24 Cal.2d 774, 778 [5], 151 P.2d 517; People v. Duane (1942), 21 Cal.2d 71, 76–78, 130 P.2d 123; People v. Kelly (1928), 203 Cal. 128, 133–135, 263 P. 226.) Here the element of intent to feloniously obtain property runs like a single thread through the various offenses, and we cannot see how defendant was prejudiced by joinder of the simple robberies and robbery-kidnapings with the revolting crimes in which sex offenses were connected with robbery.

[12] *Self Incriminating Statements of Defendant to the Police Concerning the Crimes Charged.* The reporter's transcript settled by Judge Evans reflects, as did the reporter's transcript settled by Judge Fricke, a conflict in the testimony and the inferences which could be drawn from it as to whether the incriminating statements were, as defendant testified, false and the product of force, fear, and improper inducement. Defendant's arguments concerning the effect of this evidence and asserted prejudicial errors in the instructions as to confessions which substantially reiterate the contentions considered in People v. Chessman (1951), supra, 38 Cal.2d 166, 178–182 [8–12], 238 P.2d 1001, are rejected for the reasons there stated. We particularly repeat that instructions concerning a false confession such as the italicized portion of the instruction quoted at page 180 [9] of 38 Cal.2d, at page 1010 [11] of 238 P.2d can be dangerously misleading but (as explained on pages 180–181 of 38 Cal.2d, 238 P.2d 1010) that the giving of the instruction, upon the facts of this case, was not prejudicial error. Our conclusion in this regard is not changed by the circumstance that defendant's present arguments, unlike his arguments in 38 Cal.2d, and 238 P.2d direct attention to differences (referred to by the prosecuting attorney and in remarks and instructions of the trial judge) between a confession and an admission, differences which are often subtle and questionable (see cases cited in People v. Linden (1959), 52 Cal.2d 1, 338 P.2d 397, 412, footnote 8).

[13, 14] Evidence of the incriminating statements was introduced not as part of the People's case in chief but as impeachment of defendant's testimony and as rebuttal. Defendant now complains of this order of proof, although he did not object to it at the trial or in his original briefs on appeal on the merits. Although appellate courts have properly condemned prosecuting attorneys for withholding part of the case in chief and offering it after the defense closed, we cannot see how defendant was prejudiced by the order of proof here. The prosecuting attorney on cross-examination asked defendant whether he had made a certain incriminating statement. Before the People were allowed to continue with this line of inquiry, they were required to lay a foundation that any statements of defendant to the police were voluntary, and defendant introduced evidence to the contrary. It does not appear that defendant was surprised or hindered in his defense by ensuing police testimony concerning his self incriminating statements. (See People v. Avery (1950), 35 Cal.2d 487, 491 [1, 2], 218 P.2d 527.) And defendant is mistaken in his contention that because the evidence of such statements was introduced after he had taken the stand it could be considered only to impeach defendant, not as proof of the People's case.

[15] *Misconduct of the Prosecuting Attorney not Controlled by the Trial Judge.* In People v. Chessman (1951), supra, 38 Cal.2d 166, 177–178 [7], 238 P.2d 1001, this court summarized the most serious improprieties of the prosecuting attorney and pointed out that they might have been corrected if defendant had not deliberately failed to interpose objections. Also, some matters of which defendant complains were interjected into the trial by defendant himself.[13] As to our former conclusion that

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[13] Defendant, beginning the voir dire examination of prospective jurors, repeatedly asked such questions as the following: "Do you have any prejudice against

defendant, having thus developed the record, cannot claim prejudice from it, defendant now asks why he should have "cunningly invited his own doom" and how he could have been responsible for the prosecutor's improper methods and the trial judge's failure to protect defendant. From examination of the record, the answer seems clear: defendant chose a technique (which, regrettably, in some cases has been chosen by experienced attorneys) of presenting a defense in manner and substance which conceivably might favorably impress the jury by its boldness and at the same time anticipated possible rejection of the defense and therefore sought to build up an atmosphere and incite the prosecutor to conduct which might lead to a holding of reversible error.

[16] *Instructions that One Sentenced to Life Imprisonment without Possibility of Parole Might be Released by Pardon or Retrospective Change in the Law.* We recognize that there is authority contrary to such decisions as People v. Turville (1959), 51 Cal.2d 620, 335 P.2d 678; People v. Friend (1957), 47 Cal.2d 749, 754–755, 764,

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an individual defending himself in court rather than securing an attorney?" "Do you think that criminality is a form of insanity?" "Do you feel that a person with superior intelligence is more apt to be mentally unstable or criminally inclined?" He complains that thereafter the prosecutor on voir dire said that defendant "asked some questions with reference to, 'Do you think criminals are insane?' I could not anticipate what the evidence will show here * * * but * * * on a trial under a plea of Not Guilty, which is the only one the defendant here has entered, * * * you might think he is just as insane as some people for the defense say; but you have got to find him Guilty if you think he is guilty beyond a reasonable doubt even though you think that at the time of the crime in your humble belief he was insane." Defendant also complains that the prosecutor repeatedly referred to defendant's appearing for himself as "a good advantage to grab some sympathy," and in argument said, "He is not only depraved and vicious, but he is also clever. * * * I personally feel I am at a disadvantage trying this case with him representing himself."

On direct examination defendant (replying to questions asked by his legal adviser) testified as follows:

"Q. By Mr. Matthews: You have robbed people in the past, have you not? A. That is correct.

"Q. You have been a thief most of your life, have you not? A. I have been a thief most of my life."

Mr. Leavy commenced his cross-examination of defendant by asking, "How much money did you have on you at the time of your arrest?" (About $265 had been stolen some two hours before in the crimes above numbered (14) through (17).) Defendant replied that he had $150 and, in answer to further questions, testified that he had obtained the money by working for his father. Pressed further as to the source of his funds defendant testified that he obtained some money "From a bookie"; that he had not bet with the bookie but "we just had occasion to walk into his establishment and I told him that he had lost on a particular horse" and "he gave us $2300." Mr. Matthews then objected to further questions on this line on the ground that defendant might incriminate himself. Judge Fricke overruled the objection on the ground that "You opened the door." Defendant explained that the bookie "lost because I had a pistol in my hand."

Note that the situation is not the usual one where the "open the gates" argument is invoked because defendant has made over-extensive protestations of his goodness (see People v. Wells (1949), 33 Cal. 2d 330, 340 [6], 202 P.2d 53); rather, defendant here frankly testified on direct examination that he was a robber and a thief and the People then proceeded to introduce evidence of specific instances of his banditry and criminality.

Similarly the testimony of police officers concerning defendant's extrajudicial admissions of his gun fights with the authorities in years prior to the crimes for which he was on trial was not improper impeachment to show that defendant had testified falsely as to matters which could not be proved independently in the case (see People v. Wells, supra, at page 340 [7] of 33 Cal.2d, at page 59 of 202 P.2d), but rather confirmed testimony which defendant had volunteered, not in answer to specific questions, on cross-examination in connection with the laying of the foundation as to whether the officers had improperly coerced or induced him to make admissions.

306 P.2d 463; People v. Chessman (1951), supra, 38 Cal.2d 166, 189 [30], 238 P.2d 1001; and People v. Osborn (1951), 37 Cal. 2d 380, 384–385, 231 P.2d 850, which hold that the jury can be informed of the possible effect of executive or legislative action on a sentence to life imprisonment without possibility of parole, or of such action or parole upon a sentence to life imprisonment. (Jones v. Commonwealth (1952), 194 Va. 273 [72 S.E.2d 693, 35 A.L.R.2d 761]; annotation, 35 A.L.R.2d 769; State v. White (1958), 27 N.J. 158 [142 A.2d 65, 71–76 [10, 11]] [the majority, concurring, and dissenting opinions discuss the policy reasons for and against informing a jury as to the possibility of a life-term prisoner's being paroled; the majority concludes that a jury which inquires about the matter should be informed as to the law concerning parole and further instructed that they must exclude the subject of parole from their deliberations].)

We adhere to the view that the jury have the right to know the actual possible effect of their determination as to punishment.

[17, 18] *Double Punishment.* In People v. Chessman (1951), supra, 38 Cal.2d 166, 193 [33–35], 238 P.2d 1001, we accepted defendant's contention that he could not be punished both for kidnaping the female victims for robbery with infliction of bodily harm (the two crimes for which the death sentence was imposed) and for the sex offenses which formed the basis of the findings of bodily harm. (See Pen.Code, § 654.) Defendant now contends that the proper disposition of this double punishment problem is to strike the findings of bodily harm from the two death sentence verdicts; that "The two sentences of death are accordingly void" but that (if the court rejects defendant's other attacks on the judgments) it could affirm both the sex crime convictions and the two kidnaping convictions (presumably with imposition of life sentences). This argument is devoid of merit. Penal Code section 654 specifically proscribes double punishments rather than double convictions. A single act constituting an essential element of two separately charged crimes may result in initial conviction of both crimes but only one—the more serious offense—will be punished. (People v. Knowles (1950), supra, 35 Cal. 2d 175, 187, 189, 217 P.2d 1; People v. Logan (1953), 41 Cal.2d 279, 290–291 [11, 12], 260 P.2d 20.) Where the more serious offense carries the death penalty no useful purpose would be served by reversal of the conviction for the less serious offense.

Defendant's Contentions as to Section 209 of the Penal Code. By section 209 as it read at the time the charged offenses were committed, and at the time of trial,[14] the Legislature defined and made punishable as kidnaping any detention incident to robbery or attempted robbery. (People v. Knowles (1950), supra, 35 Cal.2d 175, 180 [3], 181 [6], 217 P.2d 1.) The prosecutor so argued[15] and the jury were so instructed.[16]

[19] Since the 1951 amendment of section 209,[17] kidnaping for the purpose of robbery requires some asportation of the

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[14] Stats.1933, p. 2617: "Every person who seizes, confines * * * or who holds or detains [another person] * * to commit * * * robbery * * * is guilty of a felony and upon conviction thereof shall suffer death or * * * imprisonment in the state prison for life without possibility of parole, at the discretion of the jury trying the same, in cases in which the person * * * subjected to such kidnaping suffers * * bodily harm or * * * imprisonment in the state prison for life with possibility of parole in cases where such person * * * do[es] not suffer bodily harm."

[15] E. g., concerning offense (7), "that is kidnapping for the purpose of robbery, when he seized that woman, even before he moved her."

[16] E. g., "the Kidnapping is complete once the individual is seized for the purpose of robbery."

[17] Stats.1951, ch. 1749: "Any person * * * who kidnaps or carries away any individual to commit robbery * * * shall suffer death or shall be punished by imprisonment in the state prison for life without possibility of parole, at the discretion of the jury trying the same, in

victim, although not for any particular distance. (People v. Chessman (1951), supra, 38 Cal.2d 166, 192 [32], 238 P.2d 1001.) In the last cited case we assumed (at page 191 [31a] of 38 Cal.2d, at page 1016 of 238 P.2d) that one sentenced to death for conduct amounting to no more than robbery with infliction of bodily harm before the 1951 amendment should not be so punished after the amendment's effective date.

[20] Defendant now repeats his argument (summarized at page 186 of 38 Cal.2d, at page 1013 of 238 P.2d) that the evidence as to the two death penalty counts "at the most shows that he first robbed Regina and attempted to rob Mary, then abandoned his intent to rob and abducted the women with the sole intention of committing sex crimes against them." We there said that such argument might be addressed to the trier of fact but could not be sustained as a matter of law. But, defendant says, since the jury were instructed that the kidnaping is complete once the victim is seized for the purpose of robbery, they may well have returned the death penalties even though they believed that defendant abandoned his initial intent to rob after he had merely detained the female victims, and then formed the intent to and did move them for another purpose. We do not believe that the verdicts are susceptible of such fragmentation. The verdict as to each death penalty count reads, "We * * * find the Defendant guilty of Kidnapping for the Purpose of Robbery, a felony, *as charged* * * * and find that the person named suffered bodily harm and fix the punishment at death." (Italics added.) The offense charged in each of the two counts was "kidnapping for the Purpose of Robbery, a felony, committed as follows: That the said Caryl Chessman * * * did willfully, unlawfully and feloniously seize, confine, abduct, conceal, *kidnap and carry away* [the female victim] * * * with the intent to hold and detain, and * * * did hold and detain said [victim] * * *, with intent, and for the purpose of committing robbery." (Italics added.) It does not appear that these verdicts and the incorporated charges can reasonably be understood to amount to findings that defendant first kidnaped his female victims by mere detention for the purpose of robbery, then abandoned his intent to rob, then carried away the victims, and then inflicted bodily harm upon them by the commission of sex offenses. Rather, it appears, the jury must have viewed the series of criminal acts as continuous indivisible transactions and the various criminal intents as existing and continuing simultaneously. The similar pattern of each crime tends to establish the intent and plan in perpetrating the other.

Any doubt as to the actual findings of the jury and as to possible prejudice to defendant is dispelled by the undisputed evidence in this regard. As we pointed out in People v. Chessman (1951), supra, at pages 185–187, 192 of 38 Cal.2d, at page 1012 of 238 P.2d, as to each of the two counts which resulted in the death penalty, the bandit displayed a pistol and addressed the words "This is a stick-up" to his victims, then transported the female victim away from her chosen escort by threat of force (Mary for a considerable distance in the bandit's car, Regina from the car of her escort some 22 feet to the bandit's car), then inflicted bodily harm upon the women; i. e., the expressed intent to rob, the asportation of the woman, and the infliction of bodily harm upon her, on the uncontroverted facts, constituted one continuing transaction. In view of such evidence, the

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cases in which the person * * * subjected to such kidnaping suffers * * * bodily harm.

"Any person serving a sentence of imprisonment for life without possibility of parole following a conviction under this section as it read prior to the effective date of this act shall be eligible for a release on parole as if he had been sentenced to imprisonment for life with possibility of parole."

following provision of the California Constitution (art. VI, § 4½) controls: "No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury [note that the instructions as to kidnaping were not 'misdirection' at the time they were given], * * * unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

Defendant further attacks the discussion and the holdings as to section 209 in People v. Wein (1958), 50 Cal.2d 383, 326 P.2d 457; People v. Chessman (1951), supra, 38 Cal.2d 166, 238 P.2d 1001; and People v. Knowles (1950), supra, 35 Cal.2d 175, 217 P.2d 1, as erroneous and unconstitutional. The substance of his arguments is presented in the dissenting opinions in the Knowles and Wein cases. Defendant's present elaborations of such arguments do not persuade us to overrule those cases.

[21] *The Lengthy Confinement of Defendant under the Death Sentences.* As required by specific statutory provision (Pen.Code, §§ 1202a, 3600[1]) defendant has been held in San Quentin prison since the imposition of the death sentences (except on the occasions when, in compliance with the decision of the United States Supreme Court in Chessman v. Teets (1957), supra, 354 U.S. 156, 77 S.Ct. 1127, 1 L.Ed.2d 1253, and the implementing orders of the United States district court, of this court and of the superior court, he has been removed for court appearances). It is, of course, in fact unusual that a man should be detained for more than 11 years pending execution of sentence of death and we have no doubt that mental suffering attends such detention. Defendant argues that this confinement is unconstitutionally cruel and unusual punishment "inflicted * * * as a consequence of the California judiciary's unconstitutional actions and * * * as a penalty for appellant's demands that his constitutional rights be respected" and that he "is entitled to be discharged from custody forthwith because California has willfully failed to take, within a reasonable time, further proceedings not inconsistent with the opinion of the Supreme Court of the United States in Chessman v. Teets (1957), 354 U.S. 156, 77 S.Ct. 1127."

We do not understand that the decision in Chessman v. Teets, supra, suggests that California had not acted with reasonable diligence in the prosecution of defendant up to that time. Indeed, the decision, which imposed on California certain incidents of procedure which had not theretofore been regarded by California as requirements of due process, remanded the case to the district court "with instructions to enter such orders as may be appropriate to allow California a reasonable time within which to take further proceedings not inconsistent with this opinion." Pursuant to such remand the federal district court on August 14, 1957, made its order which "allows California until December 1, 1957 to commence the proceedings for settlement of the trial transcript," and this court on August 29, 1957, remanded the cause to the superior court "for further proceedings not inconsistent with the opinion of the United States Supreme Court in Chessman v. Teets (June 10, 1957), 354 U.S. 156, 77 S.Ct. 1127." The proceedings which followed and the dates thereof are detailed ante, pp. 12–16, and in the chronology (Appendix II) which is subjoined to this opinion, and we do not believe that those proceedings have involved unreasonable delay by California. We further conclude that under the circumstances of this case neither in the proceedings before, nor in those following, the remand by the high federal court, has California imposed unconstitutionally cruel or unusual punishment on defendant.

At no time in any proceeding during the entire history of this case has California denied this defendant the right to counsel (see Appendix II, post), nor has he at any stage of the California proceedings (unless at the attempted correction by Judge Evans of the 90 typographical or clerical errors in relation to the resettlement order, which were subsequently corrected in the presence of defendant attended by the legal adviser of his choice) been without the services of counsel except by reason of his own obdurate refusal to permit counsel to represent him.

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[1] See footnote 1, ante, p. 685.

[22] *Qualification of Justices of This Court.* Defendant asserts that the justices of this court are "jurisdictionally foreclosed" from deciding this (or any other) case because they have not complied with the provision of section 1060 of the Government Code that they "shall reside at and keep their offices in the City of Sacramento." The state Constitution (art. VI, § 23) provides that "No person shall be eligible to the office of a justice of the Supreme Court, or of a district court of appeal, or of a judge of a superior court, or of a municipal court, unless he shall have been admitted to practice before the Supreme Court of the State for a period of at least five years immediately preceding his election or appointment to such office * * *" This constitutional requirement is generally regarded as exclusive and legislative attempts to add qualifications have been held unconstitutional. (Wallace v. Superior Court (1956), 141 Cal.App.2d 771, 774–782 [2–4], 298 P.2d 69; Chambers v. Terry (1940), 40 Cal.App.2d 153, 154–156 [1], 104 P.2d 663.) When a candidate for justice meets the requirement of section 23 of article VI and, after election or appointment, qualifies by taking the oath provided by section 3 of article XX, the Legislature cannot properly require, by way of additional qualification, anything (such as change of residence) which has no reasonable relation to the performance of his duties.

For the reasons above stated, the judgments and order appealed from are affirmed.

GIBSON, C. J., and SHENK, TRAYNOR, SPENCE, McCOMB and PETERS, JJ., concur.

Appendix I

Findings of Judge Evans in February 28, 1958, Order of Resettlement

"Every shorthand reporter who took the stand in this hearing was able to read at least a portion of those [Perry] notes and the demonstration on the blackboard by Mrs. Kalin, in the opinion of the Court, corroborated the fact that Mr. Perry's notes could be and were transcribed with substantial accuracy.

"Contrary to the claims of the defendant and the testimony of Mrs. Kalin, it is the opinion of this writer that the 'perfect' symbols placed upon the blackboard during her testimony were substantially similar in the vast majority of instances to the symbols in Mr. Perry's notes—the only difference being that Mrs. Kalin was drawing 'perfect' symbols, taking ample time, while Mr. Perry's notes were written at courtroom speed.

"Regarding Mr. Hanna's findings and his testimony, the Court concedes that he certainly had the finest of qualifications to appear as an expert in this case. However, it was obvious that Mr. Hanna either did not have sufficient time to study Mr. Perry's notes or he did not approach his job as objectively as he professed from the witness stand. * * * This Court is of the opinion that had Mr. Hanna had the time to study Mr. Perry's notes, together with that part of the transcript dictated by Mr. Perry, before he began checking Mr. Frazier's [sic] work, he too would have satisfied himself that the transcript was properly prepared. On the other hand, if he approached his task from the standpoint of an elementary instructor in shorthand to try to find what he could claim as errors or omissions made by Mr. Frazier [sic], his services are of little aid to the Court,—particularly when he claims to be a verbatim reporter and then says that no reporter's notes are perfectly accurate. [Mr. Hanna was asked, on cross-examination by the People, 'As you examined these notes, were you looking for copybook shorthand?' and replied, 'Absolutely not. * * * Why, copybook shorthand is next to impossible in reporting, unless the going is very slow. There is always some departure from the copybook outlines.']

"Concerning the charges or insinuations of the defendant that the transcript herein was fraudulently prepared, this Court has combed the record and has failed to find anything upon which the defendant could base such a claim. * * * The notes of the deceased reporter were examined by several reporters and after they had expressed opinions that the notes could be transcribed, and after other reporters had been asked if they would undertake the job, and had refused, and upon the suggestion of another disinterested court reporter, Mr. Frazier [sic] was contacted and agreed to do the transcription. His relationship to Mr. Leavy's wife certainly had no part in his having been so employed. In this respect it is interesting to note that prior to October, 1948, and before anyone interested in the defense of the defendant knew the facts surrounding the employment of a transcriber, and before the transcription had been completed, the defendant was advised that his legal adviser was 'elated' that a relative of Mr. Leavy was going to do the transcribing. Certainly, at that time the defense would not have been 'elated' that a transcript could and would be made, and the only logical conclusion is that upon receipt of this information it was then and there that the defendant's claim of fraud, to be pressed at a later date, was conceived.

"Considerable time was consumed during this hearing by the defendant in an attempt to show bias and prejudice on the part of Judge Fricke and Mr. Leavy. The record is completely void of any evidence to show that Judge Fricke had any feeling of bias or prejudice against the defendant prior to or during the trial of his case. At the time Judge Fricke ruled on defendant's motion for a new trial, and when he pronounced judgment upon the defendant, it is a certainty that he then believed that the evidence produced during the trial was sufficient to justify the jury's verdict or he would have granted the defendant a new trial. His public expressions of his belief in the defendant's guilt came after he had completed the defendant's case and after he had heard the evidence for and against the defendant, and indicated only that he was exercising the right to state his opinion just as any other person might do.

"As regards Mr. Leavy, this Court is at a loss as to the reason for questioning him relative to his belief, prior to the time of trial, that the defendant was guilty. In the opinion of this Court, a district attorney who prosecuted a man whom he did not believe was guilty prior to the commencement of such prosecution would verge very closely upon a violation of his oath of office.

"As regards the claim by the defendant that during the time the jury was deliberating and when they returned to the courtroom for further instructions Judge Fricke instructed them that the defendant was one of the worst criminals he had had in his court, and that the jury should bring in the death penalty, this is purely a figment of the defendant's imagination which was conceived several years after the time of his trial, and it is the opinion of this Court that many of the other claimed omissions and errors are of a similar nature.

"Most of the defendant's claims of fraud and of bias and prejudice can be attributed to the fact that at all times during, and for some time after his trial, he refused to be represented by counsel and he could never be made to understand that as a prisoner first charged with, and then convicted of, very serious crimes, he was not and could not be accorded the same freedom of movement and the same access to conveniences that would be accorded an attorney representing a defendant, or a deputy district attorney.

"As to the claimed inability of Mr. Frazier [sic] due to his use of intoxicants, everyone will concede that he has at times, over quite a number of years, been in trouble due to his drinking. However, after observing him on the witness stand over a period of ten days, and considering all of the evidence at this hearing, this Court concludes that his work on this transcript was not affected in any way by his use of alcohol. He testified that he had not had a drink for a considerable period of time prior to commencing work on the transcript on appeal, nor did he take a drink during the time he was doing this work. The only real evidence that this testimony is in conflict with, is that of the two witnesses, who operated a liquor store in the vicinity of Mr. Frazier's [sic] home. In this respect, it is interesting to note that the gist of the testimony of these two women was that Mr. Frazier [sic] was intoxicated 97% of the time they knew him; that they sold him from one to five pints of liquor a day, but that they never sold him liquor when he was intoxicated. This type of evidence speaks for itself and no further comment is necessary.

"It is also of interest that throughout this entire hearing the only opinions expressed upon the ability of both Mr. Frazier [sic] and Mr. Perry were that they were both excellent court reporters. The fact that Mr. Frazier [sic] was arrested once during the time he was preparing the transcript in augmentation of the record on appeal in no way changes the conclusion heretofore mentioned.

"While the changes to be made as listed in Exhibit 'A' attached hereto are many in number, a study of these changes makes it very clear that, considering them either individually or collectively, they in no way change the substance and nature of either the People's case or the defendant's defense."

Appendix II

Chronology of the Proceedings Relevant to the Present Appeal and Attack on the Transcript

February 18, 1948. Original informations filed in Los Angeles superior court.

February 20, 1948. Defendant, appearing with his counsel Morris Lavine, was arraigned on the information which charged both defendant and Knowles.

March 5, 1948. Defendant, appearing with his counsel V. L. Ferguson, was arraigned on the amended informations against him and Knowles, and on the information against defendant only. Time to plead continued to March 9.

March 9, 1948. Defendant appeared with his counsel V. L. Ferguson. Mr. Ferguson was relieved. Time to plead continued to March 12.

March 12, 1948. Defendant appeared; the public defender announced, "We have been relieved"; defendant announced and insisted upon his intention to represent himself. He pleaded not guilty.

"Some time during the middle of March" Deputy Public Defender Al Matthews, who had read the transcript of the preliminary hearing, called upon defendant and offered his services. Defendant refused them.

During the latter part of March, April, May, and June, Attorney William Roy Ives visited defendant in jail.

April 29, 1948. Defendant refused the services of the public defender and refused to have Mr. Matthews as legal adviser.

April 30, 1948. At defendant's request Mr. Matthews was appointed to act as legal adviser during the course of the trial.

June 25, 1948. Judgments of conviction rendered. Mr. Matthews' appointment terminated.

Later in 1948, and during 1949, defendant was in correspondence with Mr. Matthews.

In the summer of 1948 Attorney Rosalie S. Asher, at Mr. Matthews' request, visited defendant in San Quentin. Since then she has continued to advise defendant and, at times, to represent him as counsel of record.

November 1, 1948. Defendant's petition for prohibition attacking method of preparation of record filed in California supreme court. Denied without opinion November 22, 1948. (Crim. 4950.)

April 11, 1949. Mr. Fraser certified the portion of the reporter's transcript originally prepared by him.

May 10, 1949. Defendant sent to the superior court his written motion and affidavit attacking the transcript.

June 3, 1949. Judge Fricke certified the reporter's transcript.

June 10, 1949. Record on appeal filed in California supreme court.

June 15, 1949. The clerk of California supreme court wrote to defendant that the transcript had been filed; that Miss Asher had been in his office concerning papers filed by defendant; that if she or some other attorney was not going to represent defendant on appeal and defendant wished the court to appoint counsel he should make written request therefor.

June 30, 1949. Defendant's in propria persona "Notice of Motion for Order of Supreme Court to Order Superior Court to Augment, Correct and Properly Certify Record, to Order a Hearing in the Superior Court," etc., filed in California supreme court. Thereafter defendant briefed a purported appeal "from the final order of settlement and certification of Reporter's Transcript" and filed other written motions and argument in support thereof. These matters were disposed of, as hereinafter stated, by opinion of May 19, 1950.

August 15, 1949. The California supreme court clerk wrote to defendant that defendant had failed to reply to the court's offer of June 15 to appoint counsel and asked defendant to advise the court whether he desired appointment of counsel.

September 21, 1949. At defendant's request, the California supreme court appointed Miss Asher as counsel.

September 23, 1949. At defendant's request Miss Asher's appointment was terminated.

May 12, 1950. Petition for habeas corpus attacking transcript filed in California supreme court. (Crim. 5110.)

May 19, 1950. People v. Chessman, 35 Cal.2d 455, 218 P.2d 769, 19 A.L.R.2d 1084, dismissed purported appeal from order of certification, granted defendant's motion to augment the reporter's transcript in two respects, and otherwise denied defendant's motions.

June 12, 1950. Petition for rehearing in People v. Chessman and petition for habeas corpus (Crim. 5110) denied without opinion by California supreme court.

October 9, 1950. Certiorari denied. Chessman v. California, 340 U.S. 840, 71 S.Ct. 29, 95 L.Ed. 616.

Further unsuccessful attacks on the transcript in the federal courts resulted in denial of certiorari on May 14, 1951. Chessman v. California, 341 U.S. 929, 71 S.Ct. 800, 95 L.Ed. 1359.

Meanwhile defendant continued his attacks on the transcript in the California supreme court upon the appeal on the merits and by petition for habeas corpus filed April 6, 1951. (Crim. 5217.)

December 18, 1951. Judgments affirmed. People v. Chessman, 38 Cal.2d 166, 238 P.2d 1001.

January 15, 1952. Rehearing in People v. Chessman and petition for habeas corpus (Crim. 5217) denied without opinion by California supreme court.

March 31, 1952. Certiorari denied. Chessman v. California, 343 U.S. 915, 72 S.Ct. 650, 96 L.Ed. 1330. Rehearing denied April 28, 1952, 343 U.S. 937, 72 S.Ct. 773, 96 L.Ed. 1344.

Defendant then again attacked the transcript in the federal district court (habeas corpus denied, June 9, 1952), the court of appeals (Chessman v. People (May 28, 1953), 205 F.2d 128), and the United States Supreme Court. Certiorari denied, December 14, 1953, 346 U.S. 916, 74 S.Ct. 278, 98 L.Ed. 412. Rehearing denied, February 1, 1954, 347 U.S. 908, 74 S.Ct. 430, 98 L.Ed. 1066.

In May, 1954, defendant retained Attorney Berwyn A. Rice.[1] On May 13, 1954, Mr. Rice filed in the Marin county superior court a petition for habeas corpus attacking the transcript. On May 24, 1954, after a hearing on affidavits with counsel for both parties present, the superior court denied the writ.

July 16, 1954. Petition for habeas corpus again attacking transcript filed in California supreme court. (Crim. 5632.) Denied without opinion, July 21, 1954.

October 25, 1954. Certiorari denied without prejudice to application for habeas corpus in the federal district court. Chessman v. California, 348 U.S. 864, 75 S.Ct. 85, 99 L.Ed. 681.

January 4, 1955. Petition for habeas corpus dismissed by federal district court. In re Chessman, D.C., 128 F.Supp. 600. Affirmed, Chessman v. Teets (April 7, 1955), 221 F.2d 276.

October 17, 1955. Certiorari granted and case remanded to the district court for hearing on defendant's allegations of fraud in the preparation of the transcript. Chessman v. Teets, 350 U.S. 3, 76 S.Ct. 34, 100 L.Ed. 4.

January 31, 1956. After hearing the district court found against defendant's allegations of fraud and inaccuracy in the transcript, and discharged the writ of habeas corpus. Chessman v. Teets, D.C., 138 F.Supp. 761. The court of appeals affirmed. Chessman v. Teets (October 18, 1956), 239 F.2d 205.

April 8, 1957. The United States Supreme Court granted certiorari limited to the question "whether, in the circumstances of this case, the state court proceedings to settle the trial transcript * * *, in which trial court proceedings petitioner allegedly was not represented in person or by counsel designated by the state court in his behalf, resulted in denying petitioner due process of law, within the meaning of the Fourteenth Amendment." Chessman v. Teets, 353 U.S. 928, 77 S.Ct. 720, 1 L.Ed.2d 722.

June 10, 1957. The federal supreme court remanded the cause to the federal district court "with instructions to enter such orders as may be appropriate to allow California *a reasonable time within which to take further proceedings* not inconsistent with this opinion, failing which the petitioner shall be discharged." (Italics added.) Chessman v. Teets, 354 U.S. 156, 166, 77 S.Ct. 1127, 1 L.Ed.2d 1253.

August 14, 1957. After hearing, the federal district court ordered that "The Court allows California until December 1, 1957 to commence the proceedings for settlement of the trial transcript * * * At the request of petitioner and for his benefit to allow time for preparation for such proceedings, the court orders that such proceedings shall not commence prior to October 14, 1957."

August 29, 1957. Obedient to the federal court orders and remand, the California supreme court vacated its May 19, 1950, order in People v. Chessman, 35 Cal.2d 455, 218 P.2d 769, 19 A.L.R.2d 1084, insofar as such order denied defendant's motion for an order that the superior court grant a hearing and augment, correct, and properly certify the record; recalled its remittitur issued January 21, 1952; vacated its judgment in People v. Chessman, 38 Cal.2d 166, 238 P.2d 1001; and remanded the cause to the superior court "for further proceedings not inconsistent with the opinion of the United States Supreme Court in Chessman v. Teets (June 10, 1957), 354 U.S. 156 [77 S.Ct. 1127]."

September 10, 1957. On defendant's written motion the superior court ordered him transferred from San Quentin to the Los Angeles County Jail.

September 23 through November 22, 1957. The superior court on 12 occasions heard defendant in connection with his preparation for the resettlement hearings.

November 25, 1957, through February 14, 1958. The resettlement hearings before Judge Evans were had.

February 28, 1958. Judge Evans made his order that the reporter's transcript is substantially correct but that it should be corrected in respects specifically found by him to be immaterial.

April 2, 1958. Federal District Judge Louis E. Goodman denied defendant's "Motion for Hearing and Discharge from Custody." (Civ. 34375.)

May 1, 1958. Judge Evans certified the corrected reporter's transcript on appeal and the transcripts (22 volumes of reporter's transcript and two volumes of clerk's transcript) of the resettlement proceedings.

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[1] Other attorneys who have since represented or acted as legal advisers to defendant in various proceedings include Jerome A. Duffy, Melvin Belli, George T. Davis, J. W. Ehrlich, Paul M. Posner, A. L. Wirin, and Ed Gritz, as well as Miss Asher.

May 13, 1958. Defendant, in San Quentin, received these transcripts.

June 16, 1958. Defendant's "Objections, Proposed Corrections, and Application for a Hearing," dated at San Quentin on May 26, 1958, were filed in the superior court and, so far as is here material, denied.

June 19, 1958. Corrected reporter's transcript filed in California supreme court. The clerk of such court notified defendant that his opening brief, according to rule 37 of the Rules on Appeal, must be served and filed within 30 days.

July 2, 1958. Defendant filed in California supreme court a petition for mandate attacking certain aspects of the resettlement proceedings, particularly the 90 changes in the transcript and the order appointing Mr. Fraser as an expert witness which were made in defendant's absence. (L.A. 25061.)

July 14, 1958. Defendant requested California supreme court for extension of time to file his opening brief to August 19, 1958.

July 16, 1958. The clerk of California supreme court wrote to defendant that the court, before acting on the application for extension of time, wished to know the name and address of the attorney who was to represent defendant on appeal.

July 19, 1958. Defendant wrote to the California supreme court clerk that he appeared, and intended to file his opening brief, in propria persona; that he hoped to arrange to have Miss Asher or Mr. A. L. Wirin argue the appeal orally; and that he would vigorously resist any effort of the court to appoint other counsel and did not believe it would be fair to Attorneys Asher and Wirin or to defendant for the court to seek to induce them to become counsel of record.

Mr. Wirin on July 26, 1958, and Miss Asher on July 29, 1958, wrote to the clerk of the California supreme court agreeing generally with the position taken by defendant in his letter of July 19.

August 7, 1958. On defendant's application to the California supreme court, the time to file his opening brief was extended to August 19, 1958.

August 18, 1958. On defendant's application to the California supreme court, time to file opening brief extended to September 3, 1958.

September 2, 1958. Defendant filed in California supreme court his opening brief on appeal, attacking both the judgments on the merits and the resettlement proceedings.

October 2, 1958. Chessman v. Superior Court, 50 Cal.2d 835, 330 P.2d 225, granted in part the relief sought by defendant's petition for mandate (L.A. 25061) and ordered a hearing as to the 90 changes.

October 10, 1958. Respondent, on its application to California supreme court, granted to October 27, 1958, to file its brief.

October 17 and November 14, 1958. Defendant appeared in the superior court at hearings preparatory to the "re-resettlement" of the transcript.

November 10, 1958. Respondent, on its application to California supreme court, granted until ten days after the filing of the "re-resettled" record to file its brief.

November 24 and 25, 1958. The "re-resettlement" hearings were had in the Los Angeles superior court.

December 10, 1958. The California supreme court without opinion denied defendant's petition for mandate and prohibition attacking the "re-resettlement." (L.A. 25261.)

December 12, 1958. Judge Evans, in defendant's presence, again certified the corrected reporter's transcript on appeal.

December 18, 1958. Transcript received in California supreme court.

On affidavit dated December 31, 1958, respondent's time to file its brief in California supreme court extended to January 9, 1959.

January 12, 1959. Respondent's brief on the merits of the appeal filed in California supreme court.

January 20, 1959. After correspondence from both parties as to the filing of additional briefs, the clerk of California supreme court advised them that defendant could have until February 10, 1959, to serve and file his closing brief and a supplementary brief as to the "re-resettlement"; respondent's answer to defendant's supplementary brief was to be served and filed by February 20, 1959; and defendant's reply to respondent's answer to defendant's supplementary brief was to be served and filed by March 3, 1959.

February 5, 1959. After further correspondence from both parties, the clerk of California supreme court advised them that defendant could have until February 10, 1959, to serve and file a supplementary opening brief; respondent could have 30 days to serve and file a reply to such supplementary opening brief; and defendant could have 20 days to serve and file his closing brief.

February 9, 1959. Defendant's supplementary opening brief filed in California supreme court.

March 13, 1959. Respondent's brief concerning the record filed in California supreme court.

April 7, 1959. On defendant's application (dated at San Quentin March 31, 1959, received in the warden's office on April 2, and filed in the California supreme court on April 7, 1959) defendant granted until May 5, 1959, to file closing brief.

April 26, 1959. Motion for leave to file petition for habeas corpus denied. Chessman v. Dickson, 359 U.S. 957 [79 S.Ct. 799, 3 L.Ed. 2d 765].

May 4, 1959. Defendant's closing brief filed in California supreme court.

May 13, 1959. Pursuant to written request of defendant dated May 1 and received May 4, 1959, and with written consent of respondent dated and received May 13, 1959, oral argument waived and matter submitted to California supreme court on the briefs on file.

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172 Cal.App.2d 54

Lucia E. VINNICOMBE, Joseph A. M. Cianciarulo, Anthony R. Cianciarulo, Standish Massie, Elaine S. Massie, and D. Ramsay Underwood, individually and as copartners doing business under the name of Massie and Underwood, W. E. Wallace and Edith D. Wallace, Plaintiffs and Appellants,

v.

STATE of California, Defendant and Respondent.

Civ. 18433, 18509.

District Court of Appeal, First District, Division 2, California.

July 15, 1959.

Hearing Denied Sept. 11, 1959.

Action to recover for consequential damages to the real property of plaintiff alleged to have resulted in rerouting of a state highway. Summary judgment for the State in the Superior Court, Contra Costa County, Hugh H. Donovan, J., and the plaintiffs appealed. The District Court of Appeal, Dooling, J., held that the statute requiring a plaintiff suing the state to file an undertaking for the payment of costs incurred by the state including a reasonable counsel's fee is valid.

Judgment and order affirmed.

1. States 🔑191(1.2)

In the case of a self-executing constitutional provision granting the right to sue the state, the legislature can adopt reasonable procedural requirements for the enforcement of such right but can do nothing which would unreasonably curtail or impair it. West's Ann.Const. art. 1, § 14.

2. States 🔑191(1.2)

The enforcement of a constitutionally granted right to sue the state may be made subject to the filing of claim or that it may be barred by statute of limitations. West's Ann.Const. art. 1, § 14.

3. States 🔑191(1.2)

While not every legislative condition imposed upon the enforcement of a right to sue the state granted by self-executing constitutional provision is unconstitutional, no such legislative restriction may impair the right or place an unreasonable burden on its exercise. West's Ann.Const. art. 1, § 14.

4. States 🔑191(1.2)

The statute requiring plaintiff suing the state to file an undertaking for costs is a reasonable provision to protect the state against the costs and expenses of defending unfounded and baseless claims against the state. West's Ann.Gov.Code, §§ 16041, 16047; West's Ann.Code Civ. Proc. § 1035.

5. States 🔑191(1.2)

The statute requiring a plaintiff suing the state to file an undertaking for payment of costs incurred by the state is not invalid on the ground that the requirement of the undertaking might work a hardship on property owners whose claims are small, nor is the statute unreasonably discriminatory, on the ground that the state has singled itself out for such requirement and made no similar provision for political subdivisions or private corporations, and that in making no similar provision for recovery of attorney's fees as a part of the costs recoverable by plaintiffs who recover judgment against it, the state has discriminated in favor of itself against such plaintiff. West's Ann.Gov.Code, §§ 16041, 16047.

6. Constitutional Law 🔑208(1)

The legislature may adopt classifications for the purpose of legislation so long as there is any reasonable basis for the classification.

Tinning & DeLap, Martinez, Breed, Robinson & Stewart, Oakland, for appellants.

Robert E. Reed, Harry S. Fenton, Robert F. Carlson, Kenneth G. Nellis, Sacramento, for respondent.

DOOLING, Justice.

Appellants brought this action against the State of California to recover for consequential damage to their real property alleged to have resulted from the rerouting of a State highway. The trial court entered a summary judgment in favor of defendant on two grounds: 1. that plaintiffs had failed to furnish the undertaking required by Government Code section 16047; 2. that the action was prematurely brought since the complaint was filed before the State Board of Control had rejected their claim presented pursuant to Government Code section 16041. It is clear that if we determine that either ground upon which the court acted is sound we need not consider the other.

Government Code section 16047 provides:

"At the time of filing the complaint in any action against the State, the plaintiff shall file therewith an undertaking in such sum, but not less than five hundred dollars ($500), as a judge of the court shall fix, with two sufficient sureties, to be approved by a judge of the court. The undertaking shall be conditioned upon payment by the plaintiff of all costs incurred by the State in the suit, including a reasonable counsel fee to be fixed by the court, if plaintiff fails to recover judgment in the action."

Appellants argue: 1. that insofar as this section applies to an action to recover damages to private property for public use under Article I, section 14 of the California Constitution it is unconstitutional in placing an unreasonable burden upon the enforcement of a right given to the landowner by that constitutional provision; and 2. that this provision is unconstitutional because it is unreasonably discriminatory.

[1] On the first branch of this argument appellants point out that Article I, section 14 is self-executing. Rose v. State of California, 19 Cal.2d 713, 123 P.2d 505. While conceding that where the right to sue the State is granted by statute the Legislature can put such limitations upon the enforcement of the right as it sees fit (McPheeters v. Board of Medical Examiners, 74 Cal.App.2d 46, 49, 168 P.2d 65; Gould v. Executive Power of the State, 112 Cal.App.2d 890, 247 P.2d 424), they correctly point out that in the case of a self-executing constitutional provision, while the Legislature can adopt reasonable procedural requirements for the enforcement of such constitutional right, it can do nothing which would unreasonably curtail or impair it. This distinction was clearly pointed out by the court in Bergevin v. Curtz, 127 Cal. 86, 59 P. 312, in upholding the right of the Legislature to require a qualified elector under the applicable constitutional provision to register in order to be entitled to exercise his constitutional right to vote. At page 88 of 127 Cal., at page 312 of 59 P. the court said: "We do not think the legislature, even if it attempted to do so, *could add any essential to the constitutional definition of an elector*. It is settled by the great weight of authority that the legislature has the power to enact reasonable provisions for the purpose of requiring persons who are electors, and who desire to vote, to show that they have the necessary qualifications; as by requiring registration, or requiring an affidavit or oath as to qualifications, as a condition precedent to the right of such electors to exercise the privilege of voting. *Such provisions do not add to the qualifications required of electors, nor abridge the right of voting, but are only reasonable regulations* for the purpose of ascertaining who are qualified electors, and to prevent persons who are not such electors from voting. *These regulations must be reasonable, and must not conflict with the requirements of the constitution.*" (Emphasis ours.)

[2] So, as conceded by appellants, the enforcement of a constitutionally granted right may be made subject to the filing of a claim (Powers Farms v. Consolidated Irr. Dist., 19 Cal.2d 123, 126, 119 P.2d 717) or may be barred by a statute of limitations (Wilson v. Beville, 47 Cal.2d 852, 860–861, 306 P.2d 789). Similarly the requirement that a veteran in order to assert his constitutional right to a tax exemption must file an affidavit with the assessor was held constitutional in Chesney v. Byram, 15 Cal. 2d 460, 463 et seq., 101 P.2d 1106, and a requirement that a citizen signing a petition for a county charter election indicate the date of his signature was upheld in Chester v. Hall, 55 Cal.App. 611, 616, 204 P. 237, although the Constitution contained no such requirement.

In the Byram case the court said (15 Cal. 2d 463, 101 P.2d at page 1108): "However, it does not follow from the determination that the above-mentioned constitutional provision is self-executing, that the legislature did not have the power to enact legislation *providing reasonable regulation* for the exercise of the right to the exemption granted by the Constitution, and if section 3612 of the Political Code constitutes *such reasonable regulation and not an invalid limitation* of the right thereby granted, the power of the legislature to enact said section should be upheld." (Emphasis ours.)

In the Chester case the court stated the rule (55 Cal.App. 616, 204 P. 239): "It is clear that the constitutional provision in question is self-executing, but it does not follow that legislation may not be enacted to facilitate its operation *and place safeguards around the exercise of the rights* thereby secured *so long as the right itself is not curtailed* or its exercise *unreasonably burdened.*" (Emphasis ours.)

[3] From these quotations we gather the rule to be that not every legislative condition imposed upon the enforcement of a right granted by a self-executing constitutional provision is unconstitutional but that no such legislative restriction may *impair* the right or place an *unreasonable burden* on its exercise.

The question thus becomes does the requirement of an undertaking to secure the payment of costs and a reasonable attorney's fee to the State in the event the plaintiff fails to recover a judgment impair the plaintiff's remedy to enforce his constitutional right to damages or place an unreasonable burden upon him in the enforcement of that right? We have concluded that it does not.

[4] Section 16047 applies equally to all plaintiffs who file actions for money judgments against the State. It applies to claims "(1) on express contract, (2) for negligence, or (3) for the taking or damaging of private property for public use within the meaning of Section 14 of Article I of the Constitution." (Gov.Code § 16041.) It is a reasonable provision to protect the State against the costs and expenses of defending unfounded and baseless claims against the State. If the plaintiff has a cause of action he can recover from the State his costs including the premium for this undertaking if he has paid one. (Code Civ.Proc. § 1035.) It is only in the event that he recovers no judgment, i. e., that the court determines that he had no cause of action and put the State to the needless expense of defending an unmeritorious claim against it, that he is required to pay the costs secured by the undertaking. Similar provisions have been held reasonable limitations upon the right to sue when applied to stockholder's derivative suits (Beyerbach v. Juno Oil Co., 42 Cal.2d 11, 265 P.2d 1) and to suits to enjoin the issuance of securities to acquire public utility works (Sacramento M. U. Dist. v. Pacific G. & Electric Co., 20 Cal.2d 684, 128 P.2d 529).

[5] Appellants' argument that the requirement of this undertaking might work a hardship on property owners whose claims were small is answered by the following from the Beyerbach case, 42 Cal.2d 20, 265 P.2d 6: "Plaintiff argues that sec-

tion 834 unconstitutionally discriminates against poor stockholders who are unable to furnish the required security. But if plaintiff's argument in this respect were accepted then any statute which required the payment of a fee or the furnishing of security as a prerequisite to the filing of a complaint, the issuance or levying of a writ, the procurement of a record on appeal, etc., would be unconstitutional."

The claim that the provision of section 16047 is unreasonably discriminatory is grounded 1. on the argument that the State has singled itself out for this requirement and made no similar provision for its political subdivisions or private corporations; and 2. that in making no similar provision for the recovery of attorney's fees as a part of the costs recoverable by plaintiffs who recover judgments against it the State has unreasonably discriminated in favor of itself and against such plaintiffs.

[6] That the Legislature may adopt classifications for the purpose of legislation so long as there is any reasonable basis for the classification is too well settled to require discussion. The case of Powers Farms v. Consolidated Irr. Dist. cited supra, 19 Cal.2d 123, 119 P.2d 717 is directly in point. That was an inverse condemnation case in which the court passed upon the classification of Irrigation Districts separately from other political subdivisions for the purpose of regulating actions against such districts and the court held such classification good against a similar attack. (19 Cal.2d page 131, 119 P.2d 717.)

There is more justification for putting the State of California in a class separate from its political subdivisions and private corporations than for singling out one class of political subdivisions for separate legislative treatment. The sovereign nature of the State and the multitudinous ramifications of its activities from the Oregon border to that of Mexico and from its eastern boundary to its western shores sets it apart from its more restricted subdivisions and from private corporations and justifies its separate classification. Nothing said in Wilson v. Beville, supra, 47 Cal.2d 852, 306 P.2d 789, would justify us in holding that the intrinsic differences between the sovereign State and other public or private parties does not fully justify the Legislature in adopting legislation of this character applicable solely to the State.

For the other argument appellants rely on Builders Supply Depot v. O'Connor, 150 Cal. 265, 88 P. 982, 17 L.R.A.,N.S., 909. That case held unconstitutionally discriminatory a statute which gave successful mechanics' lien claimants a right to recover attorney's fees while denying such recovery to the other party to such actions if successful and denying such right in other types of actions. The Builders Supply case has been distinguished and its application greatly restricted in later cases. Engebretson v. Gay, 158 Cal. 30, 32 et seq., 109 P. 880, 28 L.R.A.,N.S., 1062; Sacramento M. U. Dist. v. Pacific G. & E. Co., supra, 20 Cal.2d 684, 696, 128 P.2d 529; Beyerbach v. Juno Oil Co., supra, 42 Cal.2d 11, 21–22, 265 P.2d 1; City of Alturas v. Superior Court, 36 Cal.App.2d 457, 97 P.2d 816. All of these cases held, in distinguishing Builders Supply, that if there is a reasonable basis for the classification attorney's fees may be granted as part of the costs to a particular class of litigants. Enough has been said heretofore to support the classification here made.

Appellants also appeal from an order taxing costs under section 16047 Government Code. Appellants concede that if section 16047 is constitutional the order should be affirmed.

Judgment and order affirmed.

KAUFMAN, P. J., and DRAPER, J., concur.

172 Cal.App.2d 474

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Fred J. BARTON, Defendant and Appellant.

Cr. 6302.

District Court of Appeal, Second District, Division 3, California.

July 29, 1959.

Prosecution on charge of assault with intent to commit murder. From a judgment entered by the Superior Court, Los Angeles County, Richard C. Fildew, J., on conviction of assault by means of force likely to produce great bodily harm and from an order denying motion for new trial, the defendant appealed. The District Court of Appeal, Parker Wood, J., held that the evidence was sufficient to sustain the conviction.

Judgment and order affirmed.

Shinn, P. J., dissented.

1. Assault and Battery ⚷92

Evidence was sufficient to establish guilt beyond a reasonable doubt of assault by means of force likely to produce great bodily injury. West's Ann.Pen.Code, §§ 217, 245.

2. Criminal Law ⚷741(1), 742(1)

In a criminal case, questions as to credibility of witnesses and weight of evidence are questions of fact for determination of trier of facts.

3. Assault and Battery ⚷55

Assault by means of force likely to produce great bodily injury may be made by use of the hands. West's Ann.Pen.Code, § 245.

4. Assault and Battery ⚷95

In prosecution for assault by means of force likely to produce great bodily injury, what force is likely to produce such injury is a question of fact to be determined by trier of facts. West's Ann.Pen.Code, § 245.

5. Criminal Law ⚷656(1), 726

In criminal prosecution wherein deputy district attorney's proposal of stipulation for a polygraph test was made pursuant to defendant's offer to take test and court's statements as to what defendant said on witness stand about taking test was made in response to statement by counsel for defendant that he could not remember anything in the evidence about a polygraph test, there was no misconduct on part of deputy district attorney or judge since offer of stipulation and judge's remark were invited by counsel for defendant.

◆

Harry Weiss, Los Angeles, for appellant.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., and Ernest E. Sanchez, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

Defendant was accused of assault with intent to commit murder, a violation of section 217 of the Penal Code. In a nonjury trial, he was convicted of assault by means of force likely to produce great bodily injury (violation of section 245 of the Penal Code), a lesser offense necessarily included in the offense charged. Proceedings were suspended and probation was granted. Defendant appeals from the "sentence" wherein he "was sentenced to six months in the County Jail and placed on four years' probation." He also appeals from the order denying his motion for a new trial.

Appellant asserts that the judgment should be reversed because the prosecution failed to establish guilt beyond a reasonable doubt.

[1] Patricia McKeown testified that on February 14, 1957, about 11:30 a. m., when she entered her home and went into her bedroom, the defendant came out of a closet, which was in that room, and grabbed her; she got away from him and ran to a place which was about three feet from the front door; then defendant caught her and dragged her through the bedroom, through the bathroom, and into the den; then he

pushed or threw her onto the floor, sat on her, and "pinned down" her arms so that she could not use them; during that time she was trying to get away from him; he had a bottle with yellow capsules in it; he held her nose so that she would have to open her mouth in order to breathe; when she opened her mouth to breathe he put pills in her mouth; he had his hand over her mouth, and he pushed the pills in in handfuls and she tried to spit them out, and he would push them back again; he had some water in a glass; he got the water from the bathroom; the bathroom was next to the den and he held her and got the water; he tried to force the pills down with the water; "I was forced to swallow quite a few of them, I imagine"; he forced capsules down her throat; after a period of approximately 15 minutes, he dragged her into the bedroom, pushed her down on the bed, and said that he was going to sit there until he was sure she was gone; about two minutes thereafter, her son (about eight years of age) came home from school; then defendant ran out of the house; she was getting a little groggy and she went to the bathroom and tried to get the pills out; she vomited some of it; she was getting sleepier or dizzier; she tried to call her mother by telephone but evidently passed out because that is the last she remembered until she awakened in a hospital.

She testified further that the house, above referred to, was her mother's house and that she (Mrs. McKeown) had lived there with her mother during the past three and one-half years; she (Mrs. McKeown) had known defendant about five years; defendant had not been in her mother's house during the year preceding the incident here involved (the year preceding February 14, 1957, but during that time he had been in the yard several times; he had lived in that house for approximately a year prior to February 14, 1956 (that is, prior to year next preceding the incident here involved); after that incident she had seen the defendant in her back yard.

She testified further, in response to questions on cross-examination, that since February 14, 1957, she did not ask defendant to come to her yard; she did not go to his place of business and speak to him; she did not go to his home about 4 a.m. or about 11 a.m. on February 14, 1957; she never lived with defendant as man and wife.

Mr. Breul, called as a witness by the prosecution, testified that on February 14, 1957, about noon, while he was driving his automobile on Cahuenga Boulevard, he saw defendant running very fast out of a driveway at 4916 Cahuenga Boulevard (the driveway at the house where Mrs. McKeown lived); defendant ran across the boulevard in front of the witness' automobile, and the witness had to apply the brakes to avoid hitting defendant; the witness hollered at defendant; when defendant was at the corner on the opposite side of the street, the witness saw him duck behind a garage; the witness stopped, and then he saw the defendant "stick his head out from behind the garage"; the witness turned his automobile to the left, double parked it, and started to open the door; then the defendant ran to a nearby Mercury automobile and jumped into it; the witness asked him what he was doing; defendant said that he had just found his "old lady with a nigger"; then defendant drove away; about 5 or 10 minutes after the defendant ran out of the driveway, the witness and a police officer entered the house; he (witness) did not call the police; Mrs. McKeown was lying on the floor, with a pillow under her head; it did not appear to him (witness) that Mrs. McKeown had been in a physical struggle; he did not see any bruise on her; he had never seen her before that time, and since that time he had seen her only in the courtroom.

Mrs. Stevens, called by the prosecution, testified that on February 14, about noon, while she was in her yard across the street from 4916 Cahuenga Boulevard, she saw the defendant "burst out of" the front of Mrs. McKeown's house, and saw him run "right in front of this man" in the automobile.

Dr. Sotolov, a doctor of medicine, called as a witness by the prosecution, testified that on February 14, 1957, he was on duty as a physician at an emergency hospital; about 1 p. m. of that day Mrs. McKeown was brought to the hospital in an unconscious condition; he had the impression that she might have barbituric poisoning; he pumped from her stomach an amber colored fluid, containing an undissolved white powder material; in his experience as a physician, the fluid and powder material indicated nembutal capsules; in his opinion the fluid contained nembutal; he was impressed "with the number of capsules that this individual must have had in her stomach for the strong amber color of the fluid"; nembutal is a fast acting substance, and in his opinion a nembutal capsule, in the stomach, will dissolve within approximately a minute; in his opinion, if her stomach had not been pumped at that time, the nembutal would have been fatal to her.

Officer Morlan testified that on said February 14 he saw Mrs. McKeown at the receiving hospital; her stomach was pumped while she was there; from the ambulance attendant, he (officer) received a solution that had been taken from her and the solution was in a vial and it was a yellowish colored liquid with a white powdery substance at the bottom; he "booked" the vial and its contents as evidence at the police station. The vial, with its contents, was marked Exhibit 1 for identification. The officer testified further that the vial (Exhibit 1 for identification) was the vial he received at the hospital.

Ray Pinker testified that he is a forensic chemist employed in the investigation laboratory of the Los Angeles police department; he analyzed the contents of said vial and found that the barbituric drug nembutal was present; he performed tests regarding the time required for nembutal capsules to dissolve; in a test which in his opinion "most closely is equivalent to a capsule in the human system," a nembutal capsule dissolved within a period of 65 to 75 seconds.

Defendant testified that he operated a parking lot, which is next to a restaurant; he had lived with Mrs. McKeown as man and wife about six years; they lived as husband and wife while they were living at her mother's house, and while her mother and son were there; he moved "out of the house" about two years ago; since that time she has been following him; on February 14, 1957, about 4 a. m., she knocked on the door of his apartment (which apartment was next to the parking lot), and he opened the door; she asked what was going on; he said, "We are just throwing a ball" (he was having a party there—about 15 persons were present); he told her that she could not come in; she slammed the door and went away; then he went into the shower; he left his clothes on a chair outside the bathroom door; about 15 minutes later she cut the screen (of the kitchen door) and opened the door; she "sliced down" his clothes with a razor blade; about 11 a. m. of the same day (February 14) she came to a place where he was putting a roof on a building; at that place she said that she did not know why they could not understand each other, and she also said, "Let's go and have lunch"; he said, "O. K."; she invited him to come to her apartment; he arrived at her home, on that same day about 11:30 or 11:45 a. m., and he knocked on the door and the door went open; he "just stepped in one step," and he saw that she was gagging, and that her face was foamy; he asked what was going on; she said she had taken some poison, and "I am going to tell them you did it"; she also said, "I told you in front of these people." (At that point in his testimony he said that, on the previous night at the party, she had said, "I will get you one way or another.") He testified further that (when he was at the door and saw her gagging) he got frightened, and he went out of the place right away—he "took off out the front door"; he was frightened because he "had a Peace Bond out against me [him] from going to see her"; and he had "told the court people at Van Nuys—I promised I wouldn't go near the woman"; he did not bring any nembutal to the house that day; he did not push any nembutal pills down her throat; he did not sit on her and force her mouth open with one hand and force pills down her throat with his other hand; he was not trying to make her drink water while he was sitting on her. He testified further that he was arrested on this charge on February 15 or 16; since said February 14, he had seen Mrs. McKeown about a dozen times—at the parking lot, her home, and his home; he had resumed relations with her; about April, 1957, she drove her automobile into the parking lot, and on that occasion he went with her in the automobile to a place on the lot where they had sexual relations. He also testified that, before he was accused of this crime, she had accused him of robbery, burglary, rape, and kidnaping.

On cross-examination, defendant testified that he did not tell any officer, at the time of the arrest or afterward, that she had cut his clothes; he did not talk to anyone when he was starting to run; he did not see a man, known as Mr. Breul, when he ran out of Mrs. McKeown's apartment on that day; he did not say to "this person" that he had just found his "old lady with a nigger"; he did not know Mr. Breul; after leaving her house, defendant got his "truck" and went home; he went back to his work after he had lunch; he did not report to anyone that a lady, at the Cahuenga address, had taken poison; the reason he did not make a report was that he had seen this act before; she had tried to commit suicide before; he thought the foam was a part of the act, and he had seen her do that before, but he was frightened.

At the beginning of the trial, it was stipulated that the case of the People might be submitted on the transcript of the preliminary hearing, and that further evidence might be presented. Mr. Breul had testified at the preliminary hearing.

On redirect examination (at the trial), defendant testified that, after the preliminary hearing, Mr. Breul came to defendant's parking lot and told defendant that he (Mr. Breul) had been bribed to testify against defendant; defendant did not ask, and did not know, who bribed him. On recross-examination, defendant testified that Mr. Breul told him that Mr. Breul's testimony at the preliminary hearing was false, and that it was the result of being paid money by Mrs. McKeown; defendant did not report that conversation to the police because he did not want to get in deeper. Then defendant testified, "I will take a lie detector."

Miss Peterson, called as a witness by defendant, testified that she was at the party at defendant's apartment on said February 14; she thought she saw Mrs. McKeown there; and "I do remember her arriving."

Miss Brown, called by defendant, testified that she was at the party on February 14; she did not see Mrs. McKeown there, but she heard the voices of defendant and Mrs. McKeown; those persons were hollering; the witness heard a man say, "My clothes were all cut."

Miss Webb, called by defendant, testified that she is an employee of the restaurant which is next to the parking lot; she saw Mrs. McKeown arrive at the party about 4 a. m., and saw her kick the screen door and force her way into the kitchen; defendant pushed her out the door, and then he went into the living room; on occasions before and after February 14, Mrs. McKeown called the restaurant and asked for defendant; when he answered the telephone, she would "hang up," and then call again.

Mr. Taylor, called by defendant, testified that he saw Mrs. McKeown drive an automobile into defendant's parking lot in April or May, 1957; she and defendant went, in the automobile, back of a building on the lot; they returned about 15 minutes later; then she drove away from the lot.

Miss Moore, called by defendant, testified that she resided in an apartment above the apartment where defendant resided; she had seen Mrs. McKeown go to defendant's apartment after February 14, 1957.

Mr. Weiss, one of the attorneys who represented defendant at the trial (and who represents him on this appeal), testified that he represented defendant in the municipal court in Van Nuys about eight months prior to said February 14; Mrs. McKeown had signed a complaint charging this defendant with disturbing the peace and with assault and battery; probation was granted; the judge of that court said, in effect, to defendant and Mrs. McKeown that if they wanted to live together they should get married, and that one of the conditions of probation was that he was not to see or be around her unless they made their relationship legal by getting married.

On rebuttal, the mother of Mrs. McKeown testified that she (witness) purchased the premises at 4916 Cahuenga Boulevard in 1953; the witness, her daughter, and her grandson have lived there since that time; during part of that time, the defendant slept in the garage on the premises, and when it was too cold he slept on the davenport in the living room; defendant never lived there in the relationship of husband and wife with Mrs. McKeown; on February 14, 1957, the witness was at work, away from home; on the previous evening Mrs. McKeown was at home all evening.

On rebuttal, Mr. Breul testified that he never stated to defendant that the testimony which he (Mr. Breul) gave at the preliminary hearing was false; he (witness) had not seen the defendant since the preliminary hearing, other than in the courtroom.

As above stated, appellant asserts that the prosecution failed to establish guilt beyond a reasonable doubt. He argues that a statement by the judge, after the evidence had been presented, indicates that the judge had a reasonable doubt as to the guilt of defendant. The statement, quoted by defendant in that connection, was as follows: "It appears to be a stalemate as far as the evidence is concerned, because he categorically denied forcing pills down her throat. It is something that will have to be determined outside of this evidence." That statement was part of a discussion (among the attorneys and the judge) as to whether the defendant and Mrs. McKeown would submit to a polygraph (lie detector) test. After the People and the defendant had rested the case, the deputy district attorney said: that the defendant had indicated from the witness stand that he would submit to a polygraph test; that he (deputy) had discussed this matter with Mrs. McKeown (as to whether she would submit to such a test), and that she would submit to the test under conditions to be arranged through the court; that Mr. Pinker would be willing to give the tests to defendant and to her. Then the judge said: "This is the most bizarre case I have ever heard * * * the defendant * * * says that this gentleman [Mr. Breul] * * * approached him and told him in the parking lot that he had been bribed to testify as to these matters and then he [Mr. Breul] categorically denies that he talked to or ever met the defendant or saw him, and after the evidence was admitted, then they come in and they make the defendant out to be a theoretical perjuror." Then the judge made the above statement which defendant asserts indicates that the judge had a reasonable doubt as to defendant's guilt. After making said statement, the judge continued his remarks, as follows: "What occurred there, I will have to pass on, and I have the testimony before me. Of course both sides would have to stipulate to this [polygraph tests]." The deputy said that he would so stipulate. One of the attorneys for defendant said that he did not remember that anything was in evidence about a polygraph. The judge said that the defendant, while he was on the witness stand, had said that he would take a lie detector test. One of the attorneys for defendant, after stating that the judge had expressed some apprehension about the truthfulness of defendant, asked: "How about the truthfulness of the complaining witness?" Thereupon the judge said: "I said a polygraph test of both of them might be of assistance in determining the truth of the stories. We have conflicting evidence as to their stories as to what took place and the People have some very convincing corroborating evidence as to what happened here insofar as the occurrence is concerned, and yet the defendant denies it very vociferously." One of the attorneys for defendant said that the offer of the stipulation came as a surprise, and he wanted an opportunity to discuss it with his client. After a recess, the attorney for defendant said they would so stipulate. The trial was continued about two weeks in order that the tests might be made. When the trial was resumed, after such continuance, one of the attorneys for defendant made a statement to the effect: that when he entered into the stipulation he was apprehensive that, if he refused to so stipulate, it might be contended that such refusal indicated guilt on the part of defendant; that it was improper for the deputy district attorney to suggest such a stipulation; that he (attorney) understood that Mr. Pinker had not made the tests, but that someone else had made them; that he (attorney) did not know the results of the tests, but he felt that he should not be bound by the stipulation. The deputy said that it was the defendant's suggestion that started the matter regarding the tests; that he (deputy) did not know the results of the tests; and, in view of counsel's statement, he was willing that the tests be disregarded. The judge said that the defendant, as a witness, had stated that Mr. Breul had come to defendant's parking lot and told him that he (Mr. Breul) had been paid to perjure himself at the preliminary hearing. The judge also said that Mr. Breul had testified that he did not know the defendant or Mrs. McKeown; that he was an accidental witness to this whole procedure; and that everything that he told was the truth. The judge said he believed Mr. Breul, and he was willing to disregard the entire matter regarding the tests; that he had read the report as to the tests, but it did not affect him at all; and that it would not interfere with his opinion. The report was not received in evidence.

It thus appears from the whole context of the remarks of the judge, in connection with the discussion as to polygraphs, that the part of his remarks as to a stalemate in the evidence related to the conflicting stories of the defendant and Mrs. McKeown; and that the part of his remarks to the effect that it was something that would have to be determined "outside of this evidence" also related to that conflict in the evidence. The circumstances under which the remarks were made show that the remarks were not applicable to all the evidence presented by each side. It is to be noted that, shortly after making the remarks just referred to, the judge said: "We have conflicting evidence as to their stories [defendant and Mrs. McKeown] as to what took place and the People have some very convincing corroborating evidence as to what happened here insofar as the occurrence is concerned, and yet the defendant denies it very vociferously." Also it is to be noted that, with reference to defendant's testimony concerning Mr. Breul, the judge said that he believed Mr. Breul.

At the time of announcing his decision, the judge said: "[T]here is no doubt in my mind that this fellow was there for no good reason, and there is no doubt in my mind that he wasn't telling us the truth on the stand. * * * What strikes me in the testimony of this witness Breul is that the defendant states he perjured himself or fabricated this whole story, even though this fellow saw him running out of the house and almost running him down and getting into a Mercury car that was stopped by the complaining witness' house; had words with the defendant, but there is also the physical aspect here that it would be difficult to understand how this woman would be forced to take the Nembutal tablets. I have no doubt, though, that he choked her in this matter. I am going to find him guilty of the necessary included offense of assault by means of force likely to produce great bodily injury. I think there is certainly sufficient evidence to warrant that in this case."

The contention to the effect that the judge had a reasonable doubt as to the guilt of the defendant is not sustainable.

Appellant also asserts that there was no evidence "as to a 'choking' of the alleged victim." It is true that there was no evidence that he placed his hands on her throat. There was evidence, however, that while she was lying on her back on the floor and he was sitting on her, he held her nose so that she would have to open her month in order to breathe, he had his hand over her mouth, he pushed many pills into her mouth, and he tried to force the pills down with water. Also, there was evidence (testimony of her and her mother) that it was difficult for her (prosecutrix) to swallow pills. The verb "choke" is defined, in Webster's Unabridged Dictionary, Second Edition (1950), as follows: "To render wholly or partly unable to breathe by filling or pressing the windpipe, by stopping the supply of breathable air, or by other means, or to kill by so doing; to stifle, to strangle; * * *." The evidence was sufficient to support the finding that defendant choked her.

Appellant seems to argue further that since the judge did not find him guilty of assault with intent to commit murder (the offense charged), and since the judge said "it would be difficult to understand how this woman would be forced to take the Nembutal tablets," the judge disbelieved her testimony that appellant forced or attempted to force her to swallow the pills. The fact that the judge did not find appellant guilty of assault with intent to commit murder would not necessarily mean that the judge did not believe her testimony that appellant put pills in her mouth and attempted to force her to swallow them. The statement of the judge was that "there is the physical aspect here that it would be difficult to understand how" she would be forced to "take" the pills. That was a statement to the effect that it would be difficult, from the physical aspect of the alleged occurrence, to understand how she could be forced to swallow the pills. It was not a statement that it would be difficult to understand that he put pills in her mouth and tried to force her to swallow them. As above indicated, appellant's argument to the effect that the judge disbelieved the prosecutrix' testimony, regarding an attempt to force her to swallow pills, seems to be conclusions of appellant based principally on the fact that the judge did not find him guilty of assault with intent to commit murder. Any question as to whether the judge found that appellant attempted to force her to swallow pills is settled by a statement which the judge made when he was considering the application for probation. At that time the judge said: "On this occasion, she didn't seek him out. He [appellant] went over there and *choked her and tried to push these pills down her throat.*"

In summary, with reference to some of the statements of the judge when he announced his decision and when he considered probation, the judge said that there was no doubt in his mind that appellant was not telling the truth regarding Mr. Breul; that there was no doubt that appellant choked the prosecutrix; and that appellant tried to push the pills down her throat. The statement of the judge that "On this occasion, she didn't seek him out" is tantamount to a finding that appellant was not telling the truth when he testified that the prosecutrix invited him to her home. The judge also said, as above shown, that he believed Mr. Breul. The lady who resided across the street, from the house of the prosecutrix, corroborated Mr. Breul—she saw appellant "burst" out of the house and run in front of Mr. Breul's moving automobile.

[2-4] The questions as to the credibility of the witnesses and the weight of the evidence were questions of fact for the determination of the trial judge. An assault by means of force likely to produce great bodily injury may be made by the use of the hands. People v. Bumbaugh, 48 Cal. App.2d 791, 797, 120 P.2d 703, 706. "What force is likely to produce great bodily injury is a question of fact to be determined by the jury [trier of the facts]." Ibid. In the present case, the evidence was suffi-

cient to support the decision of the trial judge wherein appellant was adjudged guilty of assault by means of force likely to produce great bodily injury.

[5] Appellant contends further that the deputy district attorney was guilty of misconduct "by initiating a stipulation that the accused and the complaining witness submit to lie detector tests." Appellant also contends that there was misconduct on the part of the judge in that, after the stipulation had been proposed, the judge said that the appellant had taken the witness stand and had said that he would take a lie detector test. With respect to the alleged misconduct, appellant argues to the effect that the proposal of the stipulation by the deputy and the remark of the judge placed counsel for appellant in a dilemma "of choosing to refuse the lie detector test, thereby creating an impression of appellant's guilt, or choosing to subject appellant to an unreliable mechanical device to determine his guilt or innocence." The details as to what was said, at the trial, regarding the polygraph tests have been stated hereinabove, and it is not necessary to repeat them here. As to the conduct of the deputy district attorney, it appears that his proposal of such stipulation was made pursuant to appellant's offer to take the test. As to the conduct of the judge, it is to be noted that his statement, as to what appellant said on the witness stand about taking the test, was made in response to a statement by counsel for appellant that he (counsel) did not remember anything in the evidence about a polygraph. It thus appears that the deputy's offer of the stipulation was invited by appellant, and that the judge's remark was invited by counsel for appellant. In any event, the result of the discussion about the polygraph tests was that counsel for appellant was permitted to withdraw his stipulation, the report of the tests was not filed, and the judge said that the report did not affect him at all and would not interfere with his opinion. There was no misconduct on the part of the deputy district attorney or the judge.

The judgment (order granting probation) and the order denying the motion for a new trial are affirmed.

VALLÉE, J., concurs.

SHINN, Presiding Justice.

I dissent.

Elementary principles of law as applied to facts that were conclusively established made it the duty of the trial court to acquit the defendant of attempted murder and all included offenses.

The guiding principle is that a judgment in a criminal case conclusively implies the existence of facts necessary to the rendition of the judgment and the nonexistence of facts that would have prevented its rendition. They cannot be relitigated between the parties. Sealfon v. United States, 332 U.S. 575, 68 S.Ct. 237, 92 L.Ed. 180; Harris v. State, 193 Ga. 109, 17 S.E.2d 573, 147 A.L.R. 980; United States v. DeAngelo, 3 Cir., 138 F.2d 466; Yawn v. United States, 5 Cir., 244 F.2d 235; Vaughn v. State, 83 Ga.App. 124, 62 S.E.2d 573; United States v. Simon, 3 Cir., 225 F.2d 260.

Defendant was charged with assault with intent to commit murder. The prosecutrix testified that he shoved her to the floor, sat upon her, held her nose closed to compel her to breathe through her mouth and forced her to swallow a potentially fatal quantity of nembutal tablets.

The elements of the offense were (a) forcing the prosecutrix to swallow the pills and (b) an intent to take her life. The judgment of acquittal of attempted murder conclusively implies either that defendant did not force the pills upon the prosecutrix or that he did so but had no intention of taking her life.

First as to the possibility that he committed the act but without criminal intent. It would be absurd to give that interpretation to the acquittal, and no one has suggested it. The judgment of conviction of assault by means of force likely to produce great bodily injury conclusively implies that the court found that defendant was not merely being playful, but that he intended to harm the prosecutrix. Whether right or wrong that was the court's finding. Therefore the inescapable inference is that defendant did not force the prosecutrix to swallow the pills; ergo, she swallowed them voluntarily.

The majority opinion gives no consideration to the implications of the judgment of acquittal other than to say that it does not "necessarily" mean that the court did not believe that defendant did force the prosecutrix to swallow the pills. What, then, does the judgment mean to the majority? The answer is, nothing.

It is argued that when the court expressed doubt that defendant forced the pills upon the prosecutrix the court meant something else. But the court thereupon acquitted the defendant of attempted murder and what the court meant by what it said is shown beyond doubt by what it did.

If, as appears to be the case, the majority opinion means that the court found that defendant forced the prosecutrix to swallow the pills, it is clearly in error. It develops that theory from statements of the court, and in so doing violates the invariable rule that implications of a judgment cannot be impeached by remarks made by the court; in the second place if defendant forced the pills upon the prosecutrix the court would have been compelled to find him guilty of attempted murder; and in the third place the judgment conclusively implies that defendant did not force the prosecutrix to swallow the pills.

But, says the majority opinion, the court said that it believed, in any event, that defendant choked the prosecutrix in attempting to make her swallow the pills, and the opinion argues that choking could constitute assault by means of force likely to produce great bodily injury, which no one has questioned.

This "choking" theory defies explanation. It is purely imaginary. To begin with, there was not one shred of evidence of choking; again, the majority opinion asserts that the "choking" took place while defendant was sitting upon prosecutrix and forcing pills upon her, and the evidence set out in the opinion clearly shows that there could have been no choking unless it was in forcing the prosecutrix to swallow the pills; and yet again, if there had been choking it would have been the duty of the court to convict defendant of attempted murder. There being no evidence of choking, the majority opinion simply takes a statement of the trial court and gives it controlling effect over the legal implications of the judgment.

In order to find a basis for affirmance of the judgment the majority opinion develops the theory that the defendant was found guilty of acts constituting attempted murder and yet was arbitrarily acquitted of that offense. It is true that in the probation hearing the court stated that it believed that defendant choked the prosecutrix in attempting to force her to swallow the pills, but reliance by this court upon what the trial court said at one time or another in disregard of the implications of its judicial acts develops the unsound hypothesis that the defendant sat upon the prosecutrix, choked her, fed her pills, but did not force her to swallow them. It appears that the statements relied upon overlooked the fact that she did swallow the pills.

The theory that what the court said overcomes the legal consequences of its judgment is logically and legally untenable. The trial court could not have been guilty of such a breach of judicial duty as to find facts establishing defendant's guilt and then acquit him. This court should pay no attention whatever to the remarks of the trial court and consider only what the court did.

The judgment of acquittal of attempted murder conclusively implies that defendant did not force the prosecutrix to swallow the pills or choke her in the attempt; and there was no evidence whatever of the use of force in any other manner.

The trial court could not go behind the facts that were established by its own judgment. It could not compromise with those facts and find defendant guilty of a lesser offense upon the supposed existence of facts it had adjudged to be non-existent. But this is what it attempted to do.

It gives me real concern to see a judgment affirmed upon the basis of random remarks of a trial court while the contrary implications of the court's judicial acts are disregarded. The rule that the implications and consequences of a judgment cannot be impeached in this manner is, as I say, invariable. To depart from it is to invite endless confusion and error.

When the court acquitted the defendant of attempted murder it determined (and I must say with good reason) that the prosecutrix swallowed the pills voluntarily. That put an end to the prosecution. The ex gratia conviction of the lesser offense came after the court had divested itself of jurisdiction to act except by rendering a judgment of acquittal.

I would reverse the judgment with instructions to dismiss the cause.

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172 Cal.App.2d 278

WESTERN ELECTROPLATING COMPANY, a California Corporation, Plaintiff and Respondent,

v.

Lewis HENNESS, Lloyd McCormick, Jack Whetnall, Defendants and Respondents.

Civ. No. 23881.

District Court of Appeal, Second District, Division 1, California.

July 23, 1959.

Rehearing Denied Aug. 14, 1959.

Hearing Denied Sept. 16, 1959.

Action to enjoin defendants from soliciting business from certain of plaintiff's former customers and for damages. The Superior Court granted a permanent injunction and awarded damages whereupon defendants moved for a new trial and from an order, the defendants appealed. On plaintiff's motion to dismiss. The District Court of Appeal, Lillie, J., held that where portion of judgment appealed from was essentially prohibitory in character and by its provisions, defendants were permanently restrained from certain acts and being prohibitory the decree was self-executing and final if not the final judgment in the proceeding, defendants were entitled to appeal from that portion of the judgment granting a permanent injunction.

As to the judgment appealed from, the motion to dismiss is denied, as to the order appealed from, the motion to dismiss is granted.

1. Trial ⇨377(2)

Where trial court granted permanent injunction and awarded damages whereupon defendants moved for a new trial, the trial court properly invoked its statutory powers under the statute authorizing the opening of proceedings for additional evidence. West's Ann.Code Civ.Proc. § 662.

2. Trial ⇨377(2)

When the court followed procedure authorized by the statute authorizing the opening of proceedings for additional evidence by reopening the case on the sole issue of amount of damages to which plaintiff is entitled, no new trial is thereby granted. West's Ann.Code Civ.Proc. § 662.

3. New Trial ⇨163(2)

If a new trial is actually granted, the court divests itself of any power to alter findings or judgment and its jurisdiction is lost except to retry the case. West's Ann. Code Civ.Proc. § 662.

4. Trial ⇨377(2)

Where case is reopened on the sole issue of damages, the effect thereof is that the case has been reopened after submission and before findings filed or judgment rendered and until further action by the court on such finding, there can be no re-examination of an issue of fact within the purview of the statute. West's Ann.Code Civ. Proc. §§ 632, 656, 662.

5. Trial ⚿377(2)

The statute authorizing the opening of proceedings for the introduction of additional evidence with the same effect as if the case had been reopened after submission thereof and before findings had been filed or judgment rendered must be liberally construed to achieve the purposes it was designed to accomplish. West's Ann.Code Civ.Proc. § 662.

6. Judgment ⚿203

Ordinarily, there may be only one final judgment in a case as to any one party.

7. Appeal and Error ⚿80(6)

Where several counts are involved between the same parties, there cannot be a piecemeal disposition thereof, with a separate judgment and right of appeal each time one is disposed of and the errors must be reviewed on a single appeal from the final judgment.

8. Injunction ⚿1, 128

Injunction is an extraordinary remedy and courts proceed with great caution in exercising their powers and require a clear showing that the threatened and impending injury is great, and can be averted only by injunction.

9. Appeal and Error ⚿78(1)

Where portion of judgment appealed from was essentially prohibitory in character and by its provisions, defendants were permanently restrained from certain acts and, being prohibitory, the decree was self-executing and final if not "the" final judgment in the proceeding, defendants were entitled to appeal from that portion of the judgment granting a permanent injunction. West's Ann.Code Civ.Proc. § 963, subd. 2.

◆

E. O. Leake, J. J. Leake, San Gabriel, for appellants.

Riedman, Dalessi, Beyer & Riedman, Long Beach, for respondent.

LILLIE, Justice.

Plaintiff, respondent herein, sought to have defendants enjoined from soliciting business from certain of its former customers; substantial damages were also demanded. The trial court granted a permanent injunction and awarded damages, whereupon defendants moved for new trial. The court, exercising powers granted by Section 662, Code of Civil Procedure, thereafter rendered its order, the material portion of which reads as follows: "The motion for a new trial is denied and in lieu of granted (sic) the motion for a new trial those portions of the findings and judgment involving the subject of monetary damages and no other are set aside and the case is reopened on the sole issue of the amount of damages for further proceedings and the introduction of further evidence with the same effect as if the case had been reopened after submission and before findings filed or judgment rendered for the sole purpose of hearing additional evidence on the amount of damages to which plaintiff is entitled. * * *" The order further recited that it was made on the sole ground of the insufficiency of the evidence to support the award and fixed March 30, 1959, as the date for the hearing of additional evidence. On March 12, 1959, defendants filed notice of appeal from the judgment previously rendered "and from the whole thereof," and from the minute order vacating and setting aside a portion of the findings and judgment as mentioned above. Respondent has moved to dismiss on the ground that no appeal lies from either such judgment or such order.

[1–3] We first consider the appealability of the order in question. The trial court properly invoked the powers authorized under Section 662 upon what presumably was an ordinary motion for new trial (Hontou v. Orvis, 42 Cal.App.2d 585, 589, 109 P.2d 395). Appellants do not argue otherwise, nor is there any suggestion that normal procedure was not followed by assigning a later date for the taking of additional evidence (Smith v. Wood, 100 Cal.App.2d 96, 223 P.2d 103). What is disputed, however, is the effect of the order entered. Appellants contend that the court's action was equivalent to the granting of a new trial which is expressly made appealable by Section 963(2), Code of Civil Procedure; respondent, on the other hand, maintains that when the court availed itself of Section 662, the effect was a denial of the motion for new trial. As in other reported cases (Bureau of Welfare, etc., v. Drapeau, 21 Cal.App.2d 138, 68 P.2d 998; In re Estate of Busteed, 105 Cal.App.2d 14, 232 P.2d 881), some confusion may have here occurred because of the use of the word "grant." In that connection appellants point out that the formal judgment entered on January 9, 1959, now includes the caption "New Trial Granted As To Damages Only as Per Minute Order of March 9, 1959." Such subsequent clerical misprision or inadvertence seems relatively unimportant. In both the Drapeau and Busteed cases, supra, the order in question recited that the motion was "granted," and the use of this seemingly contradictory language was reconciled by reference to the order as a whole. To the same general effect is Gardner v. Rich Mfg. Co., 68 Cal. App.2d 725, 158 P.2d 23. Despite appellants' claims to the contrary, it is now settled that when the court follows the procedure authorized by Section 662, no new trial is thereby granted (Pacific Home v. County of Los Angeles, 41 Cal.2d 855, 264 P.2d 544; In re Estate of Perkins, 21 Cal. 2d 561, 134 P.2d 231; Spier v. Lang, 4 Cal.2d 711, 53 P.2d 138). If the opposite were true, as the court in the Spier case observes, it would be meaningless and inappropriate to attempt to modify the judgment thus set aside. Stated otherwise, if a new trial is actually granted the court divests itself of any power to alter the findings or judgment—its jurisdiction is lost except to retry the case (Sparr v. Beyers, 139 Cal.App. 668, 34 P.2d 787).

[4] The same principles must control when, as here, an order is made for the introduction of further evidence. Almost apposite is Roraback v. Roraback, 38 Cal. App.2d 592, 101 P.2d 772, 773, in which the order upon the motion for new trial read as follows: "A new trial in this case is granted to the following extent only, to-wit: the findings of fact herein are hereby vacated and set aside, and the decree heretofore entered herein is hereby vacated and set aside, and the case is reopened for the taking of further testimony by both sides. Date of hearing is to be set by counsel or order of court." The court concluded, upon a reading of the entire transcript, that the trial court neither intended to, nor did it permit "a re-examination of an issue of fact * * * after a trial and decision by a jury, court, or referee" (Section 656, Code of Civil Procedure). "It is implicit in the proceeding (for new trial) that it be 'after a trial and decision'" (Gossman v. Gossman, 52 Cal.App.2d 184, 196, 126 P.2d 178, 185). The "decision" in a non-jury case normally consists of written findings of fact and conclusions of law (Section 632, Code of Civil Procedure). As the order in question clearly declares, "the case is reopened on the sole issue of damages * * * with the same effect as if the case had been reopened after submission and *before findings filed or judgment rendered* * * *" Until further action by the court on such a finding, manifestly there could be no "re-examination of an issue of fact" within the purview of Section 656, supra.

Appellants cite Leipert v. Honold, 39 Cal. 2d 462, 247 P.2d 324, 29 A.L.R.2d 1185; Hamasaki v. Flotho, 39 Cal.2d 602, 248 P. 2d 910; Cary v. Wentzel, 39 Cal.2d 491, 247 P.2d 341 and Rose v. Melody Lane, 39 Cal.2d 481, in support of the recognized rule that a court is authorized to order a partial or limited new trial; however, in all four cases a partial new trial was in fact granted and they must therefore be distinguished from the proceeding at bar where the effect of the order was otherwise. Likewise not in point is Eades v. Trowbridge, 143 Cal. 25, 76 P. 714, which concerned the construction of Section 662 as it read prior to its repeal in 1915. The statute with which we are concerned was enacted in 1929 and its language is substantially different from former Section 662.

[5] Summing up this phase of the matter, the procedure followed by the trial court has been declared to be an "innova-

tion," yet the "purposes (of section 662) are so well recognized that it has been held the provisions of the section are to be liberally construed to achieve the purposes it was designated to accomplish (citations)" (Roraback v. Roraback, supra, 38 Cal.App. 2d 592, 597, 101 P.2d 772, 775).

[6, 7] With respect to the appeal from the unvacated portion of the judgment granting a permanent injunction, respondent relies on the settled rule that ordinarily there may be only one final judgment in a case as to any one party (Bank of America v. Superior Court, 20 Cal.2d 697, 701, 128 P.2d 357). As stated in the cited case, where several counts are involved between the same parties—and that is our situation—there cannot be a piecemeal disposition thereof, with a separate judgment and right of appeal each time one is disposed of; to the contrary, the errors must be reviewed on a single appeal from the final judgment. Thus, in De Vally v. Kendall De Vally O. Co., Ltd., 220 Cal. 742, 32 P.2d 638, an attempted appeal from a partial judgment (involving two counts only) was dismissed; again when nonsuits were granted on some counts and other counts given to the jury, an appeal from the purported judgment disposing only of the latter was dismissed and the cause remanded to the trial court (Murphy v. Fong Shuck, 151 Cal.App.2d 64, 311 P.2d 80). The rule appears to be no different when, as here, multiple causes of action are based on different substantive rights (Gombos v. Ashe, 158 Cal.App.2d 517, 522, 322 P.2d 933); Wilson v. Wilson, 96 Cal.App.2d 589, 216 P.2d 104). Both the Gombos and Wilson cases refer to Nicholson v. Henderson, 25 Cal.2d 375, 380, 153 P.2d 945 where mention is made of the possibility that there may be other exceptions to the general rule in addition to the two discussed therein. The test must be the existence of unusual circumstances in which postponement of the appeal until the final judgment as to all causes of action would cause serious hardship and inconvenience. (Freeman on Judgments, Fifth Edition, Sec. 45).

[8] Appellants contend that they will be subjected to serious hardship since the provisions of the injunction are prohibitory in nature and its operation is not stayed by the appeal. Food & Grocery Bureau v. Garfield, 18 Cal.2d 174, 177, 114 P.2d 579; they also contend that the Legislature made an exception to the final judgment rule by the adoption of subdivision 2 of Section 963, which provides that an order granting an injunction is appealable. They argue that relief by way of injunction is a drastic remedy—and the cases bear them out. "Injunction is an extraordinary remedy and courts have consistently proceeded with great caution in exercising their power, and have required a clear showing that the threatened and impending injury is great, and can be averted only by injunction" (Wilkins v. Oken, 157 Cal.App.2d 603, 606, 321 P.2d 876, 878). Too, unlike the rule governing certain intermediate orders, there is a right of appeal from the rendition of injunctive relief at *any* stage of the proceeding—"the intent of the statute (Section 963(2), supra) is that all orders granting or refusing injunctions, whether temporary or permanent, or provisional pending appeal, shall be appealable" (Brydon v. City of Hermosa Beach, 93 Cal.App. 615, 620, 270 P. 255, 257). To the same effect are Luitwieler v. Superior Court, 54 Cal. App. 528, 202 P. 165 and Monterey Club v. Superior Court, 44 Cal.App.2d 351, 112 P.2d 321. Except that it involved the remedy of receivership, which is likewise controlled by section 963(2), a similar problem was presented in Brown v. Memorial Nat. Home Foundation, 158 Cal.App.2d 448, 322 P.2d 600. Cognizance was taken of the "drastic character of the remedies of receivership and injunction" (158 Cal.App.2d at page 456, 322 P.2d at page 605), the court observing that "(t)here is nothing unclear or equivocal in the language of this provision (Sec. 963(2))" It was concluded that appellants had "an unqualified and unquestionable right to an immediate review of the provisions of the judgment appointing the receivers" (158 Cal.App.2d 457, 322

P.2d at page 606). We concur in the views thereinabove expressed, and we also distinguish (as does the Brown decision) the case of McCarty v. Macy & Co., 153 Cal.App. 2d 837, 315 P.2d 383. As here, the plaintiffs in the McCarty case sought an injunction as well as damages. The equitable issue was tried first by the court sitting as chancellor, the claim for damages to be tried later by a jury duly selected for that purpose. Following the reception of evidence germane to the equitable issue, the court made a minute order indicating that equitable relief would be denied. An appeal from such minute order was dismissed for the reason that "it was not the intention of the court to enter any judgment until the issue of damages had been disposed of, and it is likewise clear that no final judgment, or any judgment, had been entered" (153 Cal.App. 2d at page 840, 315 P.2d at page 385).

[9] The situation in the case at bar is quite different. As heretofore observed, the portion of the judgment appealed from is essentially prohibitory in character; by its provisions, appellants are "permanently restrained and enjoined from individually or through their agents, servants or employees, soliciting any business from any of the former customers of plaintiff listed in the plaintiff's complaint * * * and each of them are further permanently enjoined and restrained from accepting any business from any of such customers on said list as shall have prior to the date hereof transferred any portion of their chrome plating business to the defendants * *" Being thus prohibitory, the decree is self-executing (Food & Grocery Bureau v. Garfield, supra, 18 Cal.2d 174, 177, 114 P. 2d 579), and *a* final, if not *the* final, judgment in the present proceeding since "no issue is left for future consideration except the fact of compliance or noncompliance with the terms of the first decree" (Meehan v. Hopps, 45 Cal.2d 213, 217, 288 P.2d 267, 270).

Mindful though we are of the general appellate practice that deprecates piecemeal disposition and multiple appeals in a single action, for the reasons stated we are constrained to hold that appellants have the right of review of that portion of the judgment granting a permanent injunction.

As to the judgment appealed from, the motion to dismiss is denied; as to the order appealed from, the motion to dismiss is granted.

WHITE, P. J., and FOURT, J., concur.

Hearing denied: WHITE, J., not participating.

172 Cal.App.2d 36

PEOPLE of State of California, Plaintiff and Respondent,

v.

Edward KLIMEK, Jr., and Harry M. Howser, Defendants and Appellants.

Cr. 2811.

District Court of Appeal, Third District, California.

July 14, 1959.

Rehearing Denied Aug. 13, 1959.

Hearing Denied Sept. 11, 1959.

Defendants were convicted of robbery in the first degree in Superior Court, Sacramento County, Raymond T. Coughlin, J., and they appealed. The District Court of Appeal, Warne, J. pro tem., held that where it appeared that ice pick was capable of being used in dangerous or deadly manner, and it could be fairly inferred from evidence that possessor intended to use it as weapon should circumstances require, ice pick could be dangerous or deadly weapon.

Affirmed.

1. Criminal Law ⚷1130(4)

Where appellant's brief was not filed within time allowed, appeal would be dismissed. West's Ann.Rules on Appeal, rule 17(a).

2. Robbery ⚷11

Although dangerous and deadly weapon is not used by robber, and even if robber conceals weapon from view and victim does not know of its existence, robber is guilty of robbery in first degree.

3. Robbery ⚷11

Where it appeared that ice pick was capable of being used in dangerous or deadly manner, and it could be fairly inferred from evidence that possessor of ice pick intended on particular occasion to use it as weapon should circumstances require, character of ice pick as "dangerous or deadly weapon", is established for purpose of determining degree of offense of robbery.

See publication Words and Phrases, for other judicial constructions and definitions of "Dangerous or Deadly Weapon".

4. Robbery ⚷26

Where perpetrator of robbery has in his immediate possession instrumentality other than such as guns, dirks, and blackjacks, which are dangerous weapons in strict sense of word, there is question of fact to be determined in fixing degree of robbery, and for this purpose jury should determine whether character of instrumentality as dangerous or deadly weapon has been established.

5. Robbery ⚷11

If from all facts and circumstances, jury is convinced beyond reasonable doubt that instrumentality was one which, in hands of perpetrator of robbery, was capable of being used in dangerous or deadly manner, and perpetrator intended to use it as weapon should circumstances require, character of particular instrumentality is established as dangerous or deadly weapon, and robbery is of first degree.

6. Robbery ⚷11

In robbery prosecutions, intended use of instrumentality and present ability of perpetrator of robbery are of importance in establishing character of instrumentality as dangerous or deadly weapon for the purposes of the occasion.

7. Robbery ⚷24(1)

In robbery prosecution, evidence supported finding that ice pick was instrumentality poked in victim's side by defendant, and that defendant had ability to use it as a deadly weapon.

8. Criminal Law ⚷404(4)

In robbery prosecution, ice pick was properly introduced into evidence where it had been found in defendant's possession at time he was apprehended and his possession thereof was relevant on question of whether or not he committed armed robbery.

9. Criminal Law ⚷641

In robbery prosecution, wherein same public defender was appointed for both defendants, fact that he called one of defendants to testify about ice pick which had been found in that defendant's possession shortly after robbery was not indicative of a diversity of interest in defense.

10. Criminal Law ⚷641

Where same public defender was appointed for both defendants without objections from anyone before or during trial, and there was nothing to indicate to trial judge that there might be conflicting interests, trial judge did not fail in any responsibility in matter of affording one of defendants opportunity for proper representation by counsel.

11. Criminal Law ⚷1171(1)

In robbery prosecution, remarks of district attorney explaining reason for contemplating dismissal of burglary charge against one defendant were not prejudicial misconduct on part of district attorney toward the other defendant.

12. Witnesses ⚷337(5)

In robbery prosecution, wherein defendant took stand and testified in his own behalf, defendant was subject to impeachment in same manner as any other witness, and could be impeached by showing of prior convictions.

13. Witnesses ⚷337(6)

Nature of crime of which defendant has been previously convicted is proper subject of inquiry in establishing fact of his conviction for impeachment purposes in subsequent trial for different crime.

14. Criminal Law ⚷1168(2)

In prosecution for robbery, wherein it was established that ice pick was in defendant's possession at time of robbery, fact that ice pick was admitted in evidence prior to establishment of defendant's possession was not prejudicial error.

15. Criminal Law ⚷680(1)

Order of proof is largely in discretion of trial court.

16. Criminal Law ⚷798(1)

In robbery prosecution, instruction that each defendant was entitled to independent judgment of each juror was not objectionable as failing to instruct jury concerning necessity of independently determining guilt or innocence of each defendant.

17. Criminal Law ⚷1173(2)

In robbery prosecution, wherein jury had during trial repeatedly been instructed not to consider certain evidence introduced against one defendant as evidence against the other and to disregard statement of counsel as evidence, so that it was improbable that different verdict would have been reached if formal instruction had been given to jury on those matters, even if failure of court to give formal instruction on its own motion was error, it was not reversible error.

◆

Edward Klimek, Jr., appellant, in pro. per.

S. Bruce Scidmore, Oakland, for appellant, Howser.

Stanley Mosk, Atty. Gen., by G. A. Strader, Deputy Atty. Gen., for respondent.

WARNE, Justice pro tem.

[1] The appellants, Harry M. Howser and Edward Klimek, Jr., were accused by an information with the crime of robbery. The jury returned a verdict finding both appellants guilty of robbery in the first degree. Both defendants appealed. However, Klimek has filed no brief or otherwise prosecuted his appeal, although this court notified him that if his brief was not filed within 30 days his appeal would be dismissed under the provisions of rule 17 (a) of Rules on Appeal. Therefore, defendant Klimek having filed no brief and the 30 days having expired on January 5, 1958, his appeal is hereby ordered dismissed.

On the evening of April 27, 1957, Richard Crane, while walking in the vicinity of 16th and Q Streets in the city of Sacramento, noticed two men in a park. As he crossed the street the two men followed him. Between 16th and 17th Streets one of the men, later identified as appellant Howser, grabbed Crane, poked something in his side and said: "Don't move, Buddy, or I will kill you." The second man, Klimek, removed Crane's watch from his person. Crane also was compelled to get his money out of his pocket and give it to Klimek. Crane was then ordered to go into a vacant lot which he did. Upon turning around, Crane observed the two defendants walking down the street and followed them for a short distance. He stopped at a service station to telephone the police. Within ten minutes the police arrived and took Crane to the corner of 14th and O Streets where he saw Howser and Klimek whom he tentatively identified as the robbers. Later at the police station he made a positive identification of the men as the robbers.

The officer who first came upon Klimek and Howser searched appellant Howser and found an ice pick in his pocket. Crane's watch was found in some shrubbery near the spot where the alleged robbers were apprehended.

Klimek confessed to the police and to the district attorney, and the statements he made to the authorities were related to the jury. Among other things that Klimek told the police was that Howser stuck an ice pick into Crane's back. Klimek testified the confession was false. He asserted that he made it because the police had beaten him, and because he had been told that other charges against him would be dropped if he confessed. The officers involved took the witness stand and denied these charges.

After the confessions were introduced into evidence the trial court cautioned the jury that the confessions had no bearing on Howser's case.

Howser testified in his own behalf. He said he was a painter; that on the day of the alleged crime he had been painting and cleaning a house for his landlady; that later in the afternoon he went over to check a paint job and when he was there he noticed an ice pick that he had used to clean cracks on a post; that he put the ice pick in his pocket; that he went home; that Klimek and he left about 8 p.m. and went to Van's Drive-In restaurant where the two men had something to eat; and that after they left the restaurant they walked for a few blocks before they were arrested. He further stated that he had never seen Crane until the officers drove up with him. He also testified that he asked the officers to take him back to the restaurant to verify his story that he had left there just five or six minutes before he was apprehended. He admitted having the ice ick in his pocket at the time of his arrest. On rebuttal the arresting officers denied that Howser had asked to go to the restaurant to verify that he had been there.

[2] Appellant first contends that the evidence is insufficient, as a matter of law, to support the finding of the jury that the robbery was first degree. He argues that no evidence was presented from which the jury could have inferred that the appellant was armed with a dangerous or deadly weapon at the time of the commission of the offense. He states that there was no evidence that appellant used the ice pick which was found in his possession at the time of his arrest. It is not necessary that the weapon be used, and the degree of the crime is the same even if the weapon is concealed from view and its existence is unknown to the victim. People v. Ash, 88 Cal.App.2d 819, 199 P.2d 711; People v. McKinney, 111 Cal.App.2d 690, 245 P.2d 24; People v. Rainey, 125 Cal.App.2d 739, 271 P.2d 144. The phrase "armed with a deadly weapon" means furnished or equipped with such a weapon. People v. Hall, 105 Cal.App. 359, 287 P. 533.

[3–6] While an ice pick is not a weapon in the strict sense of the word and is not "dangerous or deadly" to others in the ordinary use for which it is designed and therefore may not be said as a matter of law to be a "dangerous or deadly weapon," nevertheless when it appears that such instrumentality is capable of being used in a "dangerous or deadly" manner, and it may be fairly inferred from the evidence that its possessor intended on a particular occasion to use it as a weapon, should the circumstances require, its character as a "dangerous or deadly weapon" may be thus established, at least for the purpose of the occasion. People v. Raleigh, 128 Cal.App. 105, 108–109, 16 P.2d 752. And as pointed out in the Raleigh case, 128 Cal.App. at page 110, 16 P.2d 752, 754, when the perpetrator of a robbery has in his immediate possession an instrumentality other than such as guns, dirks and blackjacks, which are dangerous weapons in the strict sense of the word, there is then a question of fact to be determined in fixing the degree of robbery. "For this purpose the jury should determine whether the character of the instrumentality as a 'dangerous or deadly weapon' has been established. If from all the facts and circumstances the jury is convinced beyond a reasonable doubt that the instrumentality was one which, in the hands of the perpetrator of the robbery, was capable of being used in a 'dangerous or deadly' manner, and that the perpetrator of the robbery intended to use it as a 'weapon' should the circumstances require, then the character of the particular instrumentality is established as a 'dangerous or deadly weapon,' and it is robbery of the first degree. In such cases the intended use of the instrumentality and the 'present ability' of the perpetrator of the robbery are of importance in establishing the character of the instrumentality as a 'dangerous or deadly weapon' for the purposes of the particular occasion."

[7] In the instant case we have the testimony of the victim of the robbery that ap-

pellant grabbed him, poked something in his side and said: "Don't move, Buddy, or I will kill you"; the evidence that at the time of appellant's arrest, a few minutes after the commission of the robbery, he had in his possession an ice pick which was removed from his rear pocket; and the testimony of the appellant that this ice pick had been in his possession during the time within which the robbery was committed. These are facts and circumstances which would warrant the jury in finding that the ice pick was the instrumentality "poked" in the victim's side. Its intended use and appellant's ability to use it as a deadly weapon are clearly shown by the statement of appellant: "Don't move, Buddy, or I will kill you."

[8–10] Appellant next contends that the trial court erred in failing to appoint separate counsel for appellant and his codefendant. He argues that he was denied his right to representation by counsel by the appointment of a public defender to represent both himself and his codefendant. The record does not disclose that appellant or his codefendant at any time during the course of the trial objected to the appointment of the same counsel to represent both defendants nor that any request was made by appellant for the appointment of separate counsel. He argues that because of his representation of both defendants, the public defender was placed in a position where it was impossible for him to give adequate representation to appellant. Appellant particularly points to the introduction of the ice pick in evidence and the fact that the public defender called him to the witness stand and questioned him about it. The ice pick was properly introduced in evidence, because it was found in appellant's possession at the time he was apprehended and his possession of it was relevant on the question of whether or not appellant committed an armed robbery. Likewise the confession of Klimek in which he said that Howser used the ice pick was properly admitted. The confession was relevant to the question of guilt and the degree of crime as to the codefendant Klimek, and while it implicated appellant, the jury was instructed that it could not be used against appellant. The fact that the public defender called the appellant to testify is not indicative of a diversity of interest in the defense. People v. Lanigan, *22* Cal.2d 569, 140 P.2d 24, 148 A.L.R. 176, cited by appellant in support of his contention, is distinguishable from the present case. In that case specific objections were made to the appointment of counsel, and the circumstances were such that it was apparent there were conflicting interests. There the defendant objected and the attorney who was appointed also objected. In the instant case no objection was made by anyone, either prior to or during the entire trial, and it does not appear at all that the appellant or anyone, prior to the taking of this appeal, was not satisfied with the alleged appointment. Nor was there anything to indicate to the trial judge that there might be conflicting interests, hence it cannot be held that the trial judge failed in any responsibility in the matter of affording appellant an opportunity for proper representation by counsel. People v. Meacham, 84 Cal.App.2d 193, 190 P.2d 262. Further the record does not disclose any diversity of interest which would be prejudicial to appellant by having one counsel represent both defendants. The contention is without merit. People v. Lushenko, 170 Cal.App.2d 772, 339 P.2d 956.

[11–13] Appellant also contends that the district attorney was guilty of prejudicial misconduct in several respects. It is asserted that the district attorney made deliberate misstatements of fact, and that he improperly referred to the prior convictions of the appellant. We find no merit in this contention. During the course of the trial the defendant Klimek attempted to show that he had been charged with a burglary to which he had confessed at the time he confessed to the robbery. His purpose was to show by such evidence the improbability of his confession and the existence of bad faith on the part of the prosecution, in that the burglary could not have been committed by him while he was in jail.

Appellant's counsel in his argument also stressed the fact that the district attorney brought out the fact that the burglary charge would probably be dismissed. In his closing argument to the jury the district attorney explained the reason for the contemplated dismissal of the burglary prosecution. None of this testimony nor the comments of the district attorney in any way related to appellant Howser, and we fail to see how these remarks by the district attorney could in any way have prejudiced appellant. Appellant Howser has made no showing of prejudicial misconduct on the part of the district attorney. In the case of People v. Justice, 167 Cal.App.2d 616, 334 P.2d 1031, 1033, the court, quoting from People v. Goodall, 104 Cal.App.2d 242, 249, 231 P.2d 119, stated: "'It is the duty of the defendants to show error, and that means defendants are under an affirmative duty in that respect. It is not proper to attempt to shift that burden upon the court or respondent. [Citing cases.]'" Nor is there any merit in the contention of appellant that the district attorney improperly referred to his prior convictions. Appellant took the stand and testified in his own behalf and was therefore subject to impeachment in the same manner as any other witness. He was impeached by a showing of prior convictions. The district attorney had a right to comment upon that matter. As was stated by the Supreme Court in People v. Williams, 27 Cal.2d 220, 228, 163 P.2d 692, 696: "In this state the testimony of a witness may be impeached by proof that he has suffered the prior conviction of a felony. Code Civ.Proc., § 2051. This rule applies to a defendant who testifies in his own behalf in a criminal trial despite the fact that such evidence may tend to prejudice him in the eyes of the jury. People v. LaVerne, 212 Cal. 29, 32, 297 P. 561; People v. Romer, 218 Cal. 449, 452, 453, 23 P.2d 749. The nature of the crime of which he was convicted is a proper subject of inquiry in establishing the fact of his conviction. People v. David, 12 Cal.2d 639, 646, 86 P.2d 811, and cases there cited."

[14, 15] Appellant next contends that the trial court committed error in overruling his objection to the admission of evidence of the ice pick. This assignment of error is based upon the contention that at the time the ice pick was introduced in evidence a proper foundation had not been laid as to the appellant, in that he had not been shown to have been connected with the perpetration of the robbery. No prejudicial error was committed, since subsequent to its introduction in evidence it was established by competent testimony that he had an ice pick in his possession during the time the robbery was committed. It therefore appears that the ice pick was admissible in evidence. Appellant would not have gained any advantage by having the ice pick received for identification and held in that status until the rest of the testimony was in and then admitted as an exhibit in the case. The order of proof is largely in the discretion of the trial court. People v. Romero, 156 Cal.App.2d 48, 51, 318 P.2d 835; People v. Hayes, 161 Cal.App.2d 129, 326 P.2d 169.

[16] Appellant also claims that the trial court failed to instruct the jury fully upon the law involved in the case and the essential legal principles applicable to the evidence. It is asserted that in some respects the instructions contained "glaring omissions." The alleged omissions may be summarized as follows:

1. That the court did not instruct the jury concerning the necessity of independently determining the guilt or innocence of each defendant;

2. That the court failed to instruct the jury concerning the legal effect of evidence excluded by the court;

3. That no instructions were given concerning the admissibility of evidence as to one defendant when such evidence was admissible as to the other defendant;

4. That the trial court failed to instruct the jury in regard to the admissibility of an admission or confession of one defendant as against the other defendant;

5. That the trial court neglected to instruct the jury to disregard the statements of counsel; and

6. That the court failed to instruct the jury concerning its obligation to ignore evidence which had been ruled inadmissible.

We do not feel that there is merit in appellant's first contention. We believe that the subject matter is covered by the following instruction which the court gave:

"*Each of the parties in this case is entitled to the independent judgment of each juror.* The law requires that before a verdict of conviction or acquittal can be rendered each juror must concur therein. If, therefore, any one, or number of you, after deliberating on the evidence in this case, shall be of the opinion that there is a reasonable doubt as to the guilt of the defendant, those entertaining such reasonable doubt should vote in favor of not guilty, and should adhere to such opinion until convinced beyond a reasonable doubt that you are wrong. If, on the other hand, all twelve of you are convinced beyond a reasonable doubt that *a defendant or defendants is or are guilty*, you should vote in favor of guilty accordingly." (Emphasis added.)

While this instruction could have been enlarged upon, we feel it nevertheless points out to the jury that each of the parties is entitled to an independent consideration by the jury.

[17] With respect to the other alleged omissions in the court's instructions, all of these asserted errors related to the question of admissibility of evidence as against one defendant and not the other, or the effect of arguments of counsel and effective evidence which had been offered by counsel but excluded. While the record shows that the trial court failed to give a formal instruction with respect to the other alleged omissions with the exception of the instruction, "Of course, in this case I told you, and I will repeat again, that you are not to consider any statement made by one defendant in the case against the other defendant," the court did, throughout the trial, instruct the jury that the statements of one defendant or his confession were not admissible against the other. The court also instructed the jury that arguments of counsel were not to be considered as evidence, and it was not to consider evidence which had been excluded.

Among the instances in which the trial court instructed the jury to consider evidence introduced against one defendant and not the other, or to disregard the statement of counsel as evidence, we find the following in the transcript: "The Court: Anyway, if it does develop, Ladies and Gentlemen of the Jury, that if any witness testified here as to any statement made by the defendant Klimek regarding the commission of this offense or alleged commission of it, that any statement made by Klimek is not to be considered by you in the case of the People vs. Howser in view of the fact that it would be hearsay, and he is not responsible for what someone else says in his absence * * * The Court: Now, I want to remind the Jury again that all the testimony relating to any conversation had with the defendant Klimek is not to be considered by you under any circumstances in the case of the People vs. the defendant Howser." Again, with respect to Klimek's confession the court said: "Under no circumstances is any of this testimony to be considered in the case of People vs. the other defendant other than Klimek * * * If it was voluntarily made, you may consider it on the question of guilt or innocence of the defendant Klimek. It has no bearing whatever upon the case of defendant Howser * * * Ladies and Gentlemen of the Jury, you will decide the case from the evidence you have heard from the witnesses. That is what you have to decide it from, and from the law that will be given to you by the Court. *Counsel's arguments are not evidence.* It might be what he thinks was said. You remember what was said and you can decide it from that evidence." (Italics ours.) The jury having been repeatedly instructed respecting the admissibility and effect of this evidence during the course of the trial, as above indicated, it seems highly improbable that a different verdict would have been reached if the court had given a formal instruction on the subject matter to the jury. Under such circumstances we do not feel that a miscarriage of justice occurred even if the trial court erred in failing to give a formal instruction, on its own motion, regarding the omissions complained of.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

172 Cal.App.2d 84

Shafter WILLIAMS, Plaintiff and Appellant,
v.
INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 10, a voluntary association and a labor union, Defendant and Respondent.
Civ. 18391.

District Court of Appeal, First District,
Division 2, California.
July 17, 1959.

Action by union member against union seeking reinstatement. From a judgment of the Superior Court, City and County of San Francisco, Milton D. Sapiro, J., dismissing first amended complaint without leave to amend, the union member appealed. The District Court of Appeal, O'Donnell, J. pro tem, held that where union's demurrer to original verified complaint of union member seeking to be reinstated set up bar of statute of limitations and when union member filed amended complaint omitting date of union's refusal to reinstate union member, union demurred on ground of laches, union adequately retained bar of statute and court properly sustained demurrer to amended complaint.

Judgment affirmed.

1. Pleading 🔑205(2)

Defense of laches may be raised by general demurrer.

2. Limitation of Actions 🔑180(2)

Where union member's original verified complaint seeking reinstatement in union disclosed that it was barred by statute of limitations, union member did not render his amended complaint invulnerable to demurrer on ground that statute of limitations had run by omitting reference to date on which he was refused reinstatement.

3. Pleading 🔑402

Where a verified complaint contains allegations destructive of a cause of action, defect cannot be cured in subsequently filed pleadings by simply omitting such allegations without explanation.

4. Limitation of Actions 🔑46(6)

Where membership of union member was suspended when he was unable to pay union dues while temporarily disabled in 1943 and union member claimed that within 6 months after date of injury he offered to pay all delinquent dues but that union refused to accept them and refused to reinstate him as a member of the union, member's cause of action accrued when union allegedly refused to reinstate him and action initiated in 1958 seeking reinstatement was barred by four-year statute of limitations. West's Ann.Code Civ.Proc. § 337.

5. Labor Relations 🔑92

Labor union's constitution constitutes a written contract between it and a union member.

6. Limitation of Actions 🔑180(5)

A demurrer which merely states that cause of action set forth in complaint is on its face barred by statute of limitations is sufficient to raise that defense and it is not necessary to specify the applicable statute.

7. Pleading 🔑356(1)

It is not improper for trial court to grant a motion to strike an amended complaint after pleader has made several ineffectual attempts to state a cause of action.

8. Limitation of Actions ⚿180(5)

Where union's demurrer to original verified complaint of union member seeking to be reinstated set up bar of statute of limitations and when union member filed amended complaint omitting date of union's refusal to reinstate union member, union demurred on ground of laches, union adequately retained the bar of the statute and court properly sustained demurrer to the amended complaint. West's Ann.Code Civ. Proc. § 337.

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Joseph A. Brown, San Francisco, for appellant.

Gladstein, Andersen, Leonard & Sibbett, George R. Andersen, San Francisco, for respondent.

O'DONNELL, Justice pro tem.

This is an appeal from a judgment of dismissal following the sustaining of a demurrer to plaintiff's first amended complaint without leave to amend.

In his original complaint, which was verified, plaintiff alleged that he had been a member in good standing of defendant union; that on June 15, 1943 he sustained an injury which temporarily disabled him, and as a result he was unable to pay his union dues; that by reason thereof his membership in the union was suspended. Plaintiff further alleges that within six months after the date of his injury he offered to pay all delinquent dues but that defendant wrongfully refused to accept them and further wrongfully refused and continues to refuse to reinstate plaintiff as a member of the union. Plaintiff prayed for judgment directing defendant to reinstate plaintiff's union membership and also for damages for wages lost during the period of suspension.

Defendant demurred to the original complaint on a number of grounds, among them being the grounds that the action was barred by the statute of limitations and by laches. Defendant's demurrer was sustained with leave to amend. The order sustaining the demurrer did not state on which of the grounds of demurrer the order was based. Plaintiff's first amended complaint contains substantially the same allegations as his original complaint with the following two exceptions: (1) the amended complaint omits reference to the fact that plaintiff made application for, and was refused, reinstatement in the year 1943, merely reciting that plaintiff was refused reinstatement "over a period of years"; and (2) the amended complaint omits the allegations of the original complaint relating to loss of wages.

[1] Defendant demurred to the amended complaint on the ground that it does not state facts sufficient to constitute a cause of action and in its points and authorities in support of the demurrer defendant asserts that plaintiff's cause of action is barred by laches. (The defense of laches is properly raised by general demurrer. Zakaessian v. Zakaessian, 70 Cal.App.2d 721, 161 P.2d 677.

[2, 3] By omitting reference to the date on which he was refused reinstatement, plaintiff did not thereby render his amended complaint invulnerable to demurrer on the ground that the statute of limitations had run on his cause of action. "Where a verified complaint contains allegations destructive of a cause of action, the defect cannot be cured in subsequently filed pleadings by simply omitting such allegations without explanation." Lamoreux v. San Diego and Arizona Eastern Ry. Co., 48 Cal.2d 617, 623, 311 P.2d 1, 4. The rule has been applied to cases involving an original verified complaint that is, on its face, barred by limitations. Lee v. Hensley, 103 Cal.App.2d 697, 230 P.2d 159; Gaglione v. Coolidge, 134 Cal.App.2d 518, 286 P.2d 568; Tostevin v. Douglas, 160 Cal.App.2d 321, 325 P.2d 130.

[4, 5] That the original complaint in the instant case shows on its face that the cause of action therein stated is barred cannot be doubted. The union's constitution constitutes a written contract between it and plaintiff. Therefore, the four year limitation period prescribed by Section 337

of the Code of Civil Procedure is applicable. Hopson v. Nat. Union of Marine Cooks and Stewards, 116 Cal.App.2d 320, 326–327, 253 P.2d 733. Plaintiff's cause of action accrued in 1943 when defendant allegedly refused to reinstate him. His original complaint was not filed until 1958.

The next question to be decided is whether defendant's demurrer to the amended complaint sufficiently raises the bar of the statute of limitations.

It will be recalled that defendant's demurrer to the original complaint set up the bar of the statute and that when plaintiff filed his amended complaint omitting the date of defendant's refusal to reinstate plaintiff, defendant demurred on the ground of laches.

[6, 7] It is established that a demurrer which merely states that the cause of action set forth in the complaint is on its face barred by the statute of limitations is sufficient to raise that defense. It is not necessary, as it is when the statute is pleaded in an answer, to specify the applicable code section. Spreckels v. Spreckels, 172 Cal. 775, 158 P. 537; Bainbridge v. Stoner, 16 Cal.2d 423, 106 P.2d 423. It has also been held that it is not improper for a trial court to grant a motion to strike an amended complaint after the pleader has made several ineffectual attempts to state a cause of action. In Wilson v. Shea, 194 Cal. 653, at pages 659–660, 229 P. 945, at page 947, in speaking of the employment of a motion to strike, rather than a demurrer, to reach a defective amended complaint, the Court said: "The method of disposing of it [fifth amended complaint] may have been somewhat irregular, but of this the plaintiff cannot be heard to complain, since it only at best could have suffered the fate of his several other ineffectual pleadings, his persistent refusal to amend which in the particulars to which his attention had been specifically directed may well have brought the trial court to the conclusion that it was futile to permit him to present a further defective pleading." And in Neal v. Bank of America Nat. Trust & Savings Ass'n, 93 Cal.App.2d 678, 682, 209 P.2d 825, 827, the court said: "It may be conceded that there is no statutory provision for striking complaints from the files, as there is in respect to sham or frivolous answers. Code Civ.Proc. § 453. However, the courts have inherent power, by summary means, to prevent frustration, abuse, or disregard of their processes." On page 683, of 93 Cal.App.2d on page 827, of 209 P.2d, the court further says: "The fundamental principle running through the cases is that a court is not required to tolerate a purported amended complaint which fails to amend the previous pleading, is not filed in good faith, is filed in disregard of established procedural requirements, or is otherwise violative of orderly judicial administration." (The Neal case is followed in People v. Oken, 159 Cal.App.2d 456, 462, 324 P.2d 58, and in Tostevin v. Douglas, 160 Cal.App.2d 321, 325 P.2d 130, a case, like ours, concerned with the statute of limitations.)

[8] Applying the above rules and principles to the situation presented in the case at bar, we are of the opinion that plaintiff's cause of action appears to be clearly barred by the statute of limitations, that defendant has adequately raised the bar of the statute, and that the trial court properly sustained defendant's demurrer to the amended complaint. It is true, as we have noted above, that the defendant in his demurrer to the amended complaint urged that the amended complaint failed to state a cause of action because it was barred by laches, and not because it was barred by limitations. (This was undoubtedly due to the fact that the amended complaint omitted the date that plaintiff's cause of action accrued. In its brief on appeal, however, defendant urges both laches and limitations.) However, we should not sacrifice substance to form. The important fact is that defendant is objecting to plaintiff's claim because it is stale. In what language he expresses that objection is unimportant under the circumstances here present. We would not only be requiring the performance of an idle act but would also be lend-

ing our aid to plaintiff's patent effort to evade an obvious and complete defense to his cause of action were we to reverse the judgment of dismissal. The result of a reversal could only be to put defendant to the needless trouble and expense of formally presenting in more precise phraseology the defense of limitations.

The judgment is affirmed.

DOOLING, Acting P. J., and DRAPER, J., concur.

171 Cal.App.2d 735

WYOMING PACIFIC OIL COMPANY, a corporation, Plaintiff and Respondent,

v.

Edward J. PRESTON, also known as E. J. Preston; Ralph Arnold, George B. Bush, Fred Thompson, Intermountain Production Company, a corporation, et al., Defendants,

Edward J. Preston, also known as E. J. Preston, Appellant.

Civ. 23554.

District Court of Appeal, Second District, Division 1, California.

July 7, 1959.

Rehearing Denied Aug. 3, 1959.

Hearing Denied Aug. 31, 1959.

Proceeding on motions to vacate and set aside default judgments entered against defendants. The Superior Court of Los Angeles County, Emil Gumpert and Kurtz Kauffman, JJ., entered orders denying motions and appeals were taken. The District Court of Appeal, Fourt, J., held, inter alia, that evidence supported a hearing judge's determination that summons and complaint had been served on defendants and held that alleged fraud in concealment of matters from judge rendering default judgment could constitute no more than intrinsic fraud which would afford no ground for relief from judgment in application made after expiration of statutory period for moving for relief from judgment.

Affirmed.

See, also, 50 Cal.App.2d 736, 329 P.2d 489.

1. Appeal and Error 🔑1024(5)

When conflicting evidence is presented at hearing of motion to set aside judgment, weight and sufficiency of evidence, its construction and inferences to be drawn therefrom, are for trier of facts. West's Ann.Code Civ.Proc. § 473.

2. Appeal and Error 🔑957(1)
Judgment 🔑139

Motion to set aside default judgment is addressed to sound discretion of trial court and reviewing court should not disturb order of trial court in absence of showing of clear abuse of discretion. West's Ann.Code Civ.Proc. § 473.

3. Judgment 🔑153(2)

Under provision of Code of Civil Procedure authorizing relief from default judgment, relief may not be granted after expiration of period of six months from date of entry of default, and running of time from date of judgment has no bearing on matter. West's Ann.Code Civ.Proc. § 473.

4. Appeal and Error 🔑1073(2)
Judgment 🔑153(1)

When time for vacating default has passed, any effort to vacate default is idle act, and will be reversed on appeal if granted below. West's Ann.Code Civ.Proc. § 473.

5. Judgment 🔑173

Where party moving for relief from default has made written and oral motions to vacate before two judges, second judge is justified in denying second motion, where no showing is made as to why matters raised before him were not presented on first application, assuming matters in second motion were known to petitioner at time of making motion to first judge. West's Ann.Code Civ.Proc. § 473.

6. Judgment ⚿162(4)

In proceeding on special appearance to set aside default judgment, evidence sustained hearing judge's findings that defendants had been served with summons and complaint.

7. Judgment ⚿138(1)

Any suppression of evidence by plaintiff before court rendering default judgment would constitute merely "intrinsic fraud" and would not constitute a ground to set aside judgment on motion made more than six months after entry of default. West's Ann.Code Civ.Proc. § 473.

See publication Words and Phrases, for other judicial constructions and definitions of "Intrinsic Fraud".

8. Judgment ⚿153(1)

After time for vacating default had passed, any order vacating default on grounds of intrinsic fraud would have been idle act. West's Ann.Code Civ.Proc. §§ 473, 1008.

9. Appeal and Error ⚿1024(5)

In proceeding on motion to open default on grounds of, inter alia, alleged fraud perpetrated before court rendering default judgment, evidence as to existence of fraud was matter for court hearing motion. West's Ann.Code Civ.Proc. §§ 473, 1008.

10. Judgment ⚿138(1), 497(1)

Where plaintiff specifically alleged, in complaint, that he did not know extent of money due him and he prayed for an accounting, default judgment for money granted after accounting could not be set aside on motion made after statutory time period for entering default judgment, on any theory that relief exceeded demand in prayer of complaint, and any attempt, on such motion, to show that document was presented to judge entering default containing proper method for accounting was merely improper attempt to go beyond judgment roll in attack on judgment. West's Ann. Code Civ.Proc. § 473.

11. Judgment ⚿497(1)

One making a collateral attack on judgment may not go beyond judgment roll.

12. Joint Adventures ⚿5(1)

In action brought on theory that defendant was plaintiff's coadventurer who violated fiduciary obligations and thereby incurred liability to plaintiff, relief by accounting was proper. West's Ann.Code Civ.Proc. § 585, subd. 2.

13. Appeal and Error ⚿934(3)

In proceeding on motion to open default judgment, record revealed that any marks or comments placed on original complaint or exhibits attached thereto by president of plaintiff corporation after complaint was on file did not in any way constitute amendments to complaint and reviewing court would presume that judge entering default had examined file and had determined that there were no amendments of substance.

14. Attorney and Client ⚿77
Judgment ⚿143(10)

A client is charged with negligence of his attorney and attorney's negligence will not necessarily be ground for vacating judgment by default. West's Ann.Code Civ.Proc. § 473.

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Milo V. Olson, Los Angeles, for appellant.

Nicholas & Mack, Los Angeles, Henry C. Clausen, Richard G. Burns, San Francisco, for respondent.

FOURT, Justice.

A complaint was filed in this case on December 15, 1952. On February 3, 1955, the plaintiff's then attorney, Mr. Reiter, personally served a copy of the summons and complaint on the defendant and appellant Preston. The defendant did not make an appearance within the time prescribed. An attorney, William J. Hyland III, representing the defendant, talked to the attorney for the plaintiff with reference to a demurrer to the complaint, and later advised the attorney for the plaintiff that he was not retained to represent the defendant. The default of the defendant was entered on March 16, 1955.

Later, a copy of an answer prepared by Hyland was delivered to Reiter as attorney for the plaintiff, however such answer was never filed. Hyland asked Reiter to stipulate to set aside the default. Reiter wrote to his client concerning the matter, and shortly thereafter additional counsel were substituted as attorneys for the plaintiff. Hyland made no motion under Code of Civil Procedure, section 473, on behalf of the defendant within the six months' period to vacate and set aside the default.

A judgment by court after default was signed and filed on November 19, 1957. That judgment set forth in part as follows:

> "The defendant Edward J. Preston having been regularly served with process, having failed to appear and answer the plaintiff's complaint filed herein, and the default of said defendant having been duly entered; and evidence having been introduced and the Court having found that said defendant, by false and fraudulent pretenses and false and fraudulent representations, obtained property from plaintiff and otherwise violated his fiduciary obligations to plaintiff as a joint venturer, and an accounting having been duly taken in open session of this Court:
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> "It is therefore Ordered, Adjudged and Decreed that plaintiff recover of and from said defendant Edward J. Preston the sum of Six Million One Hundred Eighty-five Thousand Dollars together with interest on said judgment as provided by law.
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> * * * * * *
>
> "Done in open Court, this 19th day of November, 1957.
>
> "Bayard Rhone
>
> "Judge of the Superior Court"

On March 31, 1958, there was filed a special appearance of the appellant to set aside the default and judgment upon the grounds that the judgment was void, that the court had no jurisdiction of the persons of the defendant and appellant by reason of nonservice of summons or copy of summons on the appellant. The motion last referred to was placed on calendar and was heard on April 28, 29 and 30, 1958, before Judge Emil Gumpert, who listened to the testimony of nine witnesses and to the arguments of counsel, and then determined, in effect, that the defendant's contentions were false, and stated at the end of the hearing:

> "I am completely satisfied, gentlemen, that the moving party has not met the burden of proof. As I indicated yesterday, I am convinced almost to the point of demonstration that the summons was attached, and that summons was served, * * *".

The motion was denied on April 30, 1958.

Appellant has now appealed from that order. In his brief he states, in substance, that because of the unsatisfactory testimony which was presented at the hearing before Judge Gumpert, it is most improbable that a reversal of the orders made by him could be secured. No arguments or citations of authority are presented to this Court with reference to the appeal from such order.

On May 9, 1958, there was filed by the appellant a notice of motion to vacate the default judgment and the default. It was set forth in this notice of motion that such motion would be made upon the following grounds:

1. The judgment was obtained as a result of fraud or imposition upon the court by plaintiff;

2. The judgment is void because the relief, that is, judgment for $6,185,000, exceeds the demand contained in the prayer of the complaint;

3. No accounting was had or necessary;

4. The complaint was amended in matters of substance after the default of defendant Preston was entered and, as a matter of law, the default was therefore

opened, and as no copy of the complaint as changed or amended was ever served on defendant Preston, the court had no right or jurisdiction to enter a judgment thereon against defendant Preston or, in the alternative;

5. In the event the complaint was in fact so changed or amended before defendant Preston was served, then because a true copy of the complaint that was on file was never served on defendant Preston, the court never attained jurisdiction over defendant Preston;

6. The plaintiff, through its controlling stockholder and president, waived any right to any relief on the complaint because of the material alterations made on the complaint in which a judgment in effect in her favor was entered. Because of the criminal nature of said acts, as a matter of public policy, plaintiff, that is, Mrs. Kathryn Mau, president and controlling stockholder and owner of said corporation, is not entitled to any benefit therefrom;

7. The delay and negligence was not truly that of defendant Preston but of his attorney, William John Hyland III;

8. Defendant Preston has a meritorious defense and, as the law favors a trial on the merits, under the circumstances of this case the order of the trial court should be reversed with directions permitting defendant Preston to file his answer, a copy of which was tendered with his motion to vacate.

The motions were heard before Judge Kauffman on May 16, 1958. No oral testimony was introduced, but many conflicting affidavits and other evidence were presented. On June 4, 1958, each of such motions was denied. The appellant appeals from such orders and indicates in his brief that these are the orders from which he is "basically appealing". Appellant urges the same grounds on appeal as asserted before Judge Kauffman, heretofore set forth.

[1-4] This Court must keep in mind that there are some well-settled rules which must be followed in cases such as this one, namely, (1) when conflicting evidence is presented at a hearing of a motion to set aside a judgment, the weight and sufficiency of the evidence, its construction and the inferences to be drawn therefrom are for the trier of facts (see, Gomes v. Bragg, 201 Cal. 70, 255 P. 499; Pacific Telephone and Telegraph Co. v. Fink, 141 Cal. App.2d 332, 296 P.2d 843; Goodrich v. Tulare Ice Co., 140 Cal.App.2d 224, 294 P.2d 1037; Stahler v. Seaboard Mortgage Corp., 9 Cal.App.2d 115, 48 P.2d 993; Cole v. Roebling Construction Co., 156 Cal. 443, 105 P. 255); (2) that a motion to set aside a default judgment is addressed to the sound discretion of the trial court, and this Court should not disturb the order of the trial court in the absence of a clear showing of abuse (Gomes v. Bragg, supra; Coyne v. Krempels, 36 Cal.2d 257, 223 P.2d 244; Daniels v. Pitman, 123 Cal.App.2d 345, 266 P.2d 820); (3) that relief may not be granted under section 473, Code of Civil Procedure, after the expiration of six months from the date of entry of default. The time does not run from the date of the judgment (see, Solot v. Linch, 46 Cal.2d 99, 292 P.2d 887; Monica v. Oliveira, 147 Cal.App.2d 275, 305 P.2d 169; Castagnoli v. Castagnoli, 124 Cal.App.2d 39, 268 P.2d 37; Jones v. Evarts, 114 Cal.App.2d 496, 250 P.2d 671); (4) that when the time for vacating the default has passed, any effort to vacate the default judgment is an idle act, and will be reversed on appeal (Title Insurance & Trust Co. v. King Land & Improvement Co., 162 Cal. 44, 120 P. 1066; Howard Greer Custom Originals v. Capritti, 35 Cal.2d 886, 221 P.2d 937; Macbeth v. Macbeth, 219 Cal. 47, 48, 25 P.2d 11; Monica v. Oliveira, supra, 147 Cal.App.2d 275, 305 P.2d 169; Cumberpatch v. Nolan, 125 Cal.App.2d 205, 207, 270 P.2d 540, 271 P.2d 519; City of Pacific Grove v. Hamilton, 100 Cal.App.2d 508, 511, 224 P.2d 19; Brooks v. Nelson, 95 Cal.App. 144, 272 P. 610).

[5] Also it is true that where the moving party has made written and oral motions to vacate before two judges, the second judge is justified in denying the second motion, where no showing is made as to why

such matters were not presented on the first application, assuming the matters in the second motion were known to the petitioner at the time of the making of the motion to the first judge. See, Beaumont v. Midway Provident Oil Co., 21 Cal.App. 128, 131 P. 106; Corcoran v. City of Los Angeles, 153 Cal.App.2d 852, 857, 315 P.2d 439; Muller v. Muller, 141 Cal.App.2d 722, 731, 297 P.2d 789; Code Civ.Proc., § 1008.

[6] With particular reference to the orders made by Judge Gumpert, the appellant, as heretofore stated, has made no showing on this appeal why the orders should be reversed. It was a question of fact whether the defendant and appellant were served with the summons and complaint (Hunter v. Bryant, 98 Cal. 247, 250, 33 P. 51), and the finding by Judge Gumpert, upon ample and sufficient evidence, was against the defendant and for the plaintiff as to such matters. A reading of the record shows that Preston repeatedly contradicted himself, and Judge Gumpert could well have disbelieved defendant's testimony when he stated, in effect, that he was not properly served.

Considering next the contention of the appellant on the appeal from the orders of Judge Kauffman, appellant asserts that when the matter came on for hearing before Judge Rhone on November 19, 1957, there was introduced into evidence a copy of a judgment in an action brought in 1949 in the United States District Court in Salt Lake City, Utah, titled Wyoming Pacific Oil Co. v. Seaton Prince, Trustee, and Continental Oil Company. The appellant here was not a party to the Federal court action. The appellant states that the Federal court judgment was introduced to establish certain facts (among others, that the plaintiff had no remaining interest in the property in question), but that the judgment alone did not disclose all of the facts and findings as to why the plaintiff did not prevail in that particular action, and that because the plaintiff in the present case did not introduce into evidence a copy of the findings of the Federal Court or a copy of the complaint in that action, a fraud was imposed upon the court presided over by Judge Rhone, and that the facts in the findings of the Federal case would have led Judge Rhone to make a different decision.

[7] Appellant asserts that when a motion is made under section 473, Code of Civil Procedure, it is immaterial whether the fraud be extrinsic or intrinsic, and cites as authority for his position the following cases: Security-First National Bank of Los Angeles v. Hauer, 47 Cal.App.2d 302, 306, 117 P.2d 952; Rice v. Rice, 93 Cal.App.2d 646, 209 P.2d 662; Peterson v. Peterson, 135 Cal.App.2d 812, 816, 288 P.2d 171; Guardianship of Levy, 137 Cal.App.2d 237, 244, 290 P.2d 320; Harada v. Fitzpatrick, 33 Cal.App.2d 453, 459, 91 P.2d 941; Campbell-Kawannanakoa v. Campbell, 152 Cal. 201, 92 P. 184. In each of the cases cited an application was seasonably made, that is, within six months of the proceeding in question. In the instant case the appellant made no such motion. Even if there was suppression of evidence, and that is in effect what appellant claims, such suppression would constitute intrinsic fraud. See, Muller v. Muller, supra, 141 Cal.App.2d 722, 730, 297 P.2d 789. "Concealment by a party of evidence which, if disclosed, would tend to overthrow his case, is not extrinsic fraud and therefore is not ground for a suit to set aside a judgment." Pietro v. Pietro, 147 Cal.App.2d 788, 791, 305 P.2d 916, 919, citing Burch v. Hibernia Bank, 146 Cal.App.2d 422, 432, 304 P.2d 212, 219, wherein it is said:

"The concealment by a party of evidence which, if disclosed, would tend to overthrow his case is not extrinsic fraud. Hogan v. Hogan, 131 Cal.App.2d 281, at page 284, 280 P.2d 64, at page 66 says:

"'It is settled in this state that a judgment will not be set aside because it is based upon perjured testimony or because material evidence is concealed or suppressed, that such fraud both as to the court and the party against whom judgment is rendered is not fraud extrinsic to the record for which relief may be had.'" See, also, Muller v. Muller, supra, 141

Cal.App.2d 722, 730–732, 297 P.2d 789. Also see, Hogan v. Hogan, 131 Cal.App.2d 281, at page 284, 280 P.2d 64, at page 66, where it is said: "And in People v. Egan, 73 Cal.App.2d 894, 167 P.2d 766, it is said that it is settled in this state that a judgment will not be set aside because it is based upon perjured testimony or because material evidence is concealed or suppressed, that such fraud both as to the court and the party against whom judgment is rendered is not fraud extrinsic to the record for which relief may be had. And, see Pico v. Cohn, 91 Cal. 129, 25 P. 970, 27 P. 537, 13 L.R.A. 336."

[8] As heretofore indicated, the time for vacating the default had passed and any order vacating the default judgment on the grounds of intrinsic fraud would be an idle act. Solot v. Linch, supra, 46 Cal.2d 99, 105, 292 P.2d 887; Cumberpatch v. Nolan, supra, 125 Cal.App.2d 205, 207, 270 P.2d 540, 271 P.2d 519.

Furthermore, in this case the appellant has failed to point out to this Court why, having apparently known of all of the facts which he claims as fraud at the time of his first motion before Judge Gumpert, he did not present such matters to Judge Gumpert. Nor did the defendant in his motion before Judge Kauffman show why he had not presented the fraud claim to Judge Gumpert. See, Code Civ.Proc., § 1008; Beaumont v. Midway Provident Oil Co., supra, 21 Cal.App. 128, 131 P. 106.

[9] In any event the charge of fraud presented only a question of fact and it was the function of the trial judge to determine the matter. It was appropriately said in Goodrich v. Tulare Ice Co., supra, 140 Cal.App.2d 224, at pages 226–227, 294 P.2d 1037, at page 1038:

"The evidence presented at the hearing on the motion to vacate the judgments reasonably supports the inference and the implied findings of the court that plaintiffs failed to establish extrinsic fraud or that the plaintiffs were prevented from fully exhibiting their case by the acts or conduct of the defendants. Under such circumstances we cannot interfere with the orders from which this appeal is taken. The weight and sufficiency of the evidence, the construction to be put upon it and the inferences to be drawn therefrom were matters for the trier of the facts. (Citing cases.) And, as is said in Farmers Automobile Inter-Insurance Exchange v. Calkins, 39 Cal.App.2d 390, 393, 103 P.2d 230, 232:

"'There is strong presumption of innocence of fraud and the burden of proving these allegations rested heavily on the plaintiff. As was said in Everett v. Standard Acc. Ins. Co., 45 Cal.App. 332, 187 P. 966, 998: "The presumption is always against fraud. This presumption approximates in strength that of innocence of crime. Truett v. Onderdonk, 120 Cal. 581, 588, 53 P. 26. One who seeks relief from fraud must allege it and prove it by clear and satisfactory evidence. A mere suspicion of fraud is not sufficient."'"

A reading of the Federal court pleadings and other documents with reference to that case and a reading of the documents in this case, convinces us that the issues in the two cases were not the same and the adjudication in that case did not dispose of the issues in the case before us.

[10] Considering the appellant's contention that the judgment for $6,185,000 must be set aside because it exceeds the relief demanded in the prayer of the complaint; the prayer in the complaint reads as follows:

"1. That the agreement of August 10, 1943, between plaintiff and defendant Bush be cancelled insofar as it pertains to said 'Mau F' lease.

"2. That defendants be declared Trustees of all interests held by them for the plaintiff in said 'Mau F' lease, and that they be required to assign any such interest to plaintiff.

"3. For an accounting of the proceeds of production received by said defendants.

"4. For damages in such sums as will compensate plaintiff for its loss of said leases.

"5. For its costs of suit herein incurred, and for such other and further relief as the Court may deem proper in the premises."

Appellant cites as authority for his position in this connection the following cases: Flores v. Smith, 47 Cal.App.2d 253, 117 P.2d 712; Gudarov v. Hadjieff, 38 Cal.2d 412, 240 P.2d 621; Burtnett v. King, 33 Cal.2d 805, 205 P.2d 657, 12 A.L.R.2d 333; Prater v. Dingus, 230 Ky. 82, 18 S.W.2d 883; Kimmarle v. Houston & T. C. Ry. Co., 76 Tex. 686, 12 S.W. 698; W. T. Rawleigh Co. v. Scott, 152 Miss. 704, 120 So. 834; Von Der Kuhlen v. Hegel, 51 Cal.App. 416, 196 P. 913; Staacke v. Bell, 125 Cal. 309, 57 P. 1012; Brooks v. Forington, 117 Cal. 219, 48 P. 1073. A reading of each of these cases indicates that none of them involved a prayer for an accounting or a judgment for money granted after an accounting which is the situation in the present case.

Appellant also asserts that an accounting was not necessary in this case, and should not be accorded with respect to a sum that was known to the plaintiff. The plaintiff here, however, specifically alleged in the complaint that it did not know the extent or amount of money involved, and no showing has been made to indicate that the contrary is true. It was said in Kupfer v. Brawner, 19 Cal.2d 562, at page 564, 122 P.2d 268, at page 270: "If there was any error in the judgment rendered in those proceedings, it was an error committed in the exercise of the court's jurisdiction, which could have been corrected only on an appeal from the judgment or other timely and direct attack thereon; but the judgment, having become final, is not subject to review in another action for error committed in the exercise of the court's jurisdiction. (Citing cases.)

"In Gray v. Hall, supra, 203 Cal. [306], at page 314, 265 P. [246], at page 251, it was said: 'The court having acquired jurisdiction of the subject matter and of the parties, its judgment is not void for the mere erroneous decision on a question of law, however important that question may have been in contemplation of the rights of the parties in the original action. A judgment is never absolutely void if the court had jurisdiction of the subject-matter and the person of the defendant no matter how erroneous it may be.' It was also there recognized that the judgment is not necessarily vulnerable even though the error appears in the judgment roll.

"'There must be an end to litigation and the question as to the correctness of the rulings of the court upon matters within its jurisdiction are reviewable only by the appellate tribunal.' Le Mesnager v. Variel, supra, 144 Cal. [463] at page 465, 77 P. [988], at page 989. 'In other words, it is not the result reached which determines whether the judgment is void, but the power or authority which we call "jurisdiction," and which lies behind the mere conclusion that determines the question.' Crew v. Pratt, supra, 119 Cal. [139] at page 151, 51 P. [38] at page 43."

Appellant also cites the cases of Davis v. California Motors, 73 Cal.App.2d 241, 246, 166 P.2d 52; Whann v. Doell, 192 Cal. 680, 684, 221 P. 899, and Garwick v. Gordon, 121 Cal.App.2d 247, 250–251, 263 P.2d 125, for authority for his contention (that even if an accounting were necessary, none, in the legal sense, was made); however, in each of such cases it is noted that the appeal was from a judgment where the sufficiency or the support for findings could be, and was in fact being reviewed. None of the cases so cited involved a motion to vacate, nor did they involve a default proceeding.

Appellant also insists that there was presented to Judge Rhone, prior to the hearing on the default judgment, a statement, brief or other document which purportedly contained the accounting or method of calculating the total sum allegedly due.

The appellant should not be permitted to go behind the judgment roll and attempt to show that something was stated to the trial court at the time of, or before the hearing which he, the appellant, assumes or thinks supports his position. There is nothing on the face of the record, or contained in the judgment which shows that Judge Rhone considered the "statement" in any manner whatsoever. We are bound to presume that whatever the evidence was which was offered, it was sufficient. (See, Williams v. Reed, 43 Cal.App. 425, 428–431, 185 P. 515, and cases therein cited.) The judgment is not void on its face, or void for want of jurisdiction of the person, or for extrinsic fraud or material mistake.

[11] As we view it, if the appellant's attack on the judgment is collateral, then he cannot go beyond the judgment roll. In re Estate of Wise, 34 Cal.2d 376, 382, 210 P.2d 497; Kaufmann v. California Mining Dredging Syn., 16 Cal.2d 90, 104 P.2d 1038; Crouch v. H. L. Miller & Co., 169 Cal. 341, 146 P. 880; Olivia v. Suglio, 139 Cal.App.2d 7, 293 P.2d 63.

If the attack on the judgment is direct, then, of course, under section 473, Code of Civil Procedure, the motion to vacate should have been filed within the period prescribed by that section. The motion in the present proceeding was not filed until more than three years after the entry of the default.

[12] In this case the complaint alleges facts to show that the appellant violated his fiduciary obligations to the plaintiff as a co-adventurer. Taking the allegations of the complaint as a whole, an accounting is clearly proper. Stamler v. Kissinger, 115 Cal.App.2d 171, 175, 251 P.2d 709; Austin v. Turrentine, 30 Cal.App.2d 750, 764, 87 P.2d 72, 88 P.2d 178; Milton Kauffman, Inc. v. Superior Court, 94 Cal.App.2d 8, 18, 210 P.2d 88; Butler v. Union Trust Co., 178 Cal. 195, 198, 172 P. 601. In Austin v. Turrentine, supra, 30 Cal.App.2d 750, at page 764, 87 P.2d 72, at page 79, 88 P.2d 178, it was said: "It is settled law of this state that where a joint adventure is alleged, and it is claimed that one of the joint adventurers received a secret profit, then relief can only be had by way of an accounting. Mosher v. Helfend, 7 Cal.App. 2d 48, 51, 44 P.2d 1050."

"The primary purpose of section 580 [Code of Civil Procedure] is to insure adequate notice to the defendant of the demands made upon him." (Anderson v. Mart, 47 Cal.2d 274, 275, 282, 303 P.2d 539, 544.) We think the appellant was fully and adequately notified that an accounting was demanded in this case. The judgment sets forth that an accounting was had, and that, under the circumstances, is binding upon the appellant and this court. In re Estate of Estrem, 16 Cal.2d 563, 570, 107 P.2d 36; Borenstein v. Borenstein, 20 Cal.2d 379, 381, 125 P.2d 465.

Section 585, subd. 2, Code of Civil Procedure, provides in part as follows:

"If the taking of an account, or the proof of any fact, is necessary to enable the court to give judgment, or to carry the judgment into effect, the court may take the account or hear the proof, or may, in its discretion, order a reference for that purpose." (See, also, Mattocks v. Van Asmus, 180 Mo.App. 404, 168 S.W. 233, 235; Crossman v. Vivienda Water Co., 136 Cal. 571, 574–575, 69 P. 220.) An accounting in this case was proper and damages are frequently allowed as an essential element of the accounting where it is made to appear that the property itself cannot be accounted for. Horan v. Consolidated etc. Min. Co., 41 Cal.App. 333, 338–340, 182 P. 813.

[13] Appellant's next contention is that the complaint was amended in matters of substance after the default of the appellant was entered, and that therefore such amendments opened the default. It appears that Kathryn Mau, who was the president of the plaintiff corporation, at sometime or another made some marks and wrote some comments or words upon the original complaint or the exhibits attached thereto, after the complaint was on file with the clerk of the court. We have carefully perused the original file in this case and the marks and words referred to, and we think that such marks and such words were not in any sense amendments to the complaint. In Rardin Logging Co. v. Bullok, 120 Cal.App.

2d 67, at pages 68–69, 260 P.2d 81, at pages 82, a case similar in many respects to the one before us, it was stated:

"1. If an amendment to a complaint is not in a matter of substance the default against a defendant is good even though he was not served with the amended complaint. (Citing cases.)

* * * * * *

"2. The default judgment having been entered by the court, and not by the clerk, was not void even though the amendment be considered one of substance. Where the court renders a default judgment after an amendment to the complaint which has not been served on the defendant, it has jurisdiction to determine whether or not the matter added by the amendment is matter of substance. Its determination of that question even though erroneous does not render its judgment void. (Citing cases.)"

We must presume that Judge Rhone examined the file, which included the pleadings and the markings in question, and determined that if they constituted amendments, they were not amendments of substance. See, Bley v. Dessin, 31 Cal.App.2d 338, 341–342, 87 P.2d 889. The evidence was conflicting as to when the marks were placed upon the complaint, and under such circumstances the determination of the trial court precludes this court from weighing the evidence again. There was evidence before the court that none of the attorneys of record ever authorized or ratified any marks, or authorized or ratified any purported amendments. Mrs. Mau, the president of the plaintiff corporation, stated in effect that no one authorized her to make any marks or to write any words on the complaint. Further, there was evidence that the marks and words were called to the attention of Judge Rhone. Harris v. Minnesota Investment Co., 89 Cal.App. 396, 265 P. 306; Electric Utilities Co. v. Smallpage, 137 Cal.App. 640, 31 P.2d 412; People v. Merkouris, 46 Cal.2d 540, 297 P.2d 999; Crane v. Crane, 121 Cal. 99, 53 P. 433. Moreover, the appellant has made no showing to the effect that he was in any wise prejudiced by any markings or writings upon the complaint. Sheehy v. Roman Catholic Archbishop, 49 Cal.App.2d 537, 122 P.2d 60, is not in point.

The appellant also asserts that it was a crime for Mrs. Mau to make markings or writings on the complaint on file, and that therefore the plaintiff should not be permitted to retain its judgment. Suffice it to say, Mrs. Mau was not a party to the action, and if she violated the law, this is not the court to which the complaint should be made.

[14] Appellant's next contention is that the delay of the defendant was excusable because of the negligence of his former attorney. We think the rule in California is that a client is charged with the negligence of his attorney, and his negligence will not necessarily be a ground for vacating a judgment by default. It was set forth in Alferitz v. Cahen, 145 Cal. 397, 400, 78 P. 878, 879, that, "Where such questions of negligence and mistake arise, there must always come a time when, notwithstanding the hardship to the client, he must be bound by the errors and omissions of his attorney." And as said in United States ex rel. Hoey v. Duesdieker, 118 Cal.App. 723, at pages 725–726, 5 P.2d 916, at page 917: "If appellants' failure to appear was the result of such neglect on the part of their former attorney, they are chargeable therewith (citing authority and cases), and they may not claim that the trial court abused its discretion in refusing to set aside their default without showing that such neglect was excusable."

Appellant's last contention is that if the complaint on file was changed by markings before it was filed, that then and in such event appellant was never served a copy of such complaint, and further that he has a meritorious defense to the action. As heretofore set forth, there was testimony that the markings were made after the complaint was filed and served, and on the basis of that and other evidence the trial court made its determination, and we are bound by such determination in this proceeding.

In our opinion the appellant has not shown that any of the trial judges having to do with this cause was arbitrary or capricious in any respect. No deceit was practiced upon the appellant by the plaintiff or any of its attorneys; no one associated or concerned with the plaintiff lulled the appellant into any false sense of security; there was no concealment upon the part of the plaintiff or any one of its attorneys. The appellant defaulted and a judgment was secured against him. Under the circumstances he is not entitled to have the default or the judgment set aside.

Each of the orders appealed from is affirmed.

WHITE, P. J., and LILLIE, J., concur.

Hearing denied; WHITE, J., not participating.

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172 Cal.App.2d 345

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Arthur Lee WILLIAMS, Defendant and Appellant.

Cr. No. 6407.

District Court of Appeal, Second District, Division 2, California.

July 27, 1959.

Defendant was convicted of selling marijuana and of possessing heroin. The Superior Court, Los Angeles County, Albert E. Wheatcroft, J., rendered judgment and defendant appealed. The District Court of Appeal, Ashburn, J., held that evidence sustained convictions and that stipulation that marijuana and heroin received in evidence without objection at preliminary hearing be received in evidence at trial precluded any subsequent successful complaint that such marijuana and heroin were found during unlawful search and seizure.

Affirmed.

1. Stipulations 🔑14(7)

Stipulation that marijuana and heroin received in evidence without objection at preliminary hearing be received in evidence at trial precluded any subsequent successful complaint that such marijuana and heroin were found during unlawful search and seizure.

2. Criminal Law 🔑1036(1)

Failure to object to evidence, at trial, as discovered during unlawful search and seizure, would preclude defendant from raising such contention on appeal.

3. Criminal Law 🔑1144(1)

It was to be presumed that arrest of defendant and search of his apartment were lawful, in absence of evidence that officer did not have search warrant.

4. Criminal Law 🔑1086(14)

Defendant could not successfully contend on appeal that he had been wrongfully refused disclosure of name of confidential informant where record failed to show any demand or request for his name, any objection interposed to testimony concerning what was learned from informant or any motion to strike that testimony.

5. Poisons 🔑9

Evidence sustained conviction for selling marijuana and possessing heroin.

6. Criminal Law 🔑1159(2)

Reviewing court could not weigh evidence, where it was sufficient to support conviction, to evaluate defendant's contentions that an officer had perjured himself in testifying and that his testimony was inherently improbable.

7. Criminal Law 🔑1077

If defendant is indigent, appellate court, upon application for appointment of attorney for him, will make independent examination of record and will make such appointment unless it finds that it would not be of advantage to defendant or helpful to court to have counsel appointed.

Rayfield Lundy, Compton, for appellant.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., Robert M. Sweet, Deputy Atty. Gen., for respondent.

ASHBURN, Justice.

Defendant was convicted of two charges of selling marijuana and one charge of possession of heroin. He has been represented by counsel at times, then in propria persona and finally by counsel.

He claims unlawful search and seizure, refusal to disclose the name of an informer, insufficiency of the evidence to support the convictions, perjured testimony on the part of Deputy Sheriff Brown, and inherent improbability therein. None of these contentions has substantial support in the record.

Count I of the information charges sale of marijuana on September 10, 1957. Deputy Sheriff Brown on that evening met defendant on the street, inquired if he had seen one "C. W." Defendant said he had not but he could help out because he had put "C. W." in business. He took Brown to his automobile, unlocked it and showed him a quantity of marijuana. Brown gave him five dollars and later defendant delivered a newspaper package of that plant to Brown. It became People's exhibit 3.

Count II charges sale of marijuana on September 19, 1957. Deputy Brown, in the afternoon of that day, waved at defendant as the latter drove by in his car and defendant pulled over to join him. The officer talked about buying some marijuana and was told he could have it right then if he had the money, that it would be eleven dollars for a can of it. They then drove into the driveway of defendant's home, 1514 East 110th Street. Defendant went to his upstairs apartment and soon returned to the car and delivered to Brown two newspaper packages of marijuana for which he was paid eleven dollars. This marijuana became People's exhibit 4.

Count III alleges possession of heroin on October 11, 1957. On that evening, acting upon information furnished by a reliable informant to the effect that defendant was dealing in heroin and had some in his possession at 1514 East 110th Street, Officers Stephenson, King and Caskey parked their automobile nearby and watched suspicious actions of the occupants of three cars which drove up and soon left. Then Stephenson and King went to defendant's upstairs apartment, looked through a peephole in the door, knocked, a woman opened the door, they identified themselves and entered. Officer King found defendant in a bedroom where he was seated with a hypodermic in his hand, withdrawing it from a glass of water. On the table were three cellophane packages containing 108 capsules of heroin, a cigarette package containing 8 bindles and 9 capsules of heroin. (They became People's exhibit 1.) Defendant was arrested and before leaving his home said he thought there were 120 capsules, as he had generally gotten that many out of a half ounce, and that was what he had bought that morning; that he had gone to a peddler to buy it and had just finished capping it. The informant was not present when any of these things occurred.

[1, 2] Re alleged unlawful search and seizure. At the preliminary hearing the marijuana and the heroin were received in evidence without objection and it was stipulated at the trial that they be received in evidence bearing the same numbers. This stipulation precluded any subsequent complaint about these exhibits. People v. Rollins, 161 Cal.App.2d 560, 565, 326 P.2d 938. In the absence of such a stipulation it would be too late now to raise the claim of unlawful search and seizure for failure to object to the evidence at the trial precludes advancing it on appeal. People v. Richardson, 51 Cal.2d 445, 334 P.2d 450. No motion to suppress the evidence was made, as claimed by appellant.

[3] Actually, it does not appear that the officers did not have a search warrant, and it must be presumed that the arrest of defendant and search of his apartment were lawful. People v. Citrino, 46 Cal.2d 284, 287, 294 P.2d 32; People v. Kelsey, 140 Cal. App.2d 722, 723–724, 295 P.2d 462.

[4] The claim that there was wrongful refusal to require the officer to disclose the name of the confidential informer fails for want of support in the record. No such demand or request was made. No objection was interposed to the officer's testimony concerning what he learned from the informant and no motion to strike was made. Priestley v. Superior Court, 50 Cal.2d 812, 819, 330 P.2d 39; Coy v. Superior Court, 51 Cal.2d 471, 334 P.2d 569.

[5] The sufficiency of the evidence is manifest. True, defendant denied everything but his evidence was rejected by the court and not without good reason.

[6] The claim of perjury in the testimony of Officer Brown calls on us to weigh the evidence, a thing which we cannot do. People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778. Likewise the assertion of inherent improbability in Brown's testimony finds no support in the transcript. People v. Huston, 21 Cal.2d 690, 693, 134 P.2d 758; People v. Baserto, 162 Cal.App.2d 123, 125, 327 P.2d 558.

[7] There is no semblance of merit in this appeal. It appears that the judgment herein was rendered on July 3, 1958, and on July 9th the trial judge upon defendant's motion granted a stay of execution pending appeal. This case was on our calendar of June 18, 1959. Presumably appellant has done almost a year of "dead" time in jail. This is not an unusual situation in a propria persona appeal. If the defendant is indigent the appellate court, upon application for appointment of an attorney for him, will make an independent examination of the record and will make such appointment unless it finds that it would not be of advantage to the defendant or helpful to the court to have counsel appointed (People v. Hyde, 51 Cal.2d 152, 331 P.2d 42). Denial of such an application should be sufficient evidence to the defendant that his appeal is without merit and that he should begin to serve his sentence forthwith. It is unfortunate that such appellants, when having no substantial grounds for appeal, are not given advice as to the futility of appeal and the folly of a stay of execution during the progress of one.

The judgment and order denying a new trial are affirmed.

FOX, P. J., and HERNDON, J., concur.

172 Cal.App.2d 314

Donald Smith BRENARD, Petitioner,
v.
SUPERIOR COURT of the State of California, In and For the COUNTY OF SACRAMENTO, Respondent.
Civ. 9765.

District Court of Appeal, Third District, California.
July 24, 1959.

Petitioner was charged with manslaughter in driving a motor vehicle and he seeks a writ of prohibition to restrain the Superior Court from proceeding with trial of the action until it orders pretrial inspection of certain documents. The District Court of Appeal, Schottky, J., held that the record did not establish an abuse of discretion by the Superior Court in refusing to order inspection.

Alternative writ discharged, stay order revoked and petition denied.

1. Mandamus ⊂⇒61
Prohibition ⊂⇒3(1)

Mandamus, not prohibition, is the proper writ to compel the pretrial inspection of material in the hands of the prosecution though the court may treat the petition for prohibition as one for writ of mandamus.

2. Mandamus ⊂⇒61

In determining whether an appellate court should order a trial court to permit the inspection of documents or other material in the hands of the prosecution, the question is whether the respondent court abused its discretion in refusing to order the act done.

3. Discovery ⚷85

Denial of a motion for pretrial inspection is not an abuse of discretion without a showing before the trial court as to why the material is needed.

4. Mandamus ⚷168(4)

In proceeding for prohibition treated as mandamus to secure pretrial inspection of certain documents made by the highway patrol respecting blood taken from the defendant and other individuals for purpose of determining alcoholic content and statements respecting the accident involved, evidence did not establish that the trial court abused its discretion in refusing a pretrial inspection. West's Ann.Vehicle Code, § 501.

5. Criminal Law ⚷627½

In prosecution for manslaughter arising out of an automobile accident, petitioner on a proper showing would be entitled to a copy of the blood test report since it is not privileged under the statute. West's Ann.Vehicle Code, §§ 488, 488.5.

6. Criminal Law ⚷627½

In prosecution for manslaughter arising out of an automobile accident, statement of petitioner allegedly recorded by the highway patrol would be subject to inspection if a proper showing was made since it is not a report which is confidential within the meaning of the statute. West's Ann.Vehicle Code, § 488.5.

◆

Robert W. Cole, Public Defender, Floyd V. Gibbert, Asst. Public Defender, Sacramento, for petitioner.

The Atty. Gen., G. A. Strader, Deputy Atty. Gen., and John M. Price, Dist. Atty., Sacramento, for respondent.

SCHOTTKY, Justice.

Petitioner herein, Donald Smith Brenard, has been charged with one count of manslaughter in the driving of a motor vehicle and three counts of violating section 501 of the Vehicle Code. He seeks a writ of prohibition to restrain the superior court from proceeding with the trial of the action until the superior court orders pretrial inspection of certain documents.

Prior to the day set for trial petitioner, through his counsel, sought pretrial inspection of the following reports made and prepared by the California Highway Patrol:

> "(1) Accident reports identifying vehicles involved, persons involved, injuries to individuals involved, and arrangements made for treatment of injured persons;
>
> "(2) Reports concerning blood taken from the defendant, Donald Smith Brenard, and any other individuals involved in the accident, for the purpose of determining alcoholic blood content thereof, or for any other purpose;
>
> "(3) Diagrams prepared by the California Highway Patrol depicting the scene of the accident, and location of vehicles, and point of impact;
>
> "(4) Statements made by the defendant and recorded by the California Highway Patrol;
>
> "(5) Statements made by other individuals involved in the accident and recorded by the California Highway Patrol;
>
> "(6) Names and addresses of witnesses not involved in the accident, and statements taken and recorded from such individuals by the California Highway Patrol;
>
> "(7) Photographs taken at the scene of the accident and of vehicles involved; and
>
> "(8) All other reports relevant and material which were recorded by the California Highway Patrol."

The record presented in this court only discloses that the motion for pretrial inspection was made and argued before the respondent court and that the motion was denied. There is nothing in the record to indicate what transpired at the hearing or whether or not affidavits in support of the motion were filed in the court; whether or not other evidence was received; and whether or not any stipulations were made.

Petitioner did receive from the California Highway Patrol a traffic accident report in which was set forth the names and addresses of the persons involved in the accident and the arrangements made for the treatment of the persons injured in the accident but "no information concerning apparent injuries observed by investigating * * * Officers." It is not clear from the record whether or not this information was received before or after the motion was argued before the superior court.

During oral argument before this court, petitioner's counsel filed an affidavit in which it was asserted that the Bureau of Criminal Identification and Investigation had refused to give counsel the results of the analysis of petitioner's blood for alcoholic content; that counsel was told that if he desired such information he must get it from the highway patrol or the district attorney; that the investigation reports of the California Highway Patrol are available to law enforcement and prosecuting agencies; and that subsequent to the filing of this petition counsel contacted the highway patrol officer who investigated the accident and sought to elicit information from him, but he was informed that the officer would not discuss the matter without consulting with and obtaining the permission of his superiors.

At oral argument, counsel for petitioner admitted that he was given the result of the blood test, but apparently he was not given the report itself.

[1] Preliminarily, it should be pointed out that petitioner has mistaken his remedy. Mandamus, not prohibition, is the proper writ to compel the pretrial inspection of material in the hands of the prosecution. Powell v. Superior Court, 48 Cal.2d 704, 312 P.2d 698; McAllister v. Superior Court, 165 Cal.App.2d 297, 331 P.2d 654. However, this court may treat the petition as one for a writ of mandamus. Powell v. Superior Court, supra.

[2-4] In determining whether or not an appellate court should order a trial court to permit the inspection of documents or other material in the hands of the prosecution or other law enforcement agency, we believe that the question is, as it usually is in mandamus, whether or not the respondent court abused its discretion in refusing to order the act done. As stated in Walker v. Superior Court, 155 Cal.App.2d 134, 139, 317 P.2d 130, 134: "* * * When an application for such [pretrial] discovery is made the trial court has a broad judicial discretion to grant or refuse and it is only when such discretion has been abused that error can be predicated thereon so that mandate will lie." In each case decided by the Supreme Court in which pretrial inspection has been granted, a showing was made as to why the information was sought. In Powell v. Superior Court, supra, the petitioner, who was seeking inspection of signed statements made by him to the police, had alleged by affidavit before the trial court that he was unable to relate to his attorney the matters contained in the statements. In Vance v. Superior Court, 51 Cal.2d 92, 330 P.2d 773, the petitioner sought to require the prosecution to permit him to listen to his taped conversation with police officers which he could not remember and to a taped conversation between the purported victim and the police which had been played to petitioner during his examination by the police. Affidavits were filed in support of the motion. In Funk v. Superior Court, 52 Cal.2d 423, 340 P.2d 593, pretrial inspection was sought of statements made to the police which had been recorded through the use of a stenotype machine and of another statement written in long hand by a police officer, with the notes from which the written statements were made. The court said that the showing made by the petitioner was sufficient to entitle him to the production of the documents. In Tupper v. Superior Court, 51

Cal.2d 263, 331 P.2d 977, the court recognized that it is error to deny production of a statement of a prosecution witness on a proper motion before trial. In People v. Cartier, 51 Cal.2d 590, 335 P.2d 114, though not a pretrial inspection case, it is said that an accused is entitled to hear recordings of his conversation where he has forgotten what he said at the time he was examined and alleges the recordings are necessary to refresh his memory. No case has gone so far as to state that the denial of a motion for pretrial inspection is an abuse of discretion without a showing before the trial court as to why the material is needed. While in many of the reported cases the showing made is not indicated, impliedly a showing has been made. Unless a proper showing is made before the trial court, and unless the record made before that court is presented to an appellate court, there is nothing before the appellate court from which it can be determined whether or not the trial court has abused its discretion in refusing pretrial inspection. On the record before this court it is impossible to ascertain whether or not there was an abuse of discretion in the instant case. The matter contained in the affidavit filed in this court is not germane to the issue presented on this petition. For that reason the petition must be denied.

[5, 6] What we have said will not prevent the petitioner from renewing his motion before the trial court. If a proper showing were made, petitioner would be entitled to an order requiring that he be furnished a copy of the blood test report since a blood test is not privileged under the provisions of either section 488 or 488.5 of the Vehicle Code. The statement of the petitioner allegedly recorded by the California Highway Patrol would also be subject to inspection if a proper showing were made. A statement made by a driver of a motor vehicle and recorded by a highway patrol officer is not a report which is confidential within the meaning of section 488.5 of the Vehicle Code. There is nothing in such a statement which should be kept confidential from the person who makes it. To release his own statement to a defendant in a criminal case cannot defeat the purpose of the statute.

The alternative writ heretofore issued is discharged, the stay order revoked, and the petition denied.

VAN DYKE, P. J., and WARNE, Justice pro tem., concur.

172 Cal.App.2d 388

B. D. DOCKREY, doing business as Dockrey Plumbing Company, Plaintiff and Respondent,

v.

E. L. GRAY, N. J. Laughlin, Midvalley Savings and Loan Association, Martin Hector and Midvalley Auxiliary Corporation, Defendants and Appellants.

Civ. 9602.

District Court of Appeal, Third District, California.

July 28, 1959.

Hearing Denied Sept. 22, 1959.

Action by holder of mechanic's lien to reach the surplus after sale of property to which the lien attached which sale was made pursuant to a power of sale under a prior trust deed wherein another mechanic's lienholder filed a complaint in intervention. From a judgment of the Superior Court, Yuba County, E. T. Manwell, J., the defendants appealed. The District Court of Appeals, Schottky, J., held that where the defendants had actual notice of plaintiff's lien rights, voluntary advancement made by them was an encumbrance junior in priority to that of the plaintiff's mechanic's lien and that liens of mortgages and mechanic's lien attach to the proceeds of sales in the same manner and the same order and with the same effect as they found the premises before the sales were made.

Judgment affirmed.

1. Mortgages 🔑151(3)

In action by holder of mechanic's lien to reach surplus after sale of property to which lien attached which sale was made pursuant to power of sale under a prior deed of trust, voluntary advancement made by the defendants after actual notice of the plaintiff's lien rights was an encumbrance junior in priority to that of the plaintiff's mechanic's lien. West's Ann. Code Civ.Proc. § 1188.1.

2. Assignments 🔑90

In action by holder of mechanic's lien to reach surplus after sale of property to which lien attached pursuant to power of sale under a prior deed of trust, assignment of surplus by the trustors did not create any greater rights in the assignee than were held by the assignor trustor.

3. Mortgages 🔑376

In action by holder of mechanic's lien to reach surplus after sale of property to which lien attached pursuant to power of sale under a prior trust deed, where under the first trust deed, the trustee was required to pay any surplus to the "persons legally entitled thereto" plaintiff's lien being next in priority to the first deed of trust would make the plaintiff the person entitled to the proceeds after the amount secured by the trust deed had been satisfied unless his lien was in some way extinguished.

See publication Words and Phrases, for other judicial constructions and definitions of "Persons Legally Entitled Thereto".

4. Mortgages 🔑378

All liens subsequent to the date of a deed of trust are destroyed as against the property itself upon a sale under a deed of trust but such does not mean that such lienholders are without remedy.

5. Mortgages 🔑376

Liens of mortgages and mechanic's lien attached to the proceeds of the sales under trust deed in the same manner, in the same order and with the same effect as they bound the premises before the sales were made.

6. Mechanics' Liens 🔑263(1)

In action by holder of mechanic's lien to reach surplus after sale of property to which the lien attached pursuant to a power of sale under a prior trust deed, alleged fact that defendants were not joined in plaintiff's suit to foreclose his lien against the trustors would not affect the validity of judgment, where defendants were accorded the opportunity in the present action to set forth any defenses which they may have had and there was no indication that the judgment was dependent upon or procedurally related to the prior foreclosure proceedings.

◆

Arthur E. Hewitt and E. L. Gray, Marysville, for appellants.

Steel & Arostegui, Marysville, for respondent.

SCHOTTKY, Justice.

This is an appeal from a judgment in favor of plaintiff in an action by the holder of a mechanic's lien to reach the surplus after sale of the property to which the lien attached, such sale having been made pursuant to a power of sale under a prior deed of trust. After the action was filed the controversy was submitted to the trial court on an agreed statement of facts. With the permission of the court, another mechanic's lien holder filed a complaint in intervention, but such intervenors have not appealed from the judgment in which it was held that they take nothing by their complaint.

On or about October 17, 1955, M. D. Lowery and Wanda Mae Lowery (hereinafter referred to as trustors) applied for and were granted a loan of $8,000 by the appellant Midvalley Savings and Loan Association (which will be referred to as the association) to finance the construction of two dwellings. A first deed of trust on the property upon which the dwellings were to be constructed was executed contemporaneously with the note evidencing the loan. Under the deed of trust the Lowerys were trustors, the association was beneficiary, and appellants E. L. Gray and N. J. Laughlin were trustees. It is apparent from the answer of appellants that appellant Midvalley Auxiliary Corporation was a substituted trustee, and it is stipulated that Midvalley Auxiliary Corporation was trustee under all outstanding deeds of trust of the association.

The deed of trust was recorded on October 27, 1955. At the time of said recording no materials had been delivered nor had work commenced on the construction of the dwellings. It is therefore not disputed that the deed of trust constituted a first lien on the property insofar as it secured the original loan of $8,000, plus interest thereon and costs amounting to $497.61.

It should be noted that while it was provided that the deed of trust was to secure future advancements as made by the association, it is stipulated that it was not mandatory upon the association to make such advancements.

On November 10, 1955, respondent, a plumbing contractor, entered into an oral contract with trustors for certain plumbing work on the buildings. In December, 1955, the buildings suffered flood damage. On March 3, 1956, respondent received $800 from appellant association in part payment for work in progress.

On May 21, 1956, appellant association recorded an agreement to make a $1,500 advance to trustors. It is stipulated that at the time the advancement was made the association had actual notice of respondent's lien rights.

On September 26, 1956, respondent recorded his mechanic's lien and on October 30, 1956, filed a complaint against trustors to foreclose the mechanic's lien. None of the appellants were joined in the foreclosure action.

On January 10, 1957, trustors assigned to the association their rights to any excess over $8,000 which might result from bids at a trustee's sale of the property.

On January 14, 1957, a certified copy of a judgment in favor of respondent in the foreclosure action was recorded.

On January 15, 1957, the trustee sold the property pursuant to the power of sale in the first deed of trust for $9,600.

The action involved in the present appeal was filed January 16, 1957.

[1] The issue involved in this appeal is whether appellants, under their voluntary advancement, are entitled to the surplus arising at the trustee's sale over the original amount secured by the first deed of trust, or whether respondent is entitled to such surplus. There can be no doubt but that by virtue of appellants' actual notice of respondent's lien rights the voluntary advance made by appellants was an encumbrance junior in priority to that of respondent's mechanic's lien. See Code of Civ. Proc., sec. 1188.1; Yost-Linn Lumber Co. v. Williams, 121 Cal.App. 571, 574, 9 P.2d 324; Althouse v. Provident Mut. Building-Loan Ass'n, 59 Cal.App. 31, 38, 209 P. 1018. Appellants concede that respondent's lien had priority as against the property, but argue that such priority does not extend to the surplus realized at the sale.

[2] Appellants' first contention is that it was error for the court to hold that the assignment of the surplus by trustors was invalid. However, the court did not so hold, but correctly held that the assignment by the trustors did not create any greater rights in the assignee association than were had by the assignor trustors.

Appellants' second and third contentions are that it was error for the trial court to hold that the mechanics' liens attached to the surplus of the trustee's sale and that it was error to hold that the trustee's sale did not cut off respondent's lien.

[3] It should first be noted that under the first deed of trust the trustee was required to pay any surplus "to the person or persons legally entitled thereto." It is

clear that respondent's lien, being next in priority to the first deed of trust, would make respondent the person entitled to the proceeds after the amount secured by the trust deed has been satisfied unless his lien was in some way extinguished.

[4] It is true, as appellants contend, that all liens subsequent to the date of the deed of trust are destroyed as against the property itself upon a sale under the deed of trust. Cook v. Huntley, 44 Cal.App.2d 635, 640, 112 P.2d 889. However, this does not mean that such lien holders are without remedy. As was stated in Sohn v. California Pacific Title Insurance Company, 124 Cal.App.2d 757, at page 766, 269 P.2d 223, 229: "* * * There was here a junior encumbrance, which was eliminated by the exercise of the power of sale, consequently the junior lien attached to the surplus proceeds so that the Berberian creditors * * * [the holder of the second trust deed] became the 'persons legally entitled thereto' as provided in said deed of trust."

[5] Appellants argue that the above quotation from the Sohn case is dicta. We do not agree as the court was there drawing a distinction between the lien of a second trust deed which is extinguished as against the property by trustee's sale and therefore in equity attaches to the surplus and a federal tax lien which is not extinguished as against the property and which therefore does not attach to the proceeds of the sale. But even if the statement in the Sohn case is dicta, we believe that the equitable principle expressed therein is sound and supported by ample authority. In Markey v. Langley, 92 U.S. 142, at page 155, 23 L.Ed. 701, it was held that: "The liens of the mortgages and the mechanics' lien attached to the proceeds of the sales in the same manner, in the same order, and with the same effect, as they bound the premises before the sales were made."

Other authorities are in accord with the above principle. See 59 C.J.S. Mortgages § 596, p. 1032, cited in Pearson v. Teddlie, Tex.Civ.App., 235 S.W.2d 757, 759; 37 Am.Jur., Mortgages, sec. 874; 117 A.L.R. 1065, 1066.

[6] Appellants' final contention is that they were not joined in the respondent's suit to foreclose his lien against the trustors. Appellants fail to point out how this fact would affect the validity of the judgment involved herein. It is true that a judgment in a foreclosure suit wherein all of the interested parties are not joined has no effect upon the rights of the parties not joined. However, a failure to join such parties in no way improves their rights. Appellants were accorded the opportunity in the instant action to set forth any defenses which they may have had, and there is no indication that the judgment which is involved in this appeal is in any way dependent upon or procedurally related to the prior foreclosure proceeding.

The judgment is affirmed.

VAN DYKE, P. J., and WARNE, Justice pro tem., concur.

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172 Cal.App.2d 24

Charles W. HINMAN, Plaintiff and Appellant,

v.

William WAGNON, Sr., et al., Defendants,

Sierra Creek Development Company, Defendant and Respondent.

Civ. 23263.

District Court of Appeals, Second District, Division 2, California.

July 14, 1959.

Rehearing Denied Aug. 7, 1959.
Hearing Denied Sept. 11, 1959.

Action by landlord against tenant for unlawful detainer. The Superior Court, Los Angeles County, Orlando H. Rhodes, J., entered a judgment dismissing the complaint, and the landlord appealed. The District Court of Appeal, Fox, P. J., held that landlord's notice to tenant requiring tenant to surrender possession of leased premises for failure to pay rent and to perform covenants and conditions of lease was insufficient since it was not in the alternative, and tenant's possession of premises after service of notice did not constitute unlawful detainer.

Judgment affirmed.

1. **Forcible Entry and Detainer** ⚿14

In order for a person to avail himself of summary remedy of unlawful detainer, he must bring himself within terms of statute establishing such relief. West's Ann.Code Civ.Proc. §§ 1161, 1166.

2. **Landlord and Tenant** ⚿291(1)

Under statute providing that a tenant of real property for a term of less than life is guilty of unlawful detainer when he continues in possession after default in payment of rent and is served with notice in writing requiring its payment or possession of property, or continues in possession after neglect or failure to perform other conditions or covenants of lease and is served with written notice requiring performance of such conditions or covenants, or possession of the property, the required notice must be framed in the alternative, that is, either pay the rent or quit, or perform the covenant or quit, and a notice which merely directs tenant to quit is insufficient to render such tenant guilty of unlawful detainer upon his continued possession. West's Ann.Code Civ.Proc. § 1161 and subds. 2, 3.

3. **Landlord and Tenant** ⚿291(1)

Landlord's notice to a tenant requiring tenant to surrender possession of leased premises for failure to pay rent and to perform covenants and conditions of lease was insufficient since it was not in the alternative, and tenant's possession of premises after service of notice did not constitute unlawful detainer. West's Ann.Code Civ Proc. § 1161, subds. 2, 3.

4. **Pleading** ⚿216(2)

In reviewing the sufficiency of a pleading, court may look to matters contained in an earlier complaint but omitted from the pleading under review.

5. **Pleading** ⚿252(1)

Facts once alleged in a verified pleading which render it vulnerable to demurrer cannot be withdrawn from court's consideration by merely omitting them from an amended pleading without explanation.

6. **Landlord and Tenant** ⚿291(1)

Under statute providing that a tenant of real property for a term less than life is guilty of unlawful detainer when he assigns, sublets, or commits waste upon demised premises contrary to conditions or covenants of his lease, or maintains, commits or permits maintenance or commission of a nuisance upon demised premises or uses premises for an unlawful purpose, and is served with notice to quit, notice required need not be framed in the alternative. West's Ann.Code Civ.Proc. § 1161, subd. 4.

7. **Pleading** ⚿225(2)

Where landlord had three opportunities to state a cause of action against tenant for unlawful detainer, court did not abuse its discretion in sustaining a demurrer to second amended complaint without leave to amend. West's Ann.Code Civ.Proc. § 1161, subds. 2–4.

◆

Charles W. Hinman, in pro. per.

McCutchen, Black, Harnagel & Shea, George Harnagel, Jr., Frederick J. Kling, Jack T. Swafford, Los Angeles, for respondent.

FOX, Presiding Justice.

Plaintiff appeals from a judgment of dismissal entered after defendant's[1] demurrer to plaintiff's second amended complaint for unlawful detainer was sustained without leave to amend.

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[1] Although there were multiple defendants, this appeal involves only the defendant Sierra Creek Development Company, and reference in the opinion to "defendant" relates exclusively to Sierra Creek Development Company.

The facts which give rise to this appeal are as follows: On May 16, 1957, plaintiff leased property at Lake Enchanto to the defendant; said lease was in writing and characterized by plaintiff as a "temporary" lease. Defendant failed to comply with various terms of the lease with respect to rental payments and other covenants. On or about July 14, 1957, plaintiff sent a written ten days' notice of default to the defendant. Thereafter, on July 28, defendant was sent a written notice which contained, inter alia, the following:

"Your failure to make any payment, even under the temporary agreement, not considering your actual agreement, constitutes a default and grounds for termination of the lease or peacefully surrendering the property to the undersigned on demand, which demand is hereby made. Your failure to cure this default within the 10 days, in my opinion, terminates now all rights to possession of the property, without a new written agreement or consent, even though payment might be made.

"You and each of you are hereby given notice, within 3 days after service on you of this notice to deliver up possession of any part of the premises of Lake Enchanto as set forth in a lease made and signed on the 16th day of May 1957, to the undersigned, or the undersigned will institute legal proceedings against you. * * *

"This notice is also given because of your failure to comply with the demands for checkers on gate, examination of records, particularly daily records, inventories of merchandise for sale, picnic reservations, amounts paid, etc."

On August 7, 1957, plaintiff commenced this action for unlawful detainer. Plaintiff was given leave to amend his original and first amended complaint after defendant successfully interposed demurrers thereto. Defendant's demurrer to plaintiff's second amended complaint, however, was sustained without leave to amend and a judgment of dismissal was entered. It is from this judgment that plaintiff appeals.

[1] In order for a person to avail himself of the summary remedy of unlawful detainer, he must bring himself within the terms of the statute establishing such relief. Lawrence Barker, Inc. v. Briggs, 39 Cal.2d 654, 661, 248 P.2d 897; Horton-Howard v. Payton, 44 Cal.App. 108, 112, 186 P. 167. Section 1161, Code of Civil Procedure, provides that a tenant of real property for a term less than life is guilty of unlawful detainer when he (1) remains in possession after the expiration of the term, or (2) continues in possession after default in the payment of rent and is served with a three days' notice, in writing, requiring its payment or possession of the property, or (3) continues in possession after a neglect or failure to perform other conditions or covenants of the lease and is served with a three days' notice, in writing, requiring the performance of such conditions or covenants, or the possession of the property, or (4) assigns, sublets, or commits waste upon the demised premises, contrary to the conditions or covenants of his lease, or maintains, commits, or permits the maintenance or commission of a nuisance upon the demised premises or uses such premises for an unlawful purpose, and is served with a three days' notice to quit.

The complaint in an action alleging an unlawful detainer must, of course, set forth the facts upon which the plaintiff predicates his right to recover. Code Civ.Proc., § 1166. In the instant complaint, plaintiff anchors his right of action on section 1161, subdivisions 2 and 3, in that, alleges plaintiff, defendant has defaulted in the payment of rentals and has not complied with other covenants of the lease. There are no allegations in the instant pleading which even remotely suggest that plaintiff sought recovery under the remaining provisions of section 1161.

[2] It is well settled that the notice required under subdivisions 2 and 3 (where the condition or covenant assertedly vio-

lated is capable of being performed) must be framed in the alternative, viz., pay the rent *or* quit, perform the covenant *or* quit, and a notice which merely directs the tenant to quit is insufficient to render such tenant guilty of unlawful detainer upon his continued possession. Colyear v. Tobriner, 7 Cal.2d 735, 742, 62 P.2d 741, 109 A.L.R. 191; Opera House & Art Ass'n Bldg. v. Bert, 52 Cal. 471, 472–473; Hudson v. Zumwalt, 64 Cal.App.2d 866, 874, 149 P.2d 457; Feder v. Wreden Packing & Provision Co., Inc., 89 Cal.App. 665, 671, 265 P. 386. As stated in the Feder case, 89 Cal.App. at page 671, 265 P. at page 388, "In order to sustain an action for unlawful detainer, section 1161, of the Code of Civil Procedure, clearly requires that a notice first be given to the delinquent tenant, which notice shall prescribe specifically the amount of rent due or the covenant that has not been performed, and a further notice that in the event of the failure of the tenant to make payment of delinquent rent, or to perform the defaulted covenant, the plaintiff will exercise his right under the law to regain possession of the premises."

[3] The notice which plaintiff served was not framed in the alternative, but merely required the defendant to surrender possession of the leased premises. The instant complaint, read in conjunction with the three days' notice, discloses that plaintiff predicated his right of action on defendant's failure to pay rent and his neglect to perform covenants and conditions of the lease which were capable of performance at the time notice was served. Plaintiff's notice, therefore, did not comply with the requirements of section 1161, subdivisions 2 and 3, and as a consequence thereof, defendant's possession of the premises after service of said notice did not constitute unlawful detainer.

[4, 5] While it is true that plaintiff did not set forth the contents of the above notice in the pleading now under review, it was incorporated into his original complaint by reference and attached as an exhibit thereto. Had the same procedure been followed in the instant pleading, it is clear that no cause of action would have been stated, for it would have affirmatively appeared from the complaint that defendant had not been served with a proper notice. The only question, then, is whether we can, in reviewing the instant pleading, look to matters contained in an earlier complaint but omitted from the one presently under consideration. That such may be done is supported by ample authority. Facts once alleged in a verified pleading which render it vulnerable to demurrer cannot be withdrawn from the court's consideration by merely omitting them from an amended pleading without explanation. Wennerholm v. Stanford Univ. Sch. of Med., 20 Cal.2d 713, 716, 128 P.2d 522, 141 A.L.R. 1358; Neal v. Bank of America, 93 Cal.App.2d 678, 682, 209 P.2d 825; Pike v. Archibald, 118 Cal.App.2d 114, 118, 257 P.2d 480.

[6, 7] It is clear, therefore, that the second amended complaint did not state a cause of action under section 1161, subdivisions 2 and 3. Plaintiff argues, however, that he should be allowed to amend his complaint so as to bring his action under section 1161, subdivision 4. The notice thereunder required need not be framed in the alternative. However, plaintiff has at no time, either by his three days' notice or in any of his pleadings, suggested that defendant had assigned the lease or sublet the property, or had committed waste contrary to the conditions or covenants of the lease, or maintained a nuisance on the premises, or had used the property for an unlawful purpose. Plaintiff had three opportunities to state a cause of action; if he was of the belief that facts existed which brought his case under 1161, subdivision 4, it would have been a simple matter to allege such facts, but this he did not do. Under such circumstances, the trial court was justified in resolving the question of the probability of plaintiff's being able to state a cause of action adversely to him, and did not abuse its discretion by sustaining the demurrer without leave to amend. Potter v. Richards, 132 Cal.App.2d 380, 385, 282 P.2d 113;

Taliaferro v. Wampler, 127 Cal.App.2d 306, 310, 273 P.2d 829. As stated in Dukes v. Kellogg, 127 Cal. 563, 565, 60 P. 44: "[t]he failure to make a good pleading probably arises in a lack of facts, rather than in the fault of the pleader."

The judgment is affirmed.

ASHBURN and HERNDON, JJ., concur.

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171 Cal.App.2d 806

Robert George CAIN, Plaintiff and Appellant,

v.

Earl B. FRIEND, Theresa J. Friend, Defendants and Respondents.

Civ. 18431.

District Court of Appeal, First District, Division 2, California.

July 9, 1959.

Action for injuries sustained by plaintiff when ladder rung broke while he was performing, in defendants' absence, carpentry work which he had volunteered to do for defendants without compensation. The Superior Court, City and County of San Francisco, H. A. van der Zee, J., rendered judgment upon directed verdict for defendants and plaintiff appealed. The District Court of Appeal, Draper, J., held that evidence was sufficient to take to jury issues as to whether plaintiff had been an invitee or a mere licensee, as to whether defendants had been negligent, and as to whether plaintiff had been contributorily negligent.

Judgment reversed and case remanded for a new trial.

1. Appeal and Error 🔑927(3)
Trial 🔑171

A trial court's power to direct a verdict is subject to same limitations as its power to grant nonsuit; and court reviewing denial of motion for nonsuit will view evidence in light most favorable to plaintiff, disregarding conflicts and indulging all reasonable inferences in plaintiff's favor.

2. Negligence 🔑19, 32(1)

An occupant of land owes to an invitee duty to exercise ordinary care to keep premises in reasonably safe condition; and, as to invitee, like duty extends to chattels to be used by him upon premises.

3. Negligence 🔑32(1)

Occupant of land owes to licensee only duty of refraining from active negligence and overt acts increasing hazards of premises.

4. Negligence 🔑136(15)

Whether one is invitee or licensee is question of fact and, where evidence is in conflict, question is for jury to determine.

5. Negligence 🔑32(2.1, 2.3)

If the purpose for which a person is upon the premises of another is one of common interest or mutual advantage, person is considered an invitee, but if object is mere pleasure or benefit of visitor, he is deemed a licensee.

6. Negligence 🔑32(2.3)

Where services performed on premises by visitor are for benefit of occupant, fact that they are performed gratuitously does not negative visitor's status as invitee; and even where benefit to occupant is intangible, visitor may rely upon them to establish his status as invitee.

7. Negligence 🔑32(2)

A social visitor or guest upon premises is a mere licensee, even though some minor service incidental to social visit is performed.

8. Negligence 🔑136(15, 18, 26)

In action for injuries sustained by plaintiff when ladder rung broke while he was performing, in defendants' absence, carpentry work which he had volunteered to do for defendants without compensation, evidence was sufficient to take to jury issues as to whether plaintiff had been an invitee or a mere licensee, as to whether defendants had been negligent, and as to whether plaintiff had been contributorily negligent.

Christin & Davis, Leonard J. R. Davis, Joseph D. Taylor, San Francisco, for plaintiff-appellant.

O'Connor, Moran, Cohn & Hall, San Francisco, for defendants-respondents.

DRAPER, Justice.

Plaintiff appeals from judgment entered upon directed verdict in this personal injury action.

Defendants, husband and wife, owned their home, and had commenced construction of an addition to it. The husband, a joiner, was building the addition in his spare time. He and his wife had known plaintiff, a journeyman carpenter, for some years. Defendants asked plaintiff's mother to have him come to see them. He did. They discussed the construction work on defendants' home. Plaintiff expected that he would not be employed for two or three days, and volunteered to do a portion of the building job without compensation. Defendants accepted his offer, pointed out the details of the work to be done, and gave him a key to their home, since both of them would be away the next day. Plaintiff testified that defendant husband showed him a ladder and said that he could use it, but defendant denied this. The next day, plaintiff returned to defendants' home as agreed and commenced work. He worked through the morning, using the ladder frequently. In the early afternoon, as he descended the ladder, the bottom rung broke, causing plaintiff to fall some 16 feet to the ground.

This action seeks damages for the injuries sustained in that fall. At the close of plaintiff's case, motion for nonsuit was denied, but after further argument, motion for directed verdict was granted.

[1] A trial court's power to direct a verdict is subject to the same limitations as its power to grant a nonsuit. Pellett v. Sonotone Corp., 26 Cal.2d 705, 708, 160 P.2d 783, 160 A.L.R. 863. Hence we view the evidence in the light most favorable to plaintiff, disregarding conflicts and indulging all reasonable inferences in plaintiff's favor.

[2, 3] The principal issue argued here is whether plaintiff was an invitee or a licensee. An occupant of land owes to an invitee the duty to exercise ordinary care to keep the premises in a reasonably safe condition. Popejoy v. Hannon, 37 Cal.2d 159, 169, 231 P.2d 484. Defendants correctly concede that as to an invitee the like duty extends to chattels to be used by him upon the premises. See Mondine v. Sarlin, 11 Cal.2d 593, 597, 81 P.2d 903. If, however, plaintiff was a mere licensee, defendants' principal duty was merely to refrain from active negligence (Demmon v. Smith, 58 Cal.App.2d 425, 136 P.2d 660; Davis v. Silverwood, 116 Cal.App.2d 39, 253 P.2d 83) or from any overt act which would increase the hazards of the premises (Laidlaw v. Perozzi, 130 Cal.App.2d 169, 172, 278 P.2d 523). If plaintiff was a mere licensee, there is grave doubt of his right to recover.

[4] Whether one is an invitee or a licensee is a question of fact (Laidlaw v. Perozzi, supra), and, where the evidence is in conflict, is for the jury to determine (Koppelman v. Ambassador Hotel Co., 35 Cal.App.2d 537, 96 P.2d 196). Thus the real question is whether there is evidence from which the jury could have found plaintiff to be an invitee.

[5, 6] "It is the purpose for which a person is upon the premises of another which renders him an invitee rather than a licensee." Popejoy v. Hannon, supra, 37 Cal.2d 159, 169, 231 P.2d 484, 490. In general, "if that purpose is one of common interest or mutual advantage the person is considered an invitee while a licensee is inferred where the object is the mere pleasure or benefit of the visitor." Ashley v. Jones, 126 Cal.App.2d 328, 332, 271 P.2d 918, 920. Where the services are for the benefit of the occupant of the premises, the fact that

they are performed gratuitously does not negative the performer's status as an invitee. Mondine v. Sarlin, supra, 11 Cal. 2d 593, 597, 81 P.2d 903. Even where the benefit to the occupant is intangible, the one rendering services may rely upon them to establish his status as an invitee. Edwards v. Hollywood Canteen, 27 Cal.2d 802, 809, 167 P.2d 729. A carpenter working without compensation in the construction of a church building is an invitee. Fernquist v. San Francisco Presbytery, 152 Cal.App. 2d 405, 313 P.2d 192.

[7] Defendants seek to argue that plaintiff was merely a social visitor or guest upon the premises. Such a visitor is a mere licensee (Saba v. Jacobs, 130 Cal.App.2d 717, 718, 279 P.2d 826; Simpson v. Richmond, 154 Cal.App.2d 27, 29, 351 P.2d 435), even though some minor service incidental to the social visit is performed (Free v. Furr, 140 Cal.App.2d 378, 295 P.2d 134; Ashley v. Jones, 126 Cal.App.2d 328, 271 P.2d 918). But the analogy fails upon the facts. In the case at bar, plaintiff went to defendants' home by prearrangement, at a time when both he and they knew the owners would be absent, to perform work beneficial to them. A "social visit" to hosts known to be absent for the sole purpose of performing manual labor severely strains both credulity and vocabulary.

Also distinguishable are the cases of Davis v. Silverwood, 116 Cal.App.2d 39, 253 P.2d 83, and Tharp v. San Joaquin Cotton Oil Co., 27 Cal.App.2d 554, 81 P.2d 443, 82 P.2d 21. In each of those cases a business visitor either after his own business was completed (Davis) or on a portion of the premises not included in the business invitation (Tharp) suffered injury while attempting to give unsolicited aid in the correction of mechanical difficulties of equipment which was wholly the concern of the occupant of the premises. Here plaintiff was injured while doing exactly what he had been asked to do, at the time and place he had been asked by defendants to do it.

[8] Here there is evidence from which a jury could find that plaintiff was expressly or impliedly invited to visit defendants' premises to perform services beneficial to defendants; that he was injured while performing such services; and that the injury resulted from the collapse of a ladder supplied by defendants for the use plaintiff was making of it at the time of his fall. Under the decisions, such findings would warrant the conclusion that plaintiff was an invitee. We do not purport to resolve any evidentiary conflicts. We hold only that the issue should have been left to the jury.

If that issue were determined in plaintiff's favor, the question whether defendants met the duty owing to their invitee likewise would present an issue of fact for the jury. Defendants separately admitted that they considered the ladder "rickety" and did not use it themselves. This is some evidence that it was defective and that they knew or reasonably should have known that its use endangered plaintiff. The ladder itself was before the jury, which from viewing it, as well as from testimony about its condition, could draw inferences as to whether its defect should have been known to defendants or to plaintiff. Thus on the issue of negligence, as well as that of contributory negligence, there were questions of fact for the jury. The case must be remanded for new trial.

Judgment reversed.

KAUFMAN, P. J., and DOOLING, J., concur.

171 Cal.App.2d 858

Francella UPTON and Betty Jean Callahan, Plaintiffs and Appellants,

v.

CITY OF ANTIOCH, P. K. Biglow, B. H. Maynard, Phil E. Minner, Defendants and Respondents.

No. 18355.

District Court of Appeal, First District, Division 2, California.

July 13, 1959.

Action for injuries sustained by a plaintiff when his automobile struck a protruding pipe in a street under construction in the defendant city. Summary judgment for the city in the Superior Court, County of Contra Costa, Harold Jacoby, J., and the plaintiffs appealed. The District Court of Appeal, Dooling, J., held that there was no legal authority for the city to relieve itself of responsibility in the matter of improvement of the street.

Judgment reversed.

1. Highways ⚿105(2)

The statutes respecting the construction, improvement and repair of streets within a city do not authorize a county to undertake such work itself, but only authorizes the county to contribute money, material, labor and engineering services and to loan its road-building machinery to a city for use by the city for such street work to be done under the city's supervision and control. West's Ann.Streets & High.Code, §§ 1680(a, e, f), 1682(a–e), 1683.

2. Municipal Corporations ⚿269(2)

The establishment and improvement of city streets is a municipal affair.

3. Counties ⚿21½

Counties have only such powers as are expressly granted to them and such others as are necessarily implied from those expressly granted. West's Ann.Gov.Code, § 23003.

4. Automobiles ⚿255

In action for injuries suffered when automobile of plaintiff struck a protruding pipe in a street under construction in defendant city, city was not relieved from liability for the condition on ground that the county had assumed entire control of work and that it was being done under county supervision by an independent contractor under contract with the county, since there was no legal authority for the city to relieve itself of responsibility in the matter of improvement of the city street. West's Ann.Streets & High.Code, §§ 1680–1684, 1700–1702.

◆

O. F. Fenstermacher, Pittsburg, for appellants.

Tinning & DeLap, Max Wilcox, Jr., Richmond, for respondents.

DOOLING, Justice.

Plaintiffs appeal from a summary judgment entered in favor of defendants City of Antioch, P. K. Biglow, its superintendent of streets, B. H. Maynard, its director of public works and city engineer, and Phil E. Minner, its city manager. The action is based upon injuries alleged to have been suffered when an automobile struck a protruding pipe in a street under construction in the City of Antioch.

From the affidavits presented on the motion for summary judgment it appears that on May 14, 1956, by resolution the city council of Antioch requested the board of supervisors of Contra Costa County to appropriate $69,835 from the 1955–1956 Aid to Cities fund for the construction, purchase of right of way, and engineering costs for the improvement of a designated portion of Wilbur Avenue in said city, "the contract to be awarded by the Board of Supervisors, and the construction, engineering, and purchases of right of way to be under the direction and supervision of the Public Works Director of Contra Costa County."

On May 15, 1956, the board of supervisors of said county adopted a resolution which, after reciting that "(t)his Board deeming" said reconstruction of the designated part of Wilbur Avenue "is of general county interest," ordered that such work is authorized at a cost of $69,835, "said reconstruction to be done by contract to be awarded by the Board of Supervisors and the construction, engineering, and purchase of right of way to be under the direction and supervision of the Public Works Director of Contra Costa County."

Thereafter a contract was made by the county for this work with Antioch Paving Co. and the work was being done by that company at the time the accident occurred.

It is respondents' theory upon which the trial court acted in granting summary judgment to the city and its officers that they cannot be responsible for the alleged dangerous condition of the street under construction since the county had assumed the entire control of the work and it was being done under county supervision by an independent contractor under contract with the county. Appellants counter with the argument that under the sections of the Streets and Highways Code under which these proceedings were undertaken there is no legal authority for the respondent city to relieve itself and its officers of their responsibility in the matter of the improvement of a city street.

The parties agree that the proceedings were taken under sections 1680–1683 of the Streets and Highways Code.

Section 1680 provides in part:

> "The board of supervisors of any county may, by a resolution adopted by a four-fifths vote of its members, determine that any of the following activities are of general county interest and that county aid shall be extended therefor:
>
> "(a) The laying out, opening, construction, improvement, maintenance, repair, or altering of all or any part of any street within a city or extending along or across the boundary of a city.
>
> * * * * * *
>
> "(e) The construction of the necessary pavements, curbs, culverts, bridges, tunnels, subways, viaducts, drainage facilities or structures incident to or a part of such street.
>
> "(f) The acquisition of any real property or interest therein, rights of way or other property necessary for any of the purposes mentioned in this section."

Section 1682 provides:

> "Thereafter and in accordance with such resolution the county may give aid in one or more of the following ways:
>
> "(a) Contribute money.
>
> "(b) Acquire and deliver material.
>
> "(c) Furnish labor or engineering services.
>
> "(d) Loan its road building machinery.
>
> "(e) Pay or contribute money to be used for the payment of interest upon, or for the payment or redemption of, bonds, the proceeds of which have been used for, or which have been issued in payment for. work mentioned in this article."

[1] Appellants argue, and we must agree with them, that these sections do not contemplate or authorize a county to undertake such work itself, but only authorize the county to contribute money, material, labor and engineering services and to loan its road building machinery to a city for use *by the city* for such street work to be done *under the city's supervision and control.*

[2, 3] It is settled law that the establishment and improvement of city streets is a municipal affair. City of Walnut Creek v. Silveira, 47 Cal.2d 804, 812, 306 P.2d 453 and cases cited. It is equally settled that counties have only such powers as are expressly granted to them and such others as are necessarily implied from those expressly granted. Gov.Code § 23003; San Vicente Nursery School v. County of Los Angeles, 147 Cal.App.2d 79, 85, 304 P.2d 837; Tax Factors, Inc. v. County of Marin, 20 Cal.App.2d 79, 87–88, 66 P.2d 666.

The full purpose of the quoted provisions of the Streets and Highways Code may readily be accomplished by the county furnishing aid of the several kinds enumerated in section 1682 for use by the city under the city's supervision and control. There is no necessity for implying the additional power, not expressly granted, to the county to undertake such work itself. That power cannot be read into the quoted provisions either expressly or by necessary implication.

Other cognate sections of the Streets and Highways Code lend added force to this conclusion. Section 1684 provides expressly: "*The city* shall use all aid which it receives in the activities described in the resolution and *shall return to the county* any portion of such aid which is not thus used." (Emphasis ours.) This section clearly means that the city shall do the work, not the county.

The immediately following provisions of the Streets and Highways Code provide an express method for the county to take over and do such street work itself. Sections 1700 and 1701 authorize a county board of supervisors to declare by resolution, with the consent of the governing body of the city, "any highway in the county lying in whole or in part within a city to be a county highway." If this is done section 1702 provides: "Thereafter the board of supervisors of the county may improve and maintain such highway as other county highways are improved and maintained * * *"

The distinction between the right to give aid to the cities under sections 1680–1682 and to "improve and maintain" the streets which are made county highways under sections 1700–1702 is clear and obvious. In the latter case where the Legislature intended to give the counties the power to do the work themselves it used apt and explicit language conferring that power to do the work themselves it used tions 1680–1682 it gave no power to the counties except to furnish aid to the cities.

[4] Since the attempt of the respondent city to delegate its powers and duties in this manner to the county finds no authorization in the law its unauthorized action cannot relieve it or its officers of their duty of safely maintaining the streets of the city. Nor can the unauthorized delegation by the county to the contractor have any greater effect.

Judgment reversed.

KAUFMAN, P. J., and DRAPER, J., concur.

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172 Cal.App.2d 330

Eugene Roy LEACH, Plaintiff, Cross-Defendant and Respondent,

v.

Jeanne Theresa LEACH, Defendant, Cross-Complainant and Appellant (two cases).

Civ. 18447, 18574.

District Court of Appeal, First District, Division 2, California.

July 27, 1959.

Action by husband for declaratory relief. From adverse judgments in the Superior Court, County of Alameda, Thomas J. Ledwich and Richard H. Chamberlain, JJ., the wife appealed. The District Court of Appeal, Dooling, J., held that where final decree of divorce incorporating property settlement agreement as part thereof and ordering that party comply therewith had become a final judgment, it was not subject to collateral attack and that the wife was not entitled to seek a determination in a declaratory relief action to determine her rights under another provision of the property settlement agreement requiring husband to make support payments.

Part of one judgment reversed with directions and other judgment affirmed.

1. Divorce ⚷255

Where final decree of divorce incorporating property settlement agreement as a part thereof and ordering the parties to comply with its terms had been allowed to become a final judgment, it was not subject to collateral attack by the wife. West's Ann.Civ.Code, § 711.

2. Divorce ⚷255

Where divorce court has jurisdiction over the parties and subject matter, even if its decree in respect to property settlement agreement incorporated therein was erroneous on its face, it could not be collaterally impeached on that ground.

3. Divorce ⚷255

Fact that a divorce decree incorporating a property settlement of the parties might contravene the statute as an unlawful condition did not render it subject to collateral attack. West's Ann.Civ.Code, § 711.

4. Declaratory Judgment ⚷45

Where another action is pending in which a party may secure all the relief sought in a declaratory relief action the court may properly refuse to entertain the action for declaratory relief. West's Ann. Code Civ.Proc. § 1061.

5. Declaratory Judgment ⚷149

In an action by husband for declaratory relief where wife in cross complaint sought a determination of her rights under another provision of the property settlement agreement requiring husband to make monthly payments for her support, relief was properly denied on the ground that a divorce court was a proper court to determine the question. West's Ann.Code Civ. Proc. § 1061.

◆

Brown, Smith & Taber, Oakland, for appellants.

John Paul Jones, Oakland, for respondents.

DOOLING, Justice.

Jeanne Theresa Leach, defendant and cross-complainant in an action for declaratory relief brought by her former husband, has taken two appeals in said action. Since the two appeals present entirely different questions we will treat them separately.

Appeal No. 18574

The parties entered into a property settlement agreement in August 1956 which was incorporated into the final decree of divorce entered October 11, 1957 in the following language:

> "It Is Further Ordered, Adjudged And Decreed that the Property Settlement Agreement entered into by the parties hereto, dated August 22, 1956, be, and hereby is, made a part of this decree as though it were fully set forth herein, and the parties are hereby ordered to comply with the terms thereof."

As a part of the property settlement agreement it was agreed that the family home "shall remain in joint tenancy, and the joint tenancy title to said property is hereby confirmed to the parties hereto."

Appellant wife was given the exclusive right of occupancy as a residence for herself and children and respondent husband agreed to pay certain expenses in connection therewith. The agreement further provided:

> "Neither of the parties hereto shall transfer or dispose of said real property without the consent of the other first had and obtained * * *"

By paragraph 2 of its judgment in declaratory relief the court decreed that the last quoted limitation "is void as an unlawful condition in violation of Civil Code Section 711 * * *" The wife appeals and attacks only this portion of the judgment.

[1] We need not determine whether this provision of the property settlement agreement contravened Civil Code, § 711 since it is too late now for respondent to attack its validity. The final decree of divorce incorporating the agreement as a part thereof and ordering the parties to

comply with its terms has been allowed to become a final judgment and it is not subject to collateral attack.

[2, 3] The divorce court had jurisdiction over the parties and subject matter and even if its decree in this respect is erroneous on its face it cannot be collaterally impeached on that ground. (29 Cal.Jur. 2d, Judgments, § 207, p. 160.) Nor does the fact that the decree may contravene a statute render it subject to collateral attack. The courts have repeatedly held in the case of decrees of distribution that provisions in such decrees contravening statutory restraints on alienation or other statutory provisions are immune to collateral attack. In re Estate of Loring, 29 Cal. 2d 423, 432, 175 P.2d 524; Manning v. Bank of California, 216 Cal. 629, 634–635, 15 P.2d 746; Luscomb v. Fintzelberg, 162 Cal. 433, 438–439, 123 P. 247; Keating v. Smith, 154 Cal. 186, 191, 97 P. 300; Crew v. Pratt, 119 Cal. 139, 151–152, 51 P. 38; In re Estate of Buckhantz, 159 Cal.App.2d 635, 644, 324 P.2d 317.

In Pacific Mut. Life Ins. Co. of California v. McConnell, 44 Cal.2d 715, on pages 725, 726–727, 285 P.2d 636, on page 641, the court assembled a host of authorities in support of the statement: "It is the general rule that a final judgment or order is res judicata even though contrary to statute where the court has jurisdiction in the fundamental sense, i. e., of the subject matter and the parties."

Appeal No. 18447

By cross-complaint appellant sought a determination in the declaratory relief action to determine her rights under another provision of the property settlement agreement requiring the husband to make certain monthly payments for her support, in view of her subsequent remarriage. The court sustained a demurrer to this cross-complaint without leave to amend and from the judgment following this order cross-complainant appeals.

The trial court's order was based on the conclusion of the trial judge "that the divorce court is the proper court" to determine this question.

Section 1061, Code of Civil Procedure provides with regard to actions for declaratory relief: "The court may refuse to exercise the power granted by this chapter in any case where its declaration or determination is not necessary or proper at the time under all the circumstances."

[4] Where another action is pending in which a party may secure all the relief sought in a declaratory relief action the court may properly refuse to entertain the action for declaratory relief. Schessler v. Keck, 125 Cal.App.2d 827, 837, 271 P.2d 588; Marden v. Bailard, 124 Cal.App.2d 458, 466, 268 P.2d 809; Wieber v. Worton, 105 Cal.App.2d 626, 234 P.2d 114; Pacific Electric Ry. Co. v. Dewey, 95 Cal.App.2d 69, 71–72, 212 P.2d 255; Sunset Scavenger Corp. v. Oddou, 11 Cal.App.2d 92, 95–96, 53 P.2d 188; Stenzel v. Kronick, 102 Cal.App. 507, 510, 283 P. 93.

[5] Here the appellant can seek execution in the divorce action and her rights can be fully determined therein. We cannot find any abuse of discretion in the order sustaining demurrer to the cross-complaint.

Paragraph 2 of the judgment entered herein on September 19, 1958 is reversed with directions to the court to amend said judgment to decree that the provision of the property settlement agreement, which it held void, is binding upon the parties; and the judgment against cross-complainant on the cross-complaint is affirmed.

KAUFMAN, P. J., and DRAPER, J., concur.

CITY OF POMONA, a municipal corporation, Plaintiff and Respondent,

v.

STATE BOARD OF EQUALIZATION, an agency of the State of California; Monte Vista, a municipal corporation; and the County of San Bernardino, Defendants,

City of Montclair (formerly known and sued and named as "City of Monte Vista") and the County of San Bernardino, Appellants.*

Civ. 23715.

District Court of Appeal, Second District, Division 1, California.

July 14, 1959.

Rehearing Denied Aug. 5, 1959.

Hearing Granted Sept. 11, 1959.

Mandamus proceeding concerning the apportionment of certain taxes. From a judgment of the Superior Court of Los Angeles County, Robert E. Roberts, J., assigned, the City of Montclair and the County of San Bernardino appealed. The District Court of Appeal, Fourt, J., held that where a single retail store was located within two cities each of which had a sales tax ordinance adopted pursuant to the statute and the lower court made no finding as to what percentages of the buildings were within the respective cities, allocations of the sales tax receipts should be made on the basis of the whole store as a place of business and not on just the amount of floor space of certain departments which happen to be bisected by the dividing line between the political subdivisions.

Judgment reversed.

1. Licenses 🔑15.1(1)

A "sales tax" is an excise and privilege tax levied on a retailer for the privilege of selling tangible personal property. West's Ann.Rev. & Tax.Code, § 6051.

See publication Words and Phrases, for other judicial constructions and definitions of "Sales Tax".

2. Taxation 🔑1

An "excise tax" is imposed upon the right to exercise a privilege.

See publication Words and Phrases, for other judicial constructions and definitions of "Excise Tax".

3. Taxation 🔑1

A privilege tax is not a property tax.

4. Licenses 🔑15.1(1)

A sales tax is laid solely on the retailer and not on the consumer and the tax is upon the gross receipts and not upon the individual sale of merchandise. West's Ann. Rev. & Tax.Code, § 6051.

5. Evidence 🔑83(1)

The appellate court must presume that the board of equalization in issuing one sales tax permit abided by the law and performed its duty.

6. Licenses 🔑15.1(6), 29

Where single retail store was located within two cities each of which had a sales tax ordinance adopted pursuant to the statute and only one sales tax permit was issued by the board of equalization and the board determined that there was only one place of business and that the issuance of a single permit was legal and proper, the fact that the store was located in two cities did not alter the nature of the tax imposed nor did it change the character of the operation of the store or the measure of the tax to be applied. West's Ann.Rev. & Tax. Code, §§ 7200–7207.

7. Licenses 🔑29

Where retail store was located within two cities each of which had a sales tax ordinance adopted pursuant to the statute, the tax should be apportioned according to the percentage of the place of business and the taxing jurisdiction.

8. Licenses 🔑29

Where a single retail store was located within two cities each of which had a sales tax ordinance adopted pursuant to the statute and the lower court made no finding as to what percentages of the buildings were within the respective cities, allocations of the sales tax receipts should be made on the basis of the whole store as a place of business and not on just the amount of floor space of certain departments which happen to be bisected by the dividing line between the political subdivisions. West's Ann.Rev. & Tax.Code, §§ 7200–7207.

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* Opinion vacated 1 Cal.Rptr. 489, 347 P. 2d 904.

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FOURT, Justice.

This is an appeal from a judgment made in a mandamus proceeding concerning the apportionment of certain taxes.

The city of Pomona is a municipal corporation, hereinafter referred to as "Pomona," located in the county of Los Angeles. The city of Montclair is a municipal corporation, incorporated as the City of Monte Vista on April 25, 1956, and hereinafter referred to as "Montclair," located in the county of San Bernardino. The county of San Bernardino is a duly existing county of the state of California, at times herein referred to as "the county." On February 28, 1956, the city council of Pomona adopted an ordinance imposing a one percent sales and use tax pursuant to the Bradley-Burns Uniform Local Sales and Use Tax Law (Part 1.5, section 7200–7207, Revenue and Taxation Code), hereinafter referred to as the "Bradley-Burns Act."

On May 22, 1956, the county of San Bernardino adopted an ordinance imposing a one-tenth of one percent sales and use tax within the county, pursuant to the Bradley-Burns Act. On May 28, 1956, the city council of Montclair adopted an ordinance imposing a nine-tenths of one percent sales and use tax within that city, pursuant to the Bradley-Burns Act.

The two cities and the county each entered into an agreement with the State Board of Equalization, hereinafter referred to as the "board," which agreements provided, among other things, that the Board should "perform exclusively all functions incident to the administration and operation of" said respective ordinances. Likewise, it was agreed that all provisions of the law applicable to the administration and operation of the State Sales and Use Tax should be applicable to the administration of the ordinances; and further, that the said Board should prescribe and adopt such rules and regulations as in its judgment are necessary or desirable for the administration and operation of the ordinances, and the distribution of the local taxes collected thereunder.

The county boundary line between Los Angeles county and San Bernardino county is the boundary line between Pomona, in Los Angeles county, and Montclair, in San Bernardino county. Sears, Roebuck & Company, hereinafter referred to as "Sears," have and do operate a retail store with an address of 1600 East Holt Street, Pomona, consisting of two buildings, the first of which (sometimes hereinafter referred to as the "store") includes sales floor area, storage area, offices and administration area, cafeteria and other facilities; the second of which is known as a service building and contains a service station, sales area, warehouse and other facilities. The buildings are approximately 300 feet apart. Each of such buildings is located astride the boundary line between the two cities and counties. The buildings are part of a large, modern integrated shopping center known as Pomona Valley Shopping Center, hereinafter referred to as the "Shopping Center." Sears, as such, does not own any of the land or buildings within the Shopping Center. Some of the land within the shopping center and the two buildings occupied as the Sears store are owned by Cecil P. Bronston, as successor co-trustee of the Supplemental Savings and Retirement Plan of Sears, Roebuck & Company employees, hereinafter referred to as the "owner". The land so owned is subject to agreement with the Shopping Center which requires that certain areas be maintained for parking, and be subject to use by the customers of any of the establishments in the Shopping Center, and that certain ratios between sales floor area and parking area be maintained; and certain ratios maintained between sales floor area and parkways and walkways are subject to a non-exclusive easement in favor of the Shopping Center, its tenants and their customers. The owner has certain corresponding rights in various additional areas of the Shopping Center, including rights to have its lessees use other parking areas in the shopping center, and certain other and additional rights. All of the rights of the owner are leased to Sears for a term of years.

There was evidence which apparently was not disputed to the effect that the Sears store building is located 70.06 percent within Pomona, and 29.94 percent within Montclair; and that 14.95 percent of the Sears' service building is located within Pomona, and 85.05 percent within Montclair. Therefore, if the area of both buildings is computed, 54.14 percent is within Pomona, and 45.86 percent is within Montclair.

The Board collected from Sears for the third quarter of 1956, pursuant to the Bradley-Burns Act and the ordinances adopted by the cities and county, the sum of $32,375.16, that amount being one percent of the gross receipts of Sears as the place of business for that particular term. Pomona filed a petition for a writ of mandate and sought to compel the Board to pay the entire sum to it. Montclair and San Bernardino county contended that only a portion of the entire amount was due Pomona, and that the balance was due to Montclair and San Bernardino county, in their respective portions.

After a trial in April, 1957, a memorandum of decision was filed by the judge wherein he indicated that Pomona was entitled to 45.70 percent of the sum of money on hand with the Board, and that Montclair was entitled to nine-tenths of 54.30 percent of said sum, and that the county of San Bernardino was entitled to one-tenth of 54.30 percent of said sum. The court stated in its memorandum, "The evidence clearly demonstrates the unitary character and single location of Sears' business, but the application of the direct or separate accounting method under the circumstances presented herein would invoke an undue burden upon the retailer. On the other hand, the application of the factor formula method reflects a just and equitable allocation. Arithmatical accuracy is not generally possible in this difficult field. All methods of allocation, direct or separate accounting, as well as factor formula, contain estimates and, in varying degrees, are applied by the exercise of human judgment. If the method adopted accords with our statutes and regulations and produces an allocation approximately correct, although not meticulously precise, and is arrived at by the exercise of fair human judgment, so that it reasonably attributes gross receipts from sales allocable to that portion of the place of business within the taxing jurisdiction, it would seem to meet the test of being just and reasonable.

"The tax is not upon the sale but is upon the privilege of doing business and only those gross receipts from sales which are not attributable in any part to the place of business within the taxing jurisdiction should be excluded from the measure of the tax. The place of business in the instant matter is located within two taxing jurisdictions and thus the sales tax should be apportioned in accordance with that portion of the place of business within each of such jurisdictions. An apportionment based upon the location of the physical facilities constituting the place of business appears to be a reasonable and practicable measure of apportionment which can be applied to this action and with just and equitable results."

The trial court then determined the percentages "of the buildings and land used by Sears Roebuck & Company" in the respective cities, and determined that Pomona was entitled to 45.70 percent of the sum of money on hand with the Board, and Montclair was entitled to nine-tenths of 54.30 percent and the county of San Bernardino was entitled to one-tenth of 54.30 percent of the money on deposit with the Board.

Thereafter, pursuant to a motion made by Pomona, the orders of submission and directing judgment were vacated, the trial was reopened and additional evidence was taken. The court, on August 31, 1958, signed a judgment determining that Pomona was entitled to 87.2848 percent of the money on deposit, Montclair was entitled to nine-tenths of 12.7152 percent of said sum, and San Bernardino county was entitled to ⅒ of 12.7152 percent of the amount. The trial court in the last order, determined in effect that the lamp department, the garden shop department and the furniture department in the Sears' buildings were each divided by the county boundary line; that all of the other departments of the store making retail sales were entirely within one city or the other; that the net sales of the departments located entirely within Pomona constituted 82.7155 percent of the total net sales of the store, and the net sales of the departments located entirely within Montclair constituted 6.6112 percent of the total net sales of the store; that of total sales floor area of the furniture department (by which is meant area in which merchandise is displayed and where sales personnel and customers customarily stand in negotiating the sale of merchandise), 34.5563 percent was, during the third quarter—located within the city of Pomona and 65.4437 percent was located in the city of Montclair; that the total net sales of the furniture department for said period constituted 8.6604 percent of the total net sales of the store; that of the total sales floor area of the lamp department 95.1363 percent was * * * located within the city of Pomona and 4.8637 percent was located within Montclair; that the total net sales of the lamp department for the period constituted 1.1941 percent of the total net sales of the store; that of the total sales floor area of the garden shop department 53.8066 percent was located within Pomona, and 46.1934 percent was located within Montclair; that the total net sales of the garden shop constituted .8188 percent of the total net sales of the store; further, that if net sales of departments lying wholly within Pomona are allocated to Pomona, and the total net sales of departments lying wholly within Montclair are allocated to Montclair, and if the net sales of the furniture, lamp and garden shop departments are apportioned between the two cities on the basis of the sales floor area of such departments lying within the respective cities, there would be allocated to Pomona 87.2848 percent, and to Montclair 12.7152 percent of the total sales of the store; that such an approach did not involve substantial variation and that it would be "more appropriate and desirable if the percentage figure be left variable."

The main issue in this case is: when a single retail store is located within two cities, each of which has a sales tax ordinance adopted pursuant to the Bradley-Burns Act, how should the sales tax collected from such retail establishment be allocated between the two cities?

It is essential in determining this case to have in mind certain fundamental statutory and regulatory provisions.

The pertinent sections of the Revenue and Taxation Code, Part 1.5, Uniform Local Sales and Use Taxes, as they read in 1956 provide as follows:

> "§ 7202. The sales tax portion of any sales and use tax ordinance adopted under this part shall be imposed for the privilege of selling tangible personal property at retail, and shall include provisions in substance as follows:
>
> * * * * * *
>
> "(d) A provision that the county shall contract prior to the effective date of the county sales and use tax ordinance with the State Board of Equalization to perform all functions incident to the administration or operation of the sales and use tax ordinance of the county.
>
> * * * * * *
>
> "(h) That any retailer subject to a sales and use tax under the county

ordinance shall be entitled to credit against the payment of taxes due under that ordinance the amount of sales and use tax due to any city in which the place of business is located; provided, that the city sales and use tax is levied under an ordinance including provisions in substance as follows:

"(1) A provision imposing a tax for the privilege of selling tangible personal property at retail upon every retailer in the city at the rate of 1 percent or less of the gross receipts of the retailer from the sale of all tangible personal property sold by him at retail in the city and a use tax of 1 percent or less of purchase price upon the storage, use or other consumption of tangible personal property purchased from a retailer for storage, use or consumption in the city.

* * * * * *

"(4) A provision that the city shall contract prior to the effective date of the city sales and use tax ordinance with the State Board of Equalization to perform all functions incident to the administration or operation of the sales and use tax ordinance of the city which shall continue in effect so long as the county within which the city is located has an operative sales and use tax ordinance enacted pursuant to this part."

"§ 7205. All retail sales for the purpose of this part shall be presumed to have been consummated at the place of business of the retailer unless the tangible personal property sold is delivered by the retailer or his agent to an out-of-state destination or to a common carrier for delivery to an out-of-state destination. * * *"

Regulations of the Board of Equalization adopted in furtherance of the administration of the collection and allocation of the tax under the Bradley-Burns Act, read in part as follows:

"2202. Place of Sale for Purposes of Local Sales and Use Tax. For the purposes of the Bradley-Burns Uniform Local Sales and Use Tax Law, all retail sales occur at the place of business of the retailer unless the tangible personal property sold is delivered by the retailer or his agent to an out-of-state destination, or to a common carrier for delivery to an out-of-state destination.

* * * * * *

"If a seller has more than one location for which sellers' permits are required, and if two or more of such locations participate in the sale, the sale occurs at the place of business where the principal negotiations are carried on. If this place is the place where the order is taken, it is immaterial that the order must be forwarded for acceptance, approval of credit, shipment, or billing. For the purposes of this rule, an employee's activities will be attributed to the place of business out of which he works."

"2099. Permits. Every person engaged in the business of selling tangible personal property of a kind the gross receipts from the retail sale of which are required to be included in the measure of the sales tax is required to hold a permit for each place of business at which transactions relating to sales are customarily negotiated with his customers. * * * If two or more activities are conducted by the same person on the same premises, even though in different buildings, only one permit is required. For example, a service station operator having a restaurant in addition to the station on the same premises requires only one permit for both activities.

* * * * * *

"A retailer is liable for the payment of tax measured by receipts from retail sales made in his place of business by operators of concessions therein, unless the concessionaires obtain permits from the Board."

It will be noted that the language used in section 7202, Revenue and Taxation

Code, is substantially the same as that used in section 6051 of the same Code.

Each of the ordinances in this case contains all of the language referred to in subdivision (h) (1) of section 7202, and they are substantially the same, excepting for the rates imposed.

The courts of this state have stated, with reference to the sales tax, in Livingston Rock & Gravel Co. v. De Salvo, 136 Cal. App.2d 156, at page 160, 288 P.2d 317, at page 319:

> [1] "A sales tax is an excise and privilege tax levied on a retailer for the privilege of selling tangible personal property. Section 6051 of the Revenue and Taxation Code says:
>
> " 'For the privilege of selling tangible personal property at retail a tax is hereby imposed upon all retailers at [a fixed percentage] of the gross receipts of any retailer from the sale of all tangible personal property sold at retail in this State. * * *'
>
> [2, 3] "An excise tax is imposed upon the right to exercise a privilege. Ingels v. Riley, 5 Cal.2d 154, 159, 53 P.2d 939, 103 A.L.R. 1. A privilege tax is not a property tax. Id.; Anders v. State Board of Equalization, 82 Cal. App.2d 88, 93, 185 P.2d 883. The law imposes the fixed rate of the tax on gross receipts and not on the individual sale of tangible personal property. Western Lithograph Co. v. State Board of Equalization, 11 Cal.2d 156, 163, 78 P.2d 731, 117 A.L.R. 838. It is not a tax on the sale or because of the sale but is an excise tax for the privilege of conducting a retail business measured by the gross receipts from sales. * *
>
> [4] "It has uniformly and consistently been held that the sales tax is laid solely on the retailer and not on the consumer. The tax relationship is between the retailer only and the state; and is a direct obligation of the former. (Citing cases.)"

The tax is upon the gross receipts, and not upon the individual sale of merchandise. And, as said in Western Lithograph Co. v. State Board of Equalization, supra, 11 Cal. 2d 156, at pages 164, 166–167, 78 P.2d 731, at page 736: "It does not become a tax on the sale nor because of the sale, but remains an excise tax for the privilege of conducting a retail business measured by the gross receipts from sales.

* * * * * *

"* * * Notwithstanding the holdings or expressions in the cases distinguished, it must here be concluded that a proper construction of the Retail Sales Tax Act of California is that the tax is not on the sale, but rather that it is a tax in the same category as property and excise taxes payable by an independent contractor engaged in the business of retail sales which, although they are reflected in the higher cost of the product or commodity offered, must be considered merely as a necessary expense of conducting the business. It is a tax computed on the gross receipts from the conduct of the business of the retail merchant."

Thus, the problem here is, what are the gross receipts of the Sears' retail establishment, and what is the proper measure to use in apportioning the tax collected between the local political jurisdictions involved?

[5, 6] There is no question but that Sears is a retail store and is a single operative unit consisting of two buildings. Only one sales tax permit was issued by the Board, and we must presume that the Board has abided by the law and performed its duty. It would seem therefore, that the Board has determined that there is only one place of business, even though there is more than one political subdivision involved in its location, and that the issuance of a single permit was legal, proper and regular. Pomona, as the petitioner in the first instance, as a matter of fact, claimed that there was only one place of business; however, it also claimed that that one place of business was in Pomona. As we view it, the fact that the store is located in two cities does not in anywise change or alter the nature of the tax imposed, nor does it

change the character of the operation of the store, or the measure of the tax to be applied. The fact that one place of business is located as Sears is located in the present case, does not necessarily establish that two contesting political subdivisions can make two places of business out of it, to the end that one or the other will get more tax dollars from the establishment.

[7] The appellants assert, and we agree, that the tax should be apportioned according to the percentage of the place of business in the taxing jurisdiction. In this case, each political subdivision adopted an ordinance for the purpose of setting up a sales and use tax, and each complied with the provisions of the Revenue and Taxation Code. The presumption set forth in section 7205, with the one exception with which we are not concerned, provides that all retail sales be presumed to have been consummated at the place of business of the retailer. The Board, in the regulations adopted, deleted the words "presumed to have been consummated," and in lieu thereof, inserted "occur." In other words, the Board has said, in effect, that for the purposes of the Bradley-Burns Act, the sale occurs at the place of business of the retailer, with exceptions with which we are not now concerned.

It would seem that the tax on the sales from the place of business should be allocable to the entire place of business, and not to only a portion of the place of business. A place of business is necessarily more than a mere sales floor area. There are, of necessity, and particularly so in a large departmentalized store, many sections such as offices, administration facilities, warehouses, storage compartments and other divisions which go to make up the place of business.

Furthermore, each of the political subdivisions entered into a contract with the Board to the effect that the Board should perform, exclusively, all functions incident to the administration and operation of the ordinances. The contract provided that the taxes were to comply with the provisions of the Revenue and Taxation Code; further, the political subdivisions bound themselves to the rules and regulations adopted by the Board. One of the purposes of the Act, in the first instance, was to relieve the retailer from filing numerous tax returns and from the necessity of dealing and negotiating with various agencies. In other words, the parties in this case contracted for an allocation to be made pursuant to Board regulations.

Another difficulty with the allocation as contended for by Pomona, and as decreed by the trial court, is that net sales and taxable sales are not the same, and as a consequence there is a potential variance between the taxable sales and the net sales of about three percent. In other words, assuming that the annual sales tax collected from the store and distributable to the local political subdivisions would amount to a figure between $125,000 and $135,000, each percent would amount to at least $1,250. If the discrepancy equalled the maximum of three percent, the difference would be at least $3,750, which, to a small municipality, is a considerable sum.

Moreover, there was no evidence to the effect that there is any reasonable relationship between the square footage of a particular department in each taxing jurisdiction, and the dollar value properly allocable to each such portion of such department. In fact, the plaintiff's own witness, a representative of Sears, testified that he had no way of knowing, nor did the records reflect whether there was such a relationship. The witness also stated that to have such information, Sears would have to set up a new method of bookkeeping, adding extra expense, time and trouble, to its operations. The witness further stated that no records were kept which reflected what percent of the non-taxable sales occurred in Pomona or in Montclair.

It is true that public utility franchise payments are not exactly parallel to the situation before us. In the public utility cases, however, it has frequently been held that returns should be apportioned. See, County of Los Angeles v. Southern Counties Gas Co., 42 Cal.2d 129, 266 P.2d 27; County of

San Diego v. San Diego Gas & Electric Co., 48 Cal.2d 25, 307 P.2d 365.

[8] The court in the present case made no finding as to what percentages of the buildings were within the respective cities, or in other words, no finding was made as to what percentage of the place of business was within Pomona, and what percentage of the place of business was in Montclair.

We are of the opinion that under the circumstances the allocation should be made on the basis of the whole store as a place of business, and not on just the amount of floor space of certain departments which happen to be bisected by the dividing line between political subdivsions.

The judgment is reversed.

WHITE, P. J., and LILLIE, J., concur.

Hearing granted; WHITE, J., not participating.

171 Cal.App.2d 850

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Augustine MATEO, Defendant and Appellant.

Cr. 3572.

District Court of Appeal, First District, Division 1, California.

July 13, 1959.

Defendant was convicted of possession of marijuana, and sale of marijuana. The Superior Court, County of Alameda, James R. Agee, J., entered judgment of conviction, and the defendant appealed therefrom and from order denying new trial. The District Court of Appeal, Bray, P. J., held that the evidence, including evidence that defendant lived in trailer adjacent to house in bedroom of which marijuana was found, that defendant stored his possessions in the bedroom and admitted ownership of cardboard box and suit case and contents, exclusive of marijuana found therein, and that defendant was in possession of marked money used in purchasing marijuana, disclosed that defendant exercised such control and dominion over the marijuana and had such knowledge of its presence and character as to warrant conviction for possession of marijuana.

Affirmed.

1. Poisons 🔑9

The evidence, including evidence that defendant lived in trailer adjacent to house in bedroom of which marijuana was found, that defendant stored his possessions in the bedroom and admitted ownership of cardboard box and suitcase and contents, exclusive of marijuana found therein, and that defendant was in possession of marked money used in purchasing marijuana, disclosed that defendant exercised such control and dominion over the marijuana and had such knowledge of its presence and character as to warrant conviction for possession of marijuana. West's Ann.Health & Safety Code, § 11500.

2. Poisons 🔑4

The crime of possession of narcotics requires that defendant exercised control and dominion over the narcotic substance and had knowledge of its presence and character. West's Ann.Health & Safety Code, § 11500.

3. Poisons 🔑4

The crime of possession of narcotics does not require that there be exclusive possession. West's Ann.Health & Safety Code, § 11500.

4. Poisons 🔑9

In prosecution for possession of narcotics, the burden is on the People to prove knowledge of the presence of the narcotic; that burden may be satisfied by facts from which such knowledge may be fairly inferred. West's Ann.Health & Safety Code, § 11500.

5. Poisons 🔑9

Possession of marked money standing alone is insufficient to prove a sale of narcotics. West's Ann.Health & Safety Code, § 11500.

6. Poisons 🔑9

The evidence, including evidence that defendant was in possession of marked money used in sale of marijuana, that the bags containing marijuana found in defendant's suitcases were similar to the bag involved in the sale, and circumstances showing the possession of marijuana by defendant in the house adjacent to which he lived in a house trailer, warranted conviction for sale of marijuana. West's Ann.Health & Safety Code, § 11500.

7. Searches and Seizures 🔑3(1)

In prosecution for possession and sale of marijuana, the evidence, including information received by officers from purchaser of narcotics and the observations of the officers and the production of a particular bag of marijuana, disclosed the existence of circumstances which would cause a person of ordinary prudence to believe that a felony had been committed in the house, with the result that the officers could enter and make a reasonable search of the premises for narcotics or other evidence of suspected sale. West's Ann.Health & Safety Code, § 11500; West's Ann.Pen.Code, § 836.

8. Arrest 🔑63(4)

"Reasonable cause" to believe that person arrested without warrant committed felony is shown when a man of ordinary care and prudence, knowing what the officer knows, would believe or entertain a strong suspicion that the person is guilty. West's Ann.Pen.Code, § 836.

See publication Words and Phrases, for other judicial constructions and definitions of "Reasonable Cause".

9. Arrest 🔑71

A search without a warrant of the premises or of the person may be incidental to a lawful arrest regardless of whether the search is made before or after arrest. West's Ann.Pen.Code, § 836.

10. Arrest 🔑63(4)

In determining whether police officer had such reasonable grounds to believe that person arrested without warrant committed a felony, the court looks only at the facts and circumstances presented to the police at the time they are required to act. West's Ann.Pen.Code, § 836.

11. Criminal Law 🔑29

Where the only possession shown is necessarily incidental to sale or furnishing narcotics, separate convictions for sale and possession of narcotics cannot be had; however, conviction may be had where the narcotic possessed is separate and distinct from that sold. West's Ann.Health & Safety Code, § 11500.

12. Criminal Law 🔑29

Separate convictions for sale and possession of marijuana were proper where additional marijuana found in possession of defendant was not incidental to the marijuana involved in the sale. West's Ann.Health & Safety Code, § 11500.

13. Poisons 🔑9

Even though information charged that defendant and his two codefendants had unlawful possession of marijuana and even though all three could not have been convicted of possession, there was not such a variance as would require that the defendant who was in possession of marijuana should be exonerated on the possession count, inasmuch as the statute provides that when several defendants are named in one accusatory pleading, any one or more may be convicted or acquitted, and inasmuch as the three defendants were not charged with joint possession or joint sale but simply with sale and possession. West's Ann.Health & Safety Code, § 11500; West's Ann.Pen.Code, § 970.

◆

Robert E. Treuhaft, Oakland, for appellant.

Stanley Mosk, Atty. Gen., Clarence A. Linn, Chief Asst. Atty. Gen., Arlo E. Smith, Deputy Atty. Gen., Preble Stolz, Deputy Atty. Gen., for respondent.

BRAY, Presiding Justice.

Defendant together with Velasquez and Carillo were convicted by a jury of two counts of violation of Health and Safety Code section 11500, (1) possession of marijuana, (2) sale of marijuana, on the same day. Defendant admitted a prior narcotics conviction. Defendant appeals from the judgment of conviction and the order denying new trial.

Questions Presented.

1. Sufficiency of the evidence: (a) possession, (b) sale.
2. Alleged unlawful search and seizure.
3. Legality of conviction on both counts.
4. Was there a variance between indictment and proof?

Evidence.

Inspector McBee of the State Narcotics Bureau met one Lopez whom he directed to make narcotic purchases in the Decoto area. The next day he gave Lopez $60 in marked money. About 5 p. m. McBee and two other officers followed an automobile containng Lopez and Carillo. The Lopez automobile stopped across the street from 615 D Street, the McBee car stopping a short distance away. The officers could look down D Street, but could not see the 615 front door. Carillo left the Lopez automobile, crossed the street, returned, then crossed the street again. McBee could see him enter upon the property at 615 D Street but did not actually see him enter the house. In a few minutes he returned carrying a brown paper bag. He got in the Lopez automobile which was then driven off. The police attempted to follow the car, but lost it. Lopez testified that he gave Carillo $50, that Carillo went into 615 D Street, came out, got another $5, went back into the house, returning in five minutes with a brown bag which he gave to Lopez, and which contained marijuana. Carillo then drove the automobile away, became suspicous of a truck which appeared to be following, and pulled off into an orchard. About 20 minutes later Carillo drove to his home and left the automobile. Lopez drove on until he encountered Highway Patrolman Boulet to whom he gave the bag containing the marijuana. Boulet radioed for the narcotics people. McBee and others responded.

The group then proceeded to 615 D Street. McBee and Inspector Ojeda were admitted at the front door by defendant's mother. There was no one in the front part of the house, but there were noises behind a locked door in the rear. McBee went around to the back door, knocked a couple of times and asked to be admitted. He could see what was apparently someone looking from behind a window curtain or shade. When there was no response McBee forced the door and entered. Other officers meanwhile entered through the door leading to the front of the house. In the rear portion there were several persons. McBee found one Morales flushing the toilet. Marijuana seeds were scattered on the bathroom floor. Defendant, Velasquez and two other men were also present, as well as two women and some children. In a bedroom McBee found a small suitcase containing a brown paper bag in which was loose marijuana, a cardboard box containing marijuana cigarettes and a sock containing seven match boxes filled with marijuana. Also in the room was a large suitcase containing ten brown paper bags filled with marijuana. In a chest of drawers was a box containing loose particles of marijuana. Defendant admitted to McBee that the small suitcase was his but denied knowledge of the narcotic contents. To Ojeda he admitted that "the suitcases" were his but denied knowledge of the contents, saying that he did not know how they got there, except that his mother had heard a noise a day or so ago while he was away and that he supposed that is how the narcotics got there. $50 of the marked money was found in defendant's possession.

Defendant testified that he lived in a trailer adjacent to 615 D Street. Late in the afternoon of March 18 he went into the house to shave. He had received various amounts of money that day, $10 from one of the men in the house, $125 from his mother and then late in the afternoon she gave him $30. (She testified that Velasquez gave her $30 that day for rent.) Carillo gave defendant $20 that afternoon in the trailer. Defendant claimed to have first met Velasquez on the 18th when the latter inquired about renting a room or trailer. Defendant did not know where he might have obtained any of the marked money. He had never seen the large suitcase or its contents. The small suitcase, the personal effects in it, the cardboard box and some of its contents he admitted were his. He denied a sale to Carillo and knowledge of any narcotics anywhere in the house.

Velasquez testified admitting possession of the marijuana found in the house, but denied any sale and any connection with the marijuana obtained by Carillo. He stated that he arrived March 18th from Los Angeles where he had purchased the marijuana. Happening by the house at 615 D Street and seeing men about he inquired as to whether the trailer was for rent. Defendant told him no but rented him a room in the house. He had taken the large suitcase into the bedroom and placed some narcotics in the small suitcase.

Carillo testified that he knocked at the door of 615 D Street but then proceeded down the street where he purchased the marijuana from one "Mosquito." When returning to the Lopez automobile, he stopped at defendant's trailer and paid him $20 which he owed.

1. Sufficiency. (a) *Possession.*

[1-4] The crime of possession of narcotics requires that defendant exercised control and dominion over the narcotic substance and had knowledge of its presence and character. People v. Tabizon, 1958, 166 Cal.App.2d 271, 332 P.2d 697; People v. Hancock, 1957, 156 Cal.App.2d 305, 310, 319 P.2d 731. Defendant does not contend that he had no knowledge of what marijuana was, but merely that he was not aware of its presence. While he lived in the trailer and apparently did not have exclusive possession of the bedroom where the narcotics were found, his mother testified that he stored his possessions in the bedroom. He admitted ownership of the cardboard box and small suitcase and contents exclusive of the marijuana. In the suitcase was a receipt in his name dated four days prior. A reasonable inference is that he retained control over the suitcase. Exclusive possession is not necessary. People v. Blinks, 1958, 158 Cal.App.2d 264, 267, 322 P.2d 466; People v. Flores, 1957, 155 Cal.App.2d 347, 349, 318 P.2d 65. While the burden is on the People to prove knowledge of the presence of the narcotic, facts from which such knowledge may be fairly inferred are sufficient. As said in People v. Antista, 1954, 129 Cal.App.2d 47, 53, 276 P.2d 177, 181, "If the substance [narcotics] had been found in the personal effects of the defendant that would have been a potent circumstance indicating knowledge of its presence, ownership and control." The prosecution's theory that Velasquez was a carrier for defendant is supported by the evidence. Apparently Carillo was a runner who got his share ($5) for arranging the sale. Defendant was presumably owner, or at least had control, and also he would necessarily have knowledge. This theory accounts for defendant's possession of the marked money and the placing of some of the narcotics in defendant's suitcase.

(b) *Sale.*

[5, 6] Possession of marked money standing alone is insufficient to prove a sale. People v. Barnett, 1953, 118 Cal.App.2d 336, 257 P.2d 1041. Here, however, there are other circumstances than finding the money on defendant. The bags containing marijuana in both suitcases were similar to the one involved in the sale. The officers observed the buyer Carillo enter the property at 615 D Street. The jury could disbelieve Carillo's story that he did not enter the house but went elsewhere to purchase the narcotic. Also Velasquez denied making a sale from the narcotics

he had in the house. There were also the circumstances showing the possession of marijuana by defendant in the house. The situation differs from that in People v. Barnett, supra, 118 Cal.App.2d 336, 257 P.2d 1041, and in People v. Lawrence, 1959, 168 Cal.App.2d 510, 336 P.2d 189, where practically the only evidence against the defendant was his possession of marked money.

2. Search and Seizure.

[7–10] Penal Code section 836 provides that a peace officer may without a warrant arrest a person when a felony has in fact been committed and he has reasonable grounds to believe the person arrested committed it. Reasonable cause is shown when a man of ordinary care and prudence, knowing what the officer knows, would believe or entertain a strong suspicion that the person is guilty. People v. Fischer, 1957, 49 Cal.2d 442, 446, 317 P.2d 967; People v. Lawrence, 1957, 149 Cal.App.2d 435, 443, 308 P.2d 821. A search without a warrant of the premises or of the person may be incidental to a lawful arrest regardless of whether the search is made before or after the arrest. People v. Simon, 1955, 45 Cal.2d 645, 648, 290 P.2d 531. The court looks only at the facts and circumstances presented to the police at the time they are required to act. People v. Silvestri, 1957, 150 Cal.App.2d 114, 117, 309 P.2d 871; People v. Moore, 1956, 140 Cal.App.2d 870, 872, 295 P.2d 969. On the 18th, following McBee's observations at 615 D. Street, Lopez told McBee that Carillo obtained the marijuana there. The bag of marijuana was produced. McBee had seen Lopez' companion leave the Lopez automobile, return and go back to the premises at 615 D Street and return carrying a brown paper bag. This bag was similar to those found in the larger suitcase. The bags of narcotics were so packed in the suitcase that there was a space for one more paper bag of the same type. The information received from Lopez, the production of the bag of marijuana and the observation of the police, were circumstances which would cause a person of ordinary prudence to believe that a felony had been committed in the house. The officers were therefore entitled to enter and make a reasonable search of the premises for narcotics or other evidence of the suspected sale.

3. Conviction on Both Counts.

[11, 12] There were approximately 10 pounds of marijuana found in the larger suitcase, and about 95 marijuana cigarettes and 7 match boxes of marijuana in the smaller suitcase. All of this was in addition to the half pound which Carillo gave to Lopez. None of this additional marijuana was incidental to the sale. It is well established that where the only possession shown is necessarily incidental to its sale or furnishing separate convictions for sale and possession cannot be had. People v. Taylor, 1958, 159 Cal.App.2d 752, 324 P.2d 715; People v. Castiel, 1957, 153 Cal.App.2d 653, 660, 315 P.2d 79. In those cases the same narcotics were involved in the multiple counts. But conviction may be had where the narcotic possessed is separate and distinct from that sold. People v. Holliday, 1953, 120 Cal.App.2d 562, 564, 261 P.2d 301. Here the marijuana left in the house was separate and distinct from that sold. Hence separate convictions for sale and possession were proper.

4. Variance.

[13] In the first count the information charged Velasquez, Carillo and Mateo with violation of section 11500, Health and Safety Code, in that "they unlawfully had in their possession a narcotic, to wit: marihuana." Defendant contends that Carillo could not under the circumstances have been found guilty of possession of the marijuana found in the room and therefore defendant Mateo should be exonerated on the possession count because "they" (that is, all three defendants) did not possess the narcotic. Assuming that all three could not have been convicted of possession (a matter we are not called upon to decide), nevertheless section 970, Penal Code, completely answers this contention: "When several defendants are

named in one accusatory pleading, any one or more may be convicted or acquitted." Moreover, the three defendants were not charged in the information with joint possession or joint sale but simply with sale and possession.

The judgment and order are affirmed.

FRED B. WOOD and TOBRINER, JJ., concur.

172 Cal.App.2d 525

Joseph J. MUSCOLINO and Margaret M. Muscolino, Petitioners,

v.

SUPERIOR COURT of the State of California in and for the COUNTY of LOS ANGELES, Respondent.

No. 23951.

District Court of Appeal, Second District, Division 1, California.

July 31, 1959.

Proceeding on property owners' petition for writ of prohibition to restrain court from proceeding with trial of action in eminent domain wherein county sought to condemn for public highway and park purposes a 12-foot wide easement over lands to be a part of riding and hiking trail from which all motor vehicles would be excluded by ordinance. The District Court of Appeal, Nourse, J. pro tempore, held that under statute giving to counties power to exercise right of eminent domain to acquire property for use as roads, streets and alleys, it has right to acquire easement for riding and hiking trails.

Peremptory writ denied.

1. Statutes ⚷212.6

When legislature enacted statute giving county power to exercise right of eminent domain to acquire property for use as roads, court must assume that word "road" was used in accordance with its commonly understood meaning as set forth in the standard dictionary of that time. West's Ann.Code Civ.Proc. § 1238.

See publication Words and Phrases, for other judicial constructions and definitions of "Road".

2. Evidence ⚷11

Court could take judicial notice of fact that at time of enacting statute granting power to county to exercise right of eminent domain to acquire property for use as roads, many roads and highways were but narrow lanes used exclusively by pedestrians, equestrians, and horse-drawn vehicles. West's Ann.Code Civ.Proc. § 1238.

3. Eminent Domain ⚷19

Under statute granting county power to exercise right of eminent domain to acquire property for use as "roads, streets, and alleys", county had power to condemn easement in strip of land to be a part of a riding and hiking trail from which all motor vehicles would be excluded by ordinance. West's Ann.Code Civ.Proc. § 1238.

Fred R. Metheny, Los Angeles, for petitioners.

Harold W. Kennedy, County Counsel and Lloyd S. Davis, Deputy County Counsel, Los Angeles, for respondent.

NOURSE, Justice pro tem.

Petitioners seek a writ of prohibition to restrain the respondent court from proceeding with the trial of an action in eminent domain.

By the subject action the county of Los Angeles seeks to condemn for public highway and park purposes an easement 12 feet in width over certain lands owned by petitioners; that strip of land to be a part of riding and hiking trails (29) and (72) from which by ordinance all motor vehicles will be excluded. The land of petitioners over which the easement is sought lies within the boundaries of the Los Angeles County

Flood Control channel and is subject to an easement for flood control purposes. It is petitioners' contention that a riding and hiking trail is neither a highway nor a road nor a park and that therefore is not a purpose as to which the power of eminent domain is given to the county under section 1238 of the Code of Civil Procedure.

[1] Petitioners' contention cannot be sustained. Section 1238 of the Code of Civil Procedure was originally enacted in 1872. It then granted to counties the power to exercise the power of eminent domain to acquire property for use as "roads, streets, and alleys." The word "roads" is a generic term and *includes all public ways.* Fischer v. County of Shasta, 46 Cal.2d 771, at page 774, 299 P.2d 222. At the time of the original enactment of section 1238 of the Code of Civil Procedure, Webster's Dictionary Unabridged Edition of 1859 was the standard and accepted dictionary and in that work "road" was defined as *"an open way* or *public passage;* * * * and as a generic term which includes highways, streets and alleys." We must assume that the Legislature used the word "road" in accordance with its commonly understood meaning as set forth in the standard dictionary of that time.

[2, 3] We may take judicial notice that at the time the statute was first enacted, many roads and highways were but narrow lanes used exclusively by pedestrians, equestrians and horse-drawn vehicles and we cannot see how it can logically be maintained that although the motor vehicle has invaded the roads of today forcing the pedestrian and equestrian therefrom it has likewise deprived the governmental bodies of their power to take land for a public use limited to pedestrians and equestrians who were the only users of roads at the time the statute was enacted.

The alternative writ heretofore issued is discharged and a peremptory writ denied.

WHITE, P. J., and LILLIE, J., concur.

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171 Cal.App.2d 862

Isobel M. DUBE, Plaintiff and Respondent,
v.
KELLEY KAR COMPANY, a corporation, etc., et al., Defendants,
Kelley Kar Company, a corporation, Appellant.
Civ. 23605.

District Court of Appeal, Second District, Division 2, California.
July 13, 1959.

Action by buyer of automobile against seller to cancel all papers and for restoration of consideration paid and other appropriate relief. The Superior Court of Los Angeles County, Wallace L. Ware, J., decreed cancellation of all instruments and awarded buyer damages, and seller appealed. The District Court of Appeal, Ashburn, J., held that evidence including witness' testimony that rental value of automobile which buyer purchased was $40 per week, but that witness did not know rental value of automobile which buyer traded in, that his company did not rent out automobiles as old as that traded in, but that if company leased anything older than new automobile, it charged same rental as for new automobile did not support allowance to buyer of $1,960 as 49-week loss, at $40 per week, of rental value of automobile traded in.

Reversed.

1. Sales ⟹52(7)

In action by buyer of automobile against seller to cancel all papers and for restoration of consideration paid and other appropriate relief, evidence sustained charge of deceit in that seller through its employee falsely and fraudulently represented to buyer before she signed conditional sales contract that she would be given copy thereof and that seller refused to give her a copy of conditional sales contract, which had been executed on one date but altered to show another date, and copy of chattel mortgage. West's Ann.Civ. Code, § 2982(a).

2. Sales ⚿130(4)

In action by buyer of automobile against seller to cancel all papers and for restoration of consideration paid and other appropriate relief, evidence including witness' testimony that rental value of automobile which buyer purchased was $40 per week, but that witness did not know rental value of automobile which buyer traded in, that his company did not rent out automobiles as old as that traded in, but that if company leased anything older than new automobile, it charged same rental as for new automobile did not support allowance to buyer of $1,960 as 49-week loss, at $40 per week, of rental value of automobile traded in.

3. Damages ⚿163(1)

Proof of rental value is essential to recovery of loss of use of automobile.

4. Sales ⚿130(4)

In action by buyer of automobile against seller to cancel all papers and for restoration of consideration paid and other appropriate relief, buyer could not recover both value of automobile, which she traded in, at time of delivery to seller and value of use thereof between time of delivery and date buyer, on ground of fraud, rescinded the purchase.

5. Sales ⚿130(3)

In action by buyer of automobile against seller to cancel all papers and for restoration of consideration paid and other appropriate relief, wherein there was no proof of use by seller of automobile traded in by buyer, rental value of automobile traded in should not have been allowed to buyer.

6. Appeal and Error ⚿1033(8)
Sales ⚿130(4)

In action by buyer of automobile against seller to cancel all papers and for restoration of consideration paid and other appropriate relief, allowance to seller of offset of $360 for rental value and $360 for depreciation in value of automobile purchased by buyer was duplication and erroneous, but seller could not complain of error on appeal for error was in seller's favor.

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R. F. Neuman, Allan M. Carson, Los Angeles, for appellant.

Sanford Simon, Sherman Oaks, for respondent.

ASHBURN, Justice.

Plaintiff bought a Ford automobile from defendant company, trading in her 1955 Dodge Station Wagon and depositing $100 as part of the purchase price, the balance being payable in installments. She gave notice of rescission on the ground of fraud and brought an action to cancel all papers and restore to her the consideration which she had paid together with other appropriate relief. The trial court decreed cancellation of all instruments, awarded her the sum of $2,113.20 and further adjudged that defendant was entitled to possession of the Ford upon payment to plaintiff of said sum of $2,113.20, which payment was declared to be necessary to restore the parties to status quo.

It is unnecessary to detail the facts except to say that several of the fraud charges, not all of them, were sustained and that plaintiff bought the Ford upon a conditional sale contract, a form which she executed in blank, and that she never received a copy of the same. This was clearly violative of subdivision (a), § 2982, Civil Code.[1]

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[1] At the time of the transaction in question said subdivision contained the following:

"(a) Every conditional sale contract for the sale of a motor vehicle, with or without accessories, shall be in writing and shall contain all of the agreements between the buyer and the seller relating to the personal property described therein. It shall be signed by the buyer or his authorized representative and by the seller or its authorized representative, and when so executed an exact copy thereof shall be delivered by the seller to the buyer at the time of its execution. * * *"

The above mentioned sum of $2,113.20 was reached in the following manner. Plaintiff was held entitled to recover the net amount received by defendant upon its sale of the Dodge, $773.32, plus cash of $100 paid as a deposit upon the Ford, plus the rental value of said Dodge car in the sum of $1,960 representing 49 weeks of use at $40 a week. Defendant was awarded an offset of $720 consisting of $360 depreciation in the value of the Ford and $360 rental value of its use for nine weeks. The result is $2,113.20 (should be $2,113.32).

[1] The complaint sounds primarily in fraud but it also alleges: "That the documents referred to as Exhibits 'C' and 'D' [Leasing Agreement and Amendment to Leasing Agreement] were delivered to plaintiff as blank forms and her signature was obtained thereon while said forms were blank. That subsequently defendants, and each of them, filled in said documents to indicate that plaintiff had actually executed a Leasing Agreement for the rental of said 1957 Ford vehicle. That defendants, and each of them, represented to plaintiff that she was merely signing a Conditional Sales Contract when in truth and fact she was signing Leasing Agreements and a Chattel Mortgage on her furniture and other personal property." Also: "That all of the documents referred to hereinbefore, with the exception of said Purchase Order, were presented to plaintiff by the defendants, and each of them, in blank and were completed in their present form without knowledge or consent on the part of plaintiff and without plaintiff being informed of the true content and legal purport thereof." These allegations related to an automobile leasing agreement, amendment to leasing agreement, chattel mortgage and conditional sale contract. All of the other documents preceded the conditional sale contract and were superseded by it. The court's findings pertain principally to the allegations of fraud which are held to be true; they also contain the following: "That it is true that defendant, Kelley Kar Company, a corporation, by and through its employee, Wilbur S. Nielsen, falsely and fraudulently represented to plaintiff before she signed the Conditional Sales Contract that she would be given a copy thereof. That it is true that after plaintiff already signed the said Conditional Sales Contract (Plaintiff's Exhibit '5') that defendant, Kelley Kar Company, a corporation, refused and failed to give plaintiff a copy of said Conditional Sales Contract. * * * That it is true that the failure and refusal of defendant, Kelley Kar Company, a corporation, to give plaintiff a copy of the Conditional Sales Contract executed on January 8th or 9th, 1957, but altered and changed to show date of January 5, 1957, and a copy of the Chattel Mortgage, were in violation of the terms of Section 2982 of the Civil Code of the State of California requiring that vendee or mortgagee be given a copy of the same at the time of the execution thereof."

Appellant argues that the quoted findings are outside the issues and that the case was tried upon the sole theory of fraud and deceit. We are unable to agree with this appraisal of the record. Plaintiff's complaint and her proof reflect a dual theory of deceit and violation of § 2982. The evidence is sufficient to support both charges, although part of the fraud allegations are not sustained. The judgment must be reversed, however, because certain factors entering into the final figure of $2,113.20 are not supported by substantial evidence.

The sum of $1,960 was fixed by the court as reasonable rental value of plaintiff's Dodge, and $773.32 as the net amount received by defendant upon resale of that vehicle. It was also found that the market value of the Dodge at the time of delivery to defendant was $1,895; it is agreed that it was encumbered to the extent of $1,121.68; the difference is $773.32 which the court found to be the net amount received by defendant upon resale of the car. Actually there is no proof of any amount for which the car was sold. To the items of $1,960 and $773.32 was added the $100 deposit paid by plaintiff on the Ford. The sum of these items was credited to plaintiff as $2,833.20 (should be $2,833.32). Defendant was awarded an offset of $720 consisting of $360 rental value of the Ford and depreciation in value of same of $360.

[2, 3] Appellant argues that there is no evidence of the rental value of the plaintiff's Dodge. The record sustains this contention. Defendant's witness, Kelly L. Ross, appraiser for defendant, testified that the rental value of the Ford was $40 a week plus six cents a mile, but that he did not know the rental value of the Dodge. "Q. Are you qualified to state what, in your opinion, would be the reasonable rental value for a 1955 Dodge Suburban Station Wagon? A. I wouldn't even attempt to answer that." He further said that his concern did not lease cars as old as a 1955 Dodge but that *if* it leased anything older than a new car it would charge the same rental. That is all there is on the subject. It does not constitute substantial evidence of the reasonable rental value of the Dodge; in no wise does it reflect any existing and general practice or custom; it does not purport to say what other persons would charge and, so far as defendant itself is concerned, rests upon a wholly hypothetical basis. Hence the allowance of $1,960 to plaintiff for loss of rental value of her car is unsupported. Proof of rental value is essential to recovery of loss of use of an automobile. Tremeroli v. Austin Trailer Equipment Co., 102 Cal.App.2d 464, 482–483, 227 P.2d 923; Hesse v. Commercial Credit Co., 97 Cal.App. 600, 602, 275 P. 970.

[4] Moreover, there appears to be no basis for allowing the buyer both the value of her car at the time of delivery to the seller and the value of its use between that time and the date of rescission. This is pointed out in Williams v. Caruso Enterprises, 140 Cal.App.2d Supp. 973, 981, 295 P.2d 592, 597: "In the light of the rule which we have announced as to the nature and extent of the seller's right of offset, it necessarily follows that there is no basis for the application of the rule approved in Adams v. Caruso Enterprises, Inc., supra, 1955, 134 Cal.App.2d 403, 406, 285 P.2d 1022, to the effect that where the seller is allowed an offset in the amount of the reasonable rental value of the car sold while in the possession of the buyer, the latter is entitled to the reasonable rental value of the car traded in by him on account of the purchase price. Moreover, it seems wholly illogical to award the buyer the full value of the trade-in, treating it as cash paid to the seller, and at the same time award the buyer an additional sum for the value of the use thereof as a car." National Funding Corp. of California v. Stump, 57 Cal.App.2d 29, 36, 133 P.2d 855, 859: "Moreover, in the other portions of the judgment the sum of $200 was allowed for depreciation on the car from the time the appellant took possession until the date of the trial. The respondents are not entitled to have both an allowance for depreciation and an allowance for the value of the use of the car. Morneault v. National Surety Co., supra [37 Cal.App. 285, 174 P. 81]." See, also, Morneault v. National Surety Co., 37 Cal.App. 285, 174 P. 81.

[5] Actually there is no proof of use of the Dodge by defendant; it is claimed by appellant that a sale of same was made and respondent's brief admits that to be a fact. If no use of the car was made no rental value should have been allowed. See Morneault v. National Surety Co., supra, 37 Cal.App. at page 287, 174 P. 81; National Funding Corp. of California v. Stump, supra, 57 Cal.App. at page 35, 133 P.2d 855.

[6] The allowance to defendant of an offset of $360 for rental value and $360 for depreciation in the value of the Ford is a duplication and erroneous. Williams v. Caruso Enterprises, supra, 140 Cal.App.2d Supp. 973, at page 981, 295 P.2d 592. But plaintiff has taken no appeal and does not complain of the error; defendant-appellant is in no position to do so for the error is in its favor. 3 Cal.Jur.2d, § 111, p. 568. In this posture of affairs it becomes unnecessary for us to attempt to determine the proper method of computing the vendor's set-off in this type of case, a question

which was left open by the recent decision of the Supreme Court in City Lincoln-Mercury Co. v. Lindsey, 52 Cal.2d 267, 339 P.2d 851. While the Williams and City Lincoln cases and similar decisions discussed in the briefs deal with the adjustment of the equities of the parties consequent upon the violation of § 2982, Civil Code, we apprehend the same rules to be applicable to the situation arising from the rescission of a purchase of an automobile upon the ground of fraud. This truth is illustrated by the quotations from the Williams and National Funding cases, supra. Williams dealt with a violation of § 2982; National Funding with the rights of the buyer arising out of a claim and delivery action and no question involving § 2982 was presented.

Numerous other points are debated by counsel but we have concluded that they require no discussion on our part.

The judgment is reversed.

FOX, P. J., and HERNDON, J., concur.

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171 Cal.App.2d 847

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Guy NORMAN, Defendant and Appellant.

Cr. 3532.

District Court of Appeal, First District, Division 1, California.

July 13, 1959.

Prosecution for burglary. The Superior Court, County of Alameda, S. Victor Wagler, J., entered judgment of conviction and defendant appealed. The District Court of Appeal, Fred B. Wood, J., held that evidence was sufficient to sustain conviction notwithstanding defendant's claim that testimony of victim was inherently incredible.

Affirmed.

1. Criminal Law 🔑1159(1)

Test on appeal is whether there is substantial evidence to support conclusion of trier of fact and it is not whether guilt is established beyond a reasonable doubt, and to obtain a reversal it must be clearly made to appear that upon no hypothesis whatever is there sufficient substantial evidence to support conclusion reached in court below.

2. Burglary 🔑41(1)

Evidence was sufficient to sustain conviction of burglary notwithstanding defendant's contention that testimony of alleged victim was inherently incredible.

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Charles R. Way, San Leandro, for appellant.

Stanley Mosk, Atty. Gen., Clarence A. Linn, Chief Asst. Atty. Gen., Peter T. Kennedy, Deputy Atty. Gen., for respondent.

FRED B. WOOD, Justice.

Convicted of burglary, defendant assigns insufficiency of the evidence, claiming that the testimony of James Brooks was inherently incredible.

[1] "The test on appeal is whether there is substantial evidence to support the conclusion of the trier of fact. It is not whether guilt is established beyond a reasonable doubt. '* * * "it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below."'" People v. Daugherty, 40 Cal.2d 876, 885, 256 P.2d 911, 916.

[2] Brooks testified that he left his apartment about 1:00 p. m., locking both the front and rear doors. Upon his return in a couple of hours the rear door was open. He rushed in and encountered the defendant who attempted to leave by the rear door. Brooks shoved him back in-

side, whereupon defendant "swung" at him and produced a knife which he held open in his hand. Brooks was able to subdue the defendant by striking him with an electric iron. They grappled for a time on the kitchen floor and Brooks was eventually able to hold defendant down and dial the operator to summon the police. In the course of the struggle, Brooks noted that his movie camera was in defendant's pocket, as well as two sets of cuff links and some tie bars and keys, all belonging to Brooks. Tucked in defendant's jacket he found two of his shirts. Defendant then asked for "a break," explaining that he had a family.

When the police arrived they found the defendant and Brooks still struggling on the floor. Defendant admitted ownership of the knife (3¼ inches long), but denied having used it. An officer testified that defendant's fingerprints were found on a jewel box that was in Brooks' bedroom and in which he said he kept his cuff links.

Defendant testified that he entered Brooks' apartment believing it to be that of a girl friend of his. He entered through the back door which he found unlocked. Finding no one there, he assumed the girl friend would return soon. So he waited. Having cigarettes and no matches and wanting to smoke, he looked around for a match. He looked in the kitchen and all over the house. He opened bureau drawers when conducting this search, looking for a match. Asked, "would you say * * * you don't recall or that you are positive that you did not have" the cuff links in his possession, he replied "I don't recall." He was about to turn the radio on and listen to some music when Brooks returned.

Defendant says the following features of Brooks' testimony are incredible: (1) He locked the rear door, whereas there was no evidence indicative of a forcible entry. (2) While struggling with defendant he closed the latter's knife with one hand. (3) He found those various articles on defendant's person, whereas none of them were observed by the police officers upon their arrival. (4) He failed to notice that defendant had been drinking, despite the fact that police officers detected the odor of alcohol and one of them expressed the opinion that defendant was under the influence of alcohol.

These are questions appropriate for consideration by the triers of the facts. They observed the witnesses, heard their testimony and weighed it. As to (1), the jury may have concluded that Brooks mistakenly yet honestly believed he had locked the rear door or that defendant made a forced entrance without leaving marks of any kind or that no one took the trouble to search for traces of a forcible entry. As to (2), Brooks said that after he got the defendant down it was not much trouble to hold him with one hand in a jujitsu wrist lock and then close the knife and search defendant's person for stolen articles. Moreover, if the jury believed that defendant was under the influence of alcohol, they well may have concluded that he was a less effective combatant than he otherwise might have been. Also, hit by an electric iron, defendant may have suffered temporary diminution of his combative powers. As to (3), the police officers' testimony tended to support Brooks' account of the struggle in the kitchen. They found the room in disarray. The kitchen table and a chair had been overturned. A coffee pot was on the floor and coffee had been spilled on the floor. One officer observed Brooks and defendant struggling on the floor. He saw the telephone on the floor. He added that possibly there were other articles on the floor that he did not recall right then. He remembered seeing a camera but could not remember the location of it.

We see nothing here so manifestly incredible as would give a reviewing court a basis for overruling the jury's implied findings of fact.

The judgment is affirmed.

BRAY, P. J., and TOBRINER, J., concur.

171 Cal.App.2d 810

Virginia O. WILSON, Plaintiff and Respondent,

v.

Wallace E. WILSON, Defendant and Appellant.

No. 23562.

District Court of Appeal, Second District, Division 1, California.

July 9, 1959.

Proceeding upon order to Show Cause Re Contempt by wife charging husband with failure to comply with alimony and child support provisions of interlocutory divorce decree wherein husband countered with order to Show Cause Re Modification of alimony and support provisions. The Superior Court of Los Angeles County, James G. Whyte, J., entered order reducing alimony and support payments and restricting husband from permitting eldest son to be in presence of any woman to whom husband was not married unless she was relative, and husband appealed. The District Court of Appeal, Lillie, J., held that where there was testimony that when husband exercised visitation privileges with eldest son, husband would sometimes have lady friend, and that son would return home in nervous and upset condition, it was proper to restrict husband from permitting son to be in presence of any woman to whom husband was not married unless she was relative, but since husband had remarried, issue was moot and restriction was no longer justified.

Affirmed in part; reversed in part.

1. Divorce ⚷286, 312.6(4)

In ascertaining whether trial judge abused discretion in determining allowance for alimony and child support, appellate court can only interfere if it finds that, under all evidence viewed most favorably in support of trial court's action, no judge could reasonably have made order that trial judge did.

2. Divorce ⚷245(2), 309

In proceeding upon order to show cause re contempt by wife charging husband with failure to comply with alimony and child support provisions of interlocutory divorce decree, wherein husband countered with order to show cause re modification of order granting $150 per month alimony and $150 per month support for each of three children, amount of reduction in alimony and each support payment, to $110 per month, with additional provision that husband pay wife one half of gross income over $16,335 or one half of net income exceeding $6,625 for each six-month period, whichever was greater, was reasonable and in fair proportion to alleged loss in husband's income and decrease in his living expenses.

3. Divorce ⚷245(3), 309

In proceeding upon order to show cause re contempt by wife charging husband with failure to comply with alimony and child support provisions of interlocutory divorce decree, wherein husband countered with order to show cause re modification of alimony and support provisions, evidence showed that property settlement agreement, and order for alimony and support provisions of interlocutory divorce decree based thereon, were predicated not only upon husband's earnings but on all real and personal property owned by parties at time.

4. Divorce ⚷303(1)

Where there was testimony that when husband would exercise his visitation privileges with eldest son, husband would sometimes have lady friend, and that son would return home in nervous and upset condition, it was proper to restrict husband from permitting son to be in presence of any woman to whom husband was not married unless she was relative, but since husband had remarried, issue was moot and restriction was no longer justified.

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F. V. Lopardo, Los Angeles, for appellant.

Shatford & Shatford, Henry W. Shatford, Temple City, for respondent.

LILLIE, Justice.

Defendant husband, and a practising dentist, was ordered by an Interlocutory Decree of Divorce entered October 9, 1957, to pay each month to plaintiff for alimony the sum of $150, and $150 for each of the three children, totalling $600. Approximately four months later plaintiff filed an Order to Show Cause Re Contempt charging defendant with a failure to comply with the terms of the decree. On February 18, 1958, he countered with an Order to Show Cause Re Modification of the order of October 9, 1957, seeking a substantial reduction in the amount of alimony and child support, alleging a change of circumstances. The matter was heard on May 22, and the trial court ordered a modification, among other things, reducing the alimony payment to $110, and the support for each child to $110, totalling $440 per month; and additionally providing that defendant pay to plaintiff 50 per cent of all his gross income over $16,335 for each six-month period, or 50 per cent of the amount by which defendant's net income for each such six-month period exceeds $6,625, whichever is greater. The order also included a restriction preventing defendant from permitting his eldest son to be in the presence of any woman to whom defendant is not legally married, unless she be a relative. From these portions of the order defendant appeals.

Appellant argues that the trial judge grossly abused his discretion in making the order, both as to the amount of reduction allowed and the restriction on his visitation rights. He mainly contends he is entitled to a greater reduction of support payments than that allowed.

[1] Appellant concedes the well-settled rule that the trial judge is given a wide discretion in determining a suitable allowance for alimony and child support, having regard for the circumstances of the parties; and that a reviewing court is limited to the question whether the trial court abused its discretion (Whitney v. Whitney, 164 Cal.App.2d 577, 581, 330 P.2d 947). In ascertaining whether an abuse occurred, the appellate court can only interfere if it finds that, under all of the evidence viewed most favorably in support of the trial court's action, no judge could reasonably have made the order he did. Winn v. Winn, 143 Cal.App.2d 184, 299 P.2d 721; Simpson v. Simpson, 134 Cal.App. 219, 285 P.2d 313; Newbauer v. Newbauer, 95 Cal.App.2d 36, 212 P.2d 240. With this test in mind we find nothing in the evidence before us from which we could justifiably conclude that no judge could reasonably have made the order in question.

[2] The record discloses that although the property settlement agreement, upon which the order for alimony and child support in the Interlocutory Decree of Divorce was based, was executed in September of 1957, it was not approved by the court until October 9, when, defendant failing to appear and contest the divorce, it was heard as a default matter.

Appellant claims that the property settlement agreement was based solely upon his earnings and expenses then current; but it is apparent from the record that the support provisions of the agreement and subsequent order were predicated, among other things, not only upon his earnings but on all of the property, both real and personal, the parties owned at the time, a substantial amount having been divided by the other terms and conditions of the document. Nevertheless, a close scrutiny of defendant's income and expenses from January 1, 1957, through April, 1958, will disclose a factual situation far from justifying any further reduction of support payments. In this connection it would appear that the nine months (January through September, 1957) immediately prior to the default hearing provide the best indication of the earning power upon which the court approved the property settlement agreement on October 9, 1957.

Defendant submitted to the trial court a statement of his income revealing, for the nine months preceding the court's approval of the property settlement agreement, the total gross cash receipts from his dental practice to be $33,266.36, total expenses $14,407.95, and net income $18,858.41, or an average monthly net income for that period to be approximately $2,095.39. For the four months subsequent to the time the court approved the property settlement agreement (October, 1957, through January, 1958) which immediately preceded February 18, 1958 (when defendant filed his Order to Show Cause Re Modification alleging a change of circumstances in his income), defendant's gross cash receipts were $10,573.86, total expenses $5,983.62 and net income $4,590.24, establishing an average monthly net income for this four-month period of approximately $1,147.56. And up to the date of the hearing on the Order to Show Cause, May 22, 1958, including the three months of February, March and April of 1958, defendant's gross cash receipts were $7,693.15, total expenses $4,516.62, and net income $3,176.53, or an average monthly net income for the three-month period of approximately $1,058.84.

However, the Summary of Income Data submitted by the defendant discloses several additional items the trial judge no doubt took into consideration in making his order. We point these out, keeping in mind the somewhat seasonal character of the dental practice. Analyzing defendant's own figures, it is clear that the alleged decline in his income did not begin in October of 1957 or thereafter, as claimed by defendant in attempting to establish the change of condition necessary to justify a reduction; but it began in July of 1957, three months before the property settlement agreement was approved by the trial court on October 9, 1957. Even then defendant's gross cash receipts in July, 1957, were within $7 of those defendant received in January, 1957, $740.85 more than those in February, 1957, and only $484.15 less than in May, 1957. August and September, 1957, showed a decline in gross cash receipts, but each of those months was higher than the gross cash receipts for October, 1957. It is true there is a decline in net income. However, it appears to be in great part due to a rather sharp rise in expenses which seem to have increased out of all proportion to those during the prior nine-month period. Of interest also is the fact that beginning in March, 1958, (March and April) there was a decided increase in gross cash receipts, from which a trend upward might reasonably be inferred, which well explains the added provision in the modified order for a division of the gross or net income as the case may be for each six-month period upon an increase thereof.

On the other hand, defendant's living expenses decreased $365.63 from the $955.63 he claimed at the time he executed the property settlement agreement, to the present $590 he admitted at the hearing. Accepting defendant's income figures at their face value, between October, 1957, and May, 1958, his average net income per month was approximately $1,109. Out of this the trial judge awarded for the support of plaintiff and the three children the sum of $440, leaving $669 per month available for defendant's living expenses, which he admits amounts to $590. It appears to this court that the amount of reduction in alimony and child support was reasonable and in fair proportion to the alleged loss in defendant's income and the decrease in his living expenses; and that a further reduction would not be justified.

[3] As to the matter of taxes, the trial court without doubt considered not only the variable involved in defendant's living expenses, the $1,300 he has heretofore set aside for payment of income tax, the amount available to defendant each month after the court order has been satisfied, and the increase in his income beginning in March, 1958, but defendant's over-all financial situation, based not alone on his income but on his entire holdings. Unlike the representation appellant makes that

the property settlement and the support allowances in the subsequent order of October 9, 1957, were predicated upon his earnings and expenses alone, we find from the evidence and inferences to be reasonably drawn therefrom that the support provisions of the property settlement agreement which gave rise to the order were based upon all of the terms and conditions in the document. A reading of the property settlement agreement discloses that the support covenants therein were based upon, and a part of, all of the provisions of the entire writing, and that there was nothing in the agreement indicating that support was predicated upon only defendant's earnings. It is clear that substantial property of the parties was divided by virtue of the agreement, and that besides his dental practice, including the lease and all dental equipment, furniture and furnishings, defendant retained as his sole and separate property a house and lot at 849 South Glendora, West Covina, furniture and furnishings located therein, a lot in Rancho Estates, West Covina, a 1948 Plymouth automobile, an insurance policy and an account in the Bank of America. Although we do not question the alleged generosity which motivated defendant's execution of the property settlement agreement in the first instance, it is obvious that the parties were not guided entirely by defendant's income and expenses in agreeing to the support provisions in question, but that other factors contributed considerably to a voluntary disposition of their respective rights and obligations at that time. Although the record fails to show that as of the date of hearing appellant had other assets than a car partially paid for, it also fails to disclose, assuming the car to be his only property, how or why, only four months later (when he filed his Order to Show Cause), the substantial assets he received by virtue of the division of property under the settlement agreement had become exhausted.

[4] Appellant further contends that the trial court was guilty of gross abuse of discretion in prohibiting him from having his son with him in the presence of a female companion not his wife or not within the third degree of consanguinity. The evidence viewed in the light most favorable to the trial court's order discloses that when defendant exercised his visitation privileges with the older boy he did not take him to his home but to the beach, parks or Disneyland, and that at times defendant had a lady friend with him. As to how often, the following occurred at the hearing:

> "Q. (By Mr. Shatford) One further question. When you do take the boy, isn't it true that generally, say the majority of the times you take the boy, you have some lady friend of yours with you, so that the boy is not with you but he's always with you and someone else?
>
> "A. Occasionally, not all the time.
>
> "Q. The majority of the time, though, isn't that true, Doctor?
>
> "A. Well, I wouldn't say the majority of the time."

Since there was further evidence that the boy came home from his visits with his father in a nervous and upset condition, it was not only reasonable and proper for the court to restrict defendant's visitation rights in the manner in which it did, but entirely in keeping with the court's first consideration, the welfare of the minor child. Counsel have stipulated that appellant, since the filing of this appeal, has remarried which justifies the assumption on our part that in the future he will confine his female companionship to his wife. From the evidence it is obvious that the order was primarily designed to prevent him from subjecting the boy to the company of his lady friends. Since his field of conquest has been limited by matrimony, and the immediate issue has become moot there appears to be nothing in the record to further justify the restriction.

We find manifest no abuse of the trial court's discretion concerning that portion of its order modifying the alimony and child support payments and affirm that portion of the order appealed from. As to the restriction placed on defendant's visitation rights, for the foregoing reasons that portion of the order is reversed each party to bear his own costs on appeal.

WHITE, P. J., and FOURT, J., concur.

172 Cal.App.2d 77

Bertram M. HORN and Lawrence J. Horn, Plaintiffs and Respondents,

v.

Orville GOVAN and Ellen Govan, Defendants and Appellants.

Civ. 9589.

District Court of Appeal, Third District, California.

July 16, 1959.

Hearing Denied Sept. 11, 1959.

Suit to quiet title to realty in which defendant-husband had conveyed his interest in property to his brother, who claimed no benefit from the deed and maintained that any title which he and defendant-husband had in the property was in trust for their mother. From adverse judgment of the Superior Court, Lake County, Benjamin C. Jones, J., the defendants appealed. The District Court of Appeal, Schottky, J., held that evidence was sufficient to rebut any presumption of fraud on part of brother and was insufficient to establish that brother became trustee for benefit of defendant-husband as result of a constructive trust.

Judgment affirmed.

1. Deeds 🔑194(5)

A deed which has been acknowledged by grantor and recorded by grantee is presumed to have been duly delivered.

2. Deeds 🔑194(5)

In action to quiet title to land and for damages for holding of real property by defendant, wherein defendant-husband testified that he did not intend deed conveying his interest in property to his brother to be effective except in event of his death and that he did not intend that deed be recorded until after his death, presumption that deed, which had been acknowledged by defendant-husband and recorded by his brother was duly delivered, was sufficient to support finding that deed was valid and not void for lack of delivery.

3. Appeal and Error 🔑995

In action to quiet title to realty in which defendant-husband had conveyed his interest to his brother, even if a confidential relationship existed between defendant-husband and his brother and there was lack of consideration and activity of brother in preparation of conveyance and lack of independent advice to defendant-husband gave rise to a presumption of fraud, question of whether such presumption was overcome was one for trial court to determine.

4. Trusts 🔑110

In suit to quiet title to realty in which defendant-husband had conveyed his interest in property to his brother who claimed no benefit from deed and maintained that any title which he and defendant-husband had in property was in trust for their mother, evidence was sufficient to rebut any presumption of fraud on part of brother and was insufficient to establish that brother became trustee for benefit of defendant-husband as result of a constructive trust.

5. Limitation of Actions 🔑44(2)

Under statute providing that no action for recovery of real property, or for recovery of possession thereof can be maintained unless it appears that plaintiff or his predecessor was seized or possessed of property within five years before commencement of action, plaintiffs' predecessor who obtained legal title to property by virtue of a 1946 deed and who did not convey property until 1956 after which it was subsequently obtained by plaintiff later in 1956 had required seisin of property within the statutory period. West's Ann.Code Civ. Proc. § 318.

6. Quieting Title ⚿10(1)

Plaintiff in a quiet title action must stand upon the strength of his own title and not upon the weakness of the adversary's.

7. Quieting Title ⚿10(2)

One claiming an equitable interest in property cannot prevail as against defendant who has legal title, but where both parties assert mere equities in the property, an action to quiet title may be maintained to ascertain which party has the superior equity.

8. Quieting Title ⚿10(3)

Where plaintiffs had entered into escrow agreement for purchase of property in which a former owner claimed an interest, plaintiffs had a sufficient equitable interest in property under escrow agreement to maintain a quiet title action prior to conveyance of property to them. West's Ann.Code Civ.Proc. § 318.

9. Quieting Title ⚿44(2)

In action to quiet title to certain real property and for damages for holding of said real property by defendants, escrow agreement between plaintiffs and title company from which they purchased property was admissible to show plaintiffs' equitable claim to property. West's Ann.Code Civ. Proc. § 318.

10. Appeal and Error ⚿1051(1)

In action to quiet title to certain real property, wherein there was testimony that title company from which plaintiffs purchased property conveyed property pursuant to an escrow agreement, even though it may not have been proper to admit deed because it was executed after suit was filed, no possible prejudice could have resulted from its admission. West's Ann.Code Civ. Proc. § 318.

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Falk, Johnson & Cleland, Ukiah, for appellants.

Lloyd J. Cosgrove, Royal E. Handlos, Herbert Chamberlin, San Francisco, for respondents.

SCHOTTKY, Justice.

Plaintiffs Bertram M. Horn and Lawrence J. Horn filed an action against defendants Orville Govan and Ellen Govan to quiet title to certain real property in Lake County and for damages for the holding of said real property by defendants. Defendants filed an answer admitting that defendant Orville Govan was in possession of said real property and alleging that he had an interest therein and denying that defendant Ellen Govan claimed any interest in said real property. Defendants also alleged that plaintiffs' action was barred by section 318 of the Code of Civil Procedure.

The case was tried by the court sitting without a jury, and the court found that plaintiffs were the owners of said real property and entitled to the possession thereof; that defendants had no interest therein; and that plaintiffs' cause of action was not barred by section 318 of the Code of Civil Procedure. Judgment was entered in accordance with said findings and defendants have appealed from said judgment.

Appellants made a number of contentions, but before discussing them we shall summarize briefly the evidence as shown by the record. Appellant Orville Govan and his brother Roy, who is respondents' predecessor in interest, gained title to the subject property by decree of distribution from the estate of their brother James Govan in 1944. In 1946 Orville signed a deed conveying his interest in the property to Roy and his wife. There is substantial evidence to support the finding of the court that this deed was acknowledged by Orville before a notary. The deed was recorded by Roy about a week later. In 1947 Orville moved onto the subject property, and except for a period of about a year and a half when the property was rented, Orville has continued to live on the property during the summers, although he would move into town during the winters as the dwelling was not "winterized." It was not contended at the trial, nor is it contended on appeal, that Orville has gained any rights by reason of an adverse possession.

By deed dated July 20, 1956, Roy and Ruth Govan conveyed the property to Mr. and Mrs. Tidball. This deed was acknowledged on July 23, 1956, and recorded August 10, 1956. The Tidballs thereupon granted the property to the Lake County Title Company by a deed also dated July 20th. This deed was acknowledged on July 27th and recorded August 10th. On July 30, 1956, the title company entered into an escrow agreement with the respondents Bertram and Lawrence Horn. On October 18, 1956, the respondents filed this quiet title action. On October 22, 1956, the title company conveyed the property to respondents.

[1, 2] It is appellants' first contention that the 1946 deed from Orville to Roy was void for lack of delivery. Appellants argue that Orville did not intend the deed to be effective except in the event of his death to avoid unnecessary probate expenses; that he did not intend that the deed be recorded until after his death; and that this testimony of Orville was uncontradicted. However, such testimony is contradicted by the presumption that a deed which has been acknowledged by the grantor and recorded by the grantee was duly delivered. (15 Cal.Jur.2d Deeds, sections 111, 112.) Such presumption alone is sufficient to support the finding that the deed was valid. Willis v. Holback, 33 Cal.App.2d 145, 147, 91 P.2d 140. In addition to the presumption of the validity of the deed, there was the testimony of Roy that he was requested by Orville to have the deed drawn up so Orville could have the property transferred out of his name for the benefit of the mother of the brothers. Such transfer was to expedite any future sale of the property.

[3] Appellants' second contention is that if Roy took legal title then Roy became trustee for the benefit of Orville. Appellants' theory is that evidence of a confidential relationship between Roy and Orville, lack of consideration, activity by Roy in the preparation of the conveyance, and lack of independent advice to Orville give rise to a presumption of fraud and that this court should therefore declare that Roy held the property for the benefit of Orville as the result of a constructive trust.

[4] There is no merit in this contention. Even if, as contended by appellants, a presumption of fraud did arise, the question of whether such presumption was overcome was one for the trial court to determine. The record fully supports the following statement of the trial court in its memorandum opinion: "In the first place Roy Govan claims no benefit from the deed by his brother Orville to him. His position is, and it is supported by uncontradicted evidence, that any and all title which he or his brother Orville ever held in the property was in trust for their mother. With this contention the Court has no alternative but to agree in the light of the evidence." There was also the testimony of Roy that Orville requested him to have the deed drawn up so that the property could be transferred out of his name for the benefit of the mother of the brothers. There was ample evidence to rebut any presumption of fraud.

Furthermore, this contention of appellants could not be sustained because appellants did not plead fraud or ask the declaration of a constructive trust in their answer. As was said in Strong v. Strong, 22 Cal. 2d 540, at pages 545–546, 140 P.2d 386, 389:

> "Defendant contends that the judgment quieting title in her should be affirmed on the ground that she was induced by her husband's false representations to sign the deed. Defendant did not plead fraud, however, although the general rule that fraud must be specifically pleaded [citation] applies particularly to quiet title actions. [Citations.] Defendant, moreover, is not the legal owner, for title passed on execution of the deed. [Citation.] Any rights that she might have to the can-

> cellation of the deed or to the declaration of a constructive trust are entirely equitable [citations], and it is settled that such rights cannot be established in an action to quiet title when the pleadings contain merely general allegations asserting defendant's ownership and denying that of the plaintiff. [Citations.]"

Appellants next contend that respondents' action is barred by the provisions of section 318 of the Code of Civil Procedure, which reads: "* * * No action for the recovery of real property, or for the recovery of the possession thereof, can be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the property in question, within five years before the commencement of the action."

[5] It is appellants' contention that neither respondents nor their predecessors were shown to have been in possession for a period of five years prior to the filing of the instant action. This argument ignores that part of section 318, supra, which provides that an action is not barred if respondents or their predecessor meet the requirements of seisin within the five year period. As was stated in McKelvey v. Rodriquez, 57 Cal.App.2d 214, at page 223, 134 P.2d 870, at page 875:

> "* * * Appellants state that according to the complaint respondents had not been seised of the property since 1923. However, respondents as the owners of the legal title to the property met the requirement of seisin or possession as section 318, supra, is construed. 'The requirement of seisin or possession is met when is it established that the plaintiff was possessed of legal title, and this seisin can be destroyed only by establishing the fact that a title by adverse possession was acquired by the defendant.' * * *"

By virtue of the 1946 deed, Roy had legal title to the property. As respondents' predecessor, and in the absence of a showing of disseisin effected by an adverse possession by Orville, Roy therefore had the required seisin of the property within the statutory period.

[6, 7] Appellants next contend that respondents have not shown sufficient title to maintain a quiet title action, in that on the date suit was filed legal title was in the Lake County Title Company. It is true that a plaintiff in a quiet title action must stand upon the strength of his own title and not upon the weakness of the adversary's. Valle v. Ingram, 18 Cal.2d 761, 767, 117 P.2d 869. It is likewise true that one claiming an equitable interest cannot prevail as against a defendant who has legal title. Crane v. French, 39 Cal.App.2d 642, 653, 104 P.2d 53. However, as was stated in Turner v. Deacon, 106 Cal.App. 329, at page 334, 289 P. 179, at page 181: "* * [I]t seems to be the settled law in California that where both parties assert mere equities in real property, an action under section 738 of the Code of Civil Procedure, to determine adverse claims or as it is usually termed to 'quiet title,' may be maintained to ascertain which party has the superior equity. * * *"

[8] Other authorities supporting the view that respondents had a sufficient equitable interest in the property under the escrow agreement to maintain a quiet title action against appellants are: O'Keefe v. Aptos Land & Water Co., 134 Cal.App.2d 772, 781, 286 P.2d 417, 54 A.L.R.2d 462 (plaintiff claiming under an equitable title is not barred by reason of the fact that one of the defendants, a title company, held the legal title in escrow, where the title company claimed no more than bare legal title and the controversy was between the plaintiff and other defendants to determine for whose benefit the title company held the title); Crane v. French, supra (perfect record title not always essential to plaintiff in quiet title action); Bishop v. Morrow, 12 Cal.App.2d 720, 726, 55 P.2d 1216 (the fact that legal title was in a trustee under a deed of trust did not prevent quiet title action by the trustor as against the assignee of the note and deed of trust).

[9, 10] Appellants next contend that plaintiffs' exhibits 6 and 7 were erroneously admitted in evidence over objection. Plaintiffs' Exhibit 6 is the escrow agreement between the title company and respondents and was clearly admissible to show respondents' equitable claim to the property. Plaintiffs' Exhibit 7 is the grant deed by the title company conveying title to respondents, which was executed after suit was filed. There was testimony that the title company conveyed the property to respondents pursuant to the escrow agreement, and even though it may not have been proper to admit it in evidence because it was executed after suit was filed, no possible prejudice could have resulted from its admission.

No other points require discussion.

The judgment is affirmed.

VAN DYKE, P. J., and WARNE, J. pro tem., concur.

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172 Cal.App.2d 431

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Laymond Lee RUSH, Defendant and Appellant.

Cr. 6554.

District Court of Appeal, Second District, Division 1, California.

July 29, 1959.

The defendant was convicted of the offense of issuing checks without sufficient funds. The Superior Court of Los Angeles County, Edwin L. Jefferson, J., entered judgment, and the defendant appealed therefrom and from the sentence. The District Court of Appeal, White, P. J., held that the evidence, including evidence relating to defendant's confinement in hospital for mental disease for seven months and to his release therefrom and to the needs of his children for clothes and medicines and to the purported arrangements with his sister and brother-in-law to help him get a loan and to his writing checks on bank in which he had never had any account, prior to the making of any loan, and to his never having paid such checks, warranted finding that defendant had the required intent to defraud.

Judgment affirmed and unauthorized attempted appeal from sentence dismissed.

1. Criminal Law 🔑1023(10)

No appeal lies from sentence and attempt to appeal therefrom must be dismissed.

2. False Pretenses 🔑49(2)

In prosecution for issuing checks without sufficient funds, the evidence, including evidence relating to defendant's confinement in hospital for mental disease for seven months and to his release therefrom and to the needs of his children for clothes and medicines and to the purported arrangements with his sister and brother-in-law to help him get a loan and to his writing checks on bank in which he had never had any account, prior to the making of any loan, and to his never having paid such checks, warranted finding that defendant had the required intent to defraud. West's Ann.Pen.Code, § 476a.

3. False Pretenses 🔑4

The essential elements for a conviction of the offense of issuing checks without sufficient funds are (1) an intent to defraud, (2) the drawing, (3) of a check, (4) upon a bank, (5) a lack of sufficient funds or credit with the drawee at the time the check is made, and (6) knowledge on the part of the accused of such lack of funds or credit; the gist of the offense is the intent to defraud. West's Ann.Pen. Code, § 476a.

4. False Pretenses 🔑42

In prosecution for issuing checks without sufficient funds, the essential elements of intent to defraud must in most, if not in all cases, be proven by the circumstances surrounding the transaction. West's Ann. Pen.Code, §§ 21, 476a.

5. Criminal Law ⚿1159(2)

The appellate court will not attempt to determine weight of evidence, but will decide only whether on face of evidence, sufficient facts could not have been found by jury to warrant inference of guilt.

6. Criminal Law ⚿741(1), 1160

It is function of jury in first instance and of trial court after verdict to determine what facts are established by evidence, and before verdict of jury which has been approved by trial court can be set aside on appeal on ground of insufficiency of evidence, it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support conclusion reached in trial court.

7. Criminal Law ⚿562

The determination of charge in criminal case requires proof that offense charged was committed and that offense was perpetrated by person or persons accused thereof.

8. Criminal Law ⚿1144(13)

On appeal in criminal case, appellate court must assume in favor of verdict the existence of every fact which jury could have reasonably deduced from the evidence, and then determine whether such facts are sufficient to support the verdict.

9. Criminal Law ⚿1159(2)

If circumstances reasonably justify verdict of jury, opinion of reviewing court that those circumstances might also reasonably be reconciled with innocence of defendant will not warrant interference with determination of jury.

◆

Morris Schachter, Los Angeles, under appointment by the District Court of Appeal, for appellant.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., John A. Vander Lans, Dep. Atty. Gen., for respondent.

WHITE, Presiding Justice.

The District Attorney of Los Angeles County filed an information wherein defendant was charged in three counts with violations of Penal Code, Section 476a, issuing checks without sufficient funds, a felony. It was also charged that defendant suffered two prior felony convictions, one for forgery of a fictitious name and the other for issuing checks without sufficient funds. Defendant pleaded not guilty, and a jury trial was duly waived.

By stipulation the cause was submitted on the transcript of the preliminary hearing with each side reserving the right to offer additional evidence.

[1] After reading the transcript of the preliminary hearing and hearing additional evidence the court adjudged defendant guilty as charged on all three counts of the information. He was sentenced to state prison. From the judgment and sentence defendant prosecutes this appeal. No appeal lies from the sentence, hence the attempted appeal therefrom must be dismissed (People v. Gallardo, 41 Cal.2d 57, 60, 257 P.2d 29).

As to the factual background surrounding this prosecution, the record reveals that on July 19, 1958, defendant presented a check for $35 to Helen Ferguson, a clerk at the Portola Pharmacy in Los Angeles. Miss Ferguson gave the defendant $7.00 in merchandise and $28.00 in cash in return for the check. The check (People's Exhibit 1) was drawn on the Sixth and Grand office of the California Bank and was made payable to Portola in the amount of $35 and bore the signature of Lee Rush as maker.

Also on July 19, 1958, a check for $38.53 (Count II) was presented to a salesgirl at Portola Pharmacy in exchange for $9 in merchandise and the rest in cash. This check (People's Exhibit 2), was drawn on the same bank and branch thereof and was made payable to Portola in the amount of $38.53 and bore the signature of Lee Rush as maker.

On July 20, 1958, the defendant presented a check for $38.49 (Count III) to Thelma Jeffrey, a clerk at Portola Pharmacy, for which he received $8.49 in merchandise and the rest in cash. This check (People's Exhibit 3), was drawn on the same bank and branch, was made payable to Portola in the amount of $38.49 and bore the signature of Lee Rush as maker.

All three checks (People's Exhibits 1, 2 and 3) were returned to the Portola Pharmacy by the Sixth and Grand branch of the California Bank without being honored.

Mr. J. J. Lovett, Assistant Vice President of the California Bank, searched the bank's books and records covering a period of the past ten years and could find no account, either open or closed, in the name of Lee Rush, and testified there were no arrangements for credit between Lee Rush and his bank whereby checks drawn by Lee Rush would be paid by the bank without any money being deposited by him.

In a conversation with police officer L. A. Lechner, defendant stated that he had written and passed the three checks (People's Exhibits 1, 2 and 3) and that he had never had an account at the California Bank, Sixth and Grand. Defendant told Officer Lechner that he "intended" to have his sister and brother-in-law at Crestline "make up or make a deposit or send him some money; something to that effect."

Sworn as a witness in his own behalf defendant admitted he issued the three checks in question, and in reply to a question as to whether he had an account at the drawee bank, stated, "I had called them previously to hold some checks for me." He could not "recall the name" of the person at the bank with whom he had talked, stating that, "He is an official that works at the desk in the front of the bank". Defendant testified that he had made arrangements to get the money from his brother-in-law and sister at Crestline, California on July 21. He further testified he had no intent to defraud either the Portola Pharmacy or the bank. On cross-examination defendant was interrogated as follows concerning the use to which the money was to be put, and the urgency for its use prior to receipt of financial help from his sister and her husband.

"Q. What did you do with all of this money on the 19th and 20th? A. It went for clothes and medicine and for the children.

"Q. Was there any urgency in getting all of this money before you got your $200.00 in the bank? A. At the time there seemed to be, I mean they were without decent clothes. I had been in the hospital for seven months and they had been very short of finances."

Herman Deich, defendant's brother-in-law, testified that he and his wife had arranged to get a loan for defendant in the amount of $200 and that the latter was to arrive July 18th to get the money but he didn't arrive on that date.

Mrs. Lena Mae, defendant's sister, testified that she was present at the home of Herman and Mary Deich in Crestline, California when the defendant was also present. There was discussion about helping defendant get "straightened out" and helping him with the children. They were going to help him with a loan and furnish a car for him so that he could go to work.

It was stipulated that the testimony of Mary Deich would be substantially the same as that of her husband.

[2–9] Appellant's sole contention on appeal is that the evidence is insufficient to sustain a finding that when he concededly made and delivered the checks in question he had an intent to cheat or defraud the pharmacy or the bank upon which the checks were drawn. The essential elements for a conviction of the offense denounced by Section 476a of the Penal Code are, (1) an intent to defraud, (2) the * * * drawing * * *, (3) of a check * * *, (4) upon a bank * * *, (5) a lack of sufficient funds or credit with the drawee at the time the check * * * is made * * *, and (6) knowledge on the part of the accused of such lack of funds or credit. That the prosecution proved the last five of the foregoing elements is conceded. The intent to defraud, which as appellant urges is the gist of the offense, must in most, if not in all cases, be proven by the circumstances surrounding the transaction in question (Penal Code, Sec. 21). While it may well be said that in the case now engaging our attention, the facts concerning the element of intent to defraud are in sharp conflict, we are persuaded that the record contains sufficient proof thereof to support the finding of the trial court. This we say because of the rule, many times reiterated by the reviewing courts of this state, and set forth in People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778, 779, as follows: "The court on appeal 'will not attempt to determine the weight of the evidence, but will decide only whether upon the face of the evidence it can be held that sufficient facts could not have been found by the jury to warrant the inference of guilt. For it is the function of the jury in the first instance, and of the trial court after verdict, to determine what facts are established by the evidence, and before the verdict of the jury, which has been approved by the trial court, can be set aside on appeal upon the ground' of insufficiency of the evidence, 'it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below. The determination of a charge in a criminal case involves proof of two distinct propositions: First, that the offense charged was committed; and, second, that it was perpetrated by the person or persons accused thereof. * * * We must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence, and then determine whether such facts are sufficient to support the verdict.' If the circumstances reasonably justify the verdict of the jury, the opinion of the reviewing court that those circumstances might also reasonably be reconciled with the innocence of the defendant will not warrant interference with the determination of the jury. (Citing cases.)"

Conceding the difficulty of establishing intent by direct evidence, and that the surrounding circumstances must be examined to determine the question of intent, appellant urges that any criminal intent is negatived by evidence showing that prior to his visits to the Portola Pharmacy, he had been released from Atascadero Hospital where he was confined for a mental disturbance. That prior to writing the checks he had been at the home of his sister and brother-in-law in Crestline. At this time there was a discussion about helping appellant get straightened out and helping him with the children. Appellant's sister and brother-in-law were going to help him with a loan and furnish a car for him so that he could go to work. That appellant's brother-in-law and sister had arranged to get a $200 loan for him and he was to come to Crestline to get the money. That it was after this visit that appellant went to the Portola Pharmacy and received money and merchandise in exchange for the checks. The money was used for clothes and medicine for the children. There was an urgency at that time since appellant had been in the hospital about seven months and they had been very short of finances. It was because of this apparent urgent need of the children that appellant did not wait until he got the $200 into the bank. That Mr. Crayche, the owner of the Portola Pharmacy received a letter from appellant indicating that appellant intended to make a deposit of money before the check was cashed.

The evidence relied upon by the prosecution consisted of the testimony of J. J. Lovett, assistant vice president of the drawee bank that he had searched the books and records of said bank for a ten-year period prior to the date of the trial, and could find no record of an account in the name of appellant, either open or closed, nor any record of a credit arrangement whereby the bank would honor his checks without having any of his money on deposit to cover the same. The burden resting upon the prosecution has been thus stated in People v. Wilbur, 33 Cal.App. 511, 514, 165 P. 729, 730:

"* * * Hence, all that need be pleaded or proved to show or establish the fact of the commission of the offense denounced in said section is that, with intent to defraud, a party has made and drawn a check or draft upon some bank for the payment of money and delivered the same to another, knowing at the time such check was made, drawn, and delivered that he has not sufficient funds in, or credit with such bank to meet such check or draft in full upon its presentation."

And again, in People v. Megladdery, 40 Cal.App.2d 643, 652, 105 P.2d 385, 390, the court said:

"The argument that the evidence was insufficient to support the verdict does not require extended treatment. The appellant admitted that he issued the several checks without sufficient funds for their payment. His answer was that he had arranged credit through which be believed the checks would be paid. All the witnesses called denied this assertion and all the circumstances proved the falsity of the defense. On this appeal we must assume that the jury believed the witnesses called by the state. Under such a case it is useless to argue that the evidence was insufficient to support the verdict."

Since we are required to assume in support of the finding of the court below the existence of every fact which the arbiter of the facts could have reasonably deduced from the evidence, and then determine whether or not the guilt of the accused is deducible therefrom, we are satisfied that the court could rightfully infer that by his conduct appellant represented that the checks were valid although he knew they were worthless, and drawn upon a bank in which he never had an account.

Applicable to a determination of the question presented to us in the instant case is the language of the court in People v. Whisenhunt, 155 Cal.App.2d 534, 538, 318 P.2d 153, 155, as follows:

"The earnest and vigorous argument of appellant is but an argument as to the weight of conflicting evidence. Appellant's argument is based upon his own testimony and, as has been so often stated, it is not the function of an appellate court to weigh conflicting evidence. That was the function of the jury and it is evident that the jury reached the conclusion that appellant wrote the checks in question and passed them to the payee knowing that he did not have sufficient funds on deposit in the bank to cover the checks, and without informing the payees of that fact and without requesting that the checks be held for a few days for that reason. The evidence was sufficient to warrant an inference that appellant intended to defraud the payees.

"As stated in People v. Yrigoyen, 45 Cal. 2d 46, at page 49, 286 P.2d 1, at page 2:

"'The evidence is sufficient to show that there were not enough funds in the account when the check in question was issued or presented and that no credit arrangement was made for its payment. It can be inferred that defendant knew the depleted condition of the account, and, under the circumstances, the record supports the implied finding that he issued the check with intent to defraud Mendiboure. (Citing cases.)'"

Appellant relies heavily on the case of People v. Griffith, 120 Cal.App.2d 873, at page 880, 262 P.2d 355, at page 359, wherein it is stated, "One who negotiates a check with knowledge he has not sufficient funds in the bank to meet it, but who has good reason to believe, and honestly does believe, that it will be paid, cannot be said to have an intent to defraud the payee of the check". However, one has but to read the court's summation of the evidentiary features of the cited case as set forth on pages 880 and 881, of 120 Cal.App.2d, on pages 359 and 360 of 262 P.2d, which immediately distinguishes it from the factual background of the case at bar. In the instant case, appellant had never had an account with the bank upon which the checks were drawn, no part of the checks have been paid, and the trial judge, as he had a right to do, rejected appellant's testimony and that of his witnesses, that he had any expectation of loans or financial backing from an undisclosed "loan company", where the money "was there for him when he got there", and therefore, gave no credence to appellant's denial that he had an intent to defraud and found, we think reasonably, the requisite fraudulent intent (People v. Croxton, 162 Cal.App.2d 187, 193, 327 P.2d 611; People v. Whisenhunt, supra, 155 Cal.App.2d at page 537, 318 P.2d at page 155).

The unauthorized attempted appeal from the "sentence" is dismissed. The judgment is affirmed.

FOURT and LILLIE, JJ., concur.

172 Cal.App.2d 15

PEOPLE of the State of California, Plaintiff and Respondent,
v.
Fred DALTON, Defendant and Appellant.
Cr. 3537.

District Court of Appeal, First District, Division 1, California.
July 14, 1959.

Defendant was convicted for a violation of the statute prohibiting the selling or giving to a person promised a narcotic another substance in lieu of it and from a judgment of the Superior Court, City and County of San Francisco, Walter Carpeneti, J., defendant appealed. The District Court of Appeal, Tobriner, J., held that testimony was not inadmissible as hearsay but was admissible as forming a part of the transaction which in itself was the fact in dispute and that the evidence sustained conviction.

Judgment and order denying new trial affirmed.

1. Criminal Law 🔑419(11)

In prosecution for violation of the narcotics law, testimony of narcotics agent of conversation with vendor stating that the defendant had sent the agent and respecting the purchase of the narcotics was not inadmissible as hearsay.

2. Criminal Law 🔑419(2)

The prohibition against hearsay testimony does not apply to testimony which is not offered to prove the truth of its content, and if an extrajudicial utterance is offered not as assertion to evidence the matter asserted but without reference to the truth of the matter, the hearsay rule does not apply. West's Ann.Pen.Code, § 182; West's Ann.Health & Safety Code, §§ 11500, 11502.

3. Criminal Law 🔑419(2)

In prosecution for violation of narcotics law, testimony of agent with respect to conversation with vendor of narcotics wherein agent stated that defendant had sent him and that the defendant stated that the vendor would get the narcotics for the agent and respecting the purchase of narcotics was admissible as "part of a transaction in dispute" and an essential and "precise fact in dispute" where the trial proceeded upon the theory that the defendant aided and abetted the crime of selling narcotics and furnishing a substitute for it. West's Ann.Code Civ.Proc. §§ 1850, 1870, subds. 1, 6, 7; West's Ann.Health & Safety Code, § 11502.

4. Poisons 🔑9

Evidence sustained conviction for violation of the narcotics law prohibiting the selling, furnishing or giving to a person promised a narcotic another substance in lieu of it. West's Ann.Health & Safety Code, § 11502.

5. Poisons 🔑4

In prosecution for selling or giving to a person promised a narcotic another substance in lieu of it, defendant's personal performance of the prohibited act was not a prerequisite to guilt if he aided or abetted the commission of the crime. West's Ann. Pen.Code, §§ 31, 971.

6. Criminal Law 🔑878(3)

Defendant's acquittal on a conspiracy count did not invalidate conviction for aiding and abetting in violation of the narcotics law which was a separate and distinct offense from that of conspiracy. West's Ann.Pen.Code, § 182; West's Ann. Health & Safety Code, §§ 11500, 11502.

7. Criminal Law 🔑24

In prosecution for selling or giving to a person promised a narcotic another substance in lieu of it, law presumed that the act of defendant in aiding and abetting the sale to have been intended. West's Ann. Health & Safety Code, §§ 11500–11502.

8. Criminal Law 🔑404(4)

In prosecution for violation of the statute prohibiting the selling or giving to a person promised a narcotic another substance in lieu of it, cigarette package and contents containing heroin were properly admitted. West's Ann.Health & Safety Code, §§ 11500–11502.

9. Poisons 🔑9

In prosecution for violating the statute prohibiting the selling or giving to a person promised a narcotic another substance in lieu of it evidence was sufficient to establish the corpus delicti. West's Ann.Health & Safety Code, §§ 11500–11502.

Frank S. McGorty, San Francisco, for appellant.

Stanley Mosk, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., Thomas C. Lynch, Dist. Atty., Janet Aitken, Asst. Dist. Atty., San Francisco, for respondent.

TOBRINER, Justice.

The San Francisco grand jury indicted Fred Dalton, appellant, and Richard Wilson on two counts, Count I charging each defendant with conspiracy (Pen.Code, § 182) to violate sections 11500 and 11502 of the Health and Safety Code and Count II alleging defendants violated section 11502. Section 11500 comprises the standard prohibition as to possession, transportation, administration, sale, or gift of narcotics; section 11502 prohibits in substance the selling, furnishing, transporting, administering, or giving to a person promised a narcotic another substance in lieu of it. Count I of the indictment charged as the overt act a conversation of the defendants with one J. Andrew Keeys. The jury rendered a verdict of not guilty as to Count I but guilty as to Count II. The court denied appellant's motion for a new trial.

The principal issue involves the admissibility of testimony of a conversation which appellant contends to be barred as hearsay. As we shall point out, we have concluded the testimony was properly admitted.

The factual history begins with an approach by J. Andrew Keeys, a special agent for the Bureau of Narcotics, to appellant. Keeys asked appellant, who was standing eight to ten feet in front of a pool hall, whether he had any "stuff" (heroin). Appellant answered that he did not, but that "his man Jimmie did." Appellant pointed to "his friend Jimmie" (Richard Wilson) who was standing beside the window inside the pool hall. Appellant then pointed to Keeys; "friend Jimmie" nodded; and appellant said, "My man Jimmie will take care of you." According to Keeys' testimony on cross-examination, when appellant pointed to Keeys concurrently with his statement that Jimmie would take care of him, Jimmie "shook his head in acknowledgment."

Keeys went into the pool hall. He told Wilson that appellant had sent him and that he wanted to purchase some heroin. Wilson said that he would get it. Keeys gave ten dollars to Wilson who said he would be back "in a few minutes." Wilson did return in a few minutes and slipped into Keeys' hand a cigarette package of the type that is given away as a free sample. Subsequent examination showed that the package contained a small bindle, which was paper wrapped with powder inside so as not to unfold easily. Inspection showed the contents of the package, subsequently marked People's Exhibit No. 1, not to be a narcotic.

In substance appellant makes a two-pronged attack upon the conviction; the first and chief contention, to which we have referred, that hearsay evidence was wrongfully admitted; the second, that the evidence does not support the judgment.

The contention as to hearsay stems from the admission of Keeys' testimony of his conversation with Wilson. As we have narrated, appellant told Keeys that "his man Jimmie" (Wilson) had some "stuff," pointed to "his friend Jimmie," and Keeys went into the pool room to speak to "Jimmie." The substance of the questioned conversation follows:

"Q. When you spoke to him, would you tell us the conversation you had with him? A. I told him that I * * * wanted to get some stuff, and that Freddie [defendant] had sent me * * *

"A. He said he would get it for me. I gave him the ten dollars, and he left the pool room and said he would be back in a few minutes * * *.

"A. Mr. Wilson returned in a few minutes * * * and he slipped into my hand a cigarette package * * *."

The trial judge overruled appellant's objection to the testimony but originally limited it to the first count of conspiracy. Later the court changed this ruling, instructing the jury that it could consider the Keeys-Wilson transaction on both counts.

[1] Was this testimony inadmissible because the words were spoken outside the presence of appellant? We believe the testimony could properly be received upon two of the three grounds suggested by respondent: "First, because the statements and acts of Jimmie [Wilson] are not, in fact, hearsay; Second, because the acts and declarations form part of the transaction which is itself the fact in dispute. * * *"

In view of its historical disintegration we approach the problem of applying the hearsay rule with caution. In the fifteenth century when both the use of jury and witness emerged from the obscurantism of trial by battle, compurgation or ordeal, neither the jury nor the witness were limited by the rule of hearsay. Both could rely upon hearsay in informing themselves of the facts. Later as witnesses were used more commonly, the hearsay rule became an exclusionary device which reached its full strength in the eighteenth century. Since then it has been subjected to so many exceptions that it survives only as the skeletal remains of its former stature. Commentators have severely criticized it. The protracted morbidity of the principle itself induces a wary and narrow application of the doctrine.

Our initial analysis must probe whether the questioned evidence does actually constitute the prohibited hearsay. The core of the rule lies in the understandable objective of preventing the use of a repeated assertion of an absent party as proof of the truth of the matter contained in the assertion. The danger lies in establishing as a fact the content of the utterance of a person not present and not subject to the test of cross-examination. Such testimony could conceivably level its damaging effect upon a litigant without the safeguard of cross-check, open analysis in a courtroom, adverse probing and dissection.

But none of these considerations apply to testimony which is not offered to prove the truth of its content. Here Wilson's answer in response to Keeys' request for heroin that "he would get it" was not adduced to prove the *fact* that Wilson would actually get the heroin, or that he intended to get it. The crime here was that Wilson procured a substitute for the promised narcotic. Respondent did not inject the assertion for the prohibited purpose at all; respondent neither sought to prove the fact that Wilson did procure the heroin nor that he intended to do so. The utterance was not offered as a demonstration of the truth of its own subject matter.

Consequently the testimony itself is not the forbidden hearsay. The authorities and the cases so declare.

[2] "All of the authorities stress the point that the rule excludes hearsay statements only when they are offered for the same purpose as testimony of a witness on the stand, i. e., *to prove the truth of the matter stated.*" (Witkin, California Evidence, § 205, p. 232.) "If, therefore, an extrajudicial utterance is offered, not as an assertion to evidence the matter asserted, but *without reference to the truth of the matter asserted,* the Hearsay rule does not apply. * * * The Hearsay rule excludes extrajudicial utterances only when offered for a special purpose, namely, as *assertions to evidence the truth of the matter asserted.*" (6 Wigmore, Evidence, § 1766, pp. 177–178.) "Hearsay evidence is testimony in court or written evidence, of a statement * * * being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter." (McCormick, Evidence, § 225, p. 460.)

People v. King, 1956, 140 Cal.App.2d 1, 294 P.2d 972, upholds in a bookmaking case the admissibility of "evidence of the conversations on the telephone between the officer and those who called the house with reference to certain bets." 140 Cal.App.2d at page 9, 294 P.2d at page 977. The opinion cites a number of decisions permitting the introduction of bet-making phone conversations of third persons not for the purpose of proving the content of the conversation but the usage of the premises: People v. Radley, 1945, 68 Cal.App.2d 607, 157 P.2d 426; People v. Joffee, 1941, 45 Cal.App.2d 233, 113 P.2d 901; People v. Reifenstuhl, 1940, 37 Cal.App.2d 402, 99 P.2d 564; see also Witkin, supra, § 219, p. 245. These cases apply the general principle that the utterance introduced to prove a fact extraneous to its own content is admissible. They are decisive in the instant case.

Appellant's sole citation of People v. Curtis, 1951, 106 Cal.App.2d 321, at page 325, 235 P.2d 51, at page 53, does indeed contain a general statement of the hearsay rule but the court admitted rather than rejected, the questioned evidence under Code of Civil Procedure, section 1870(6).

[3] We turn to the second ground set out supra which supports the admissibility of the testimony: the Keeys-Wilson conversation tended to prove the precise fact in issue, a violation of Health and Safety Code, section 11502.

Code of Civil Procedure, section 1870, codifies this exception to the hearsay rule: "[E]vidence may be given upon a trial of the following facts:

"1. The precise fact in dispute; * * *

"7. The act, declaration, or omission forming part of a transaction, as explained in Section 1850; * * *"

Code of Civil Procedure, section 1850, states: "Where, also, the declaration, act, or omission *forms part of a transaction, which is itself the fact in dispute,* or evidence of that fact, such declaration, act, or omission is evidence, as part of the transaction." (Italics added.)

Since the trial proceeded upon the theory that appellant aided and abetted the crime of selling heroin and furnishing a substitute for it, the commission of the crime itself constituted the "precise fact in dispute" or the "transaction, which is itself the fact in dispute." Certainly the contemplation of a situation in which an aider or abetter does not present himself physically at the scene of the crime, but instigates or advises it, does not tax the imagination. In such a case the proof of the crime is essential to the conviction of the aider or abetter. The exclusion of the testimony showing the transgression would as a practical matter prevent introduction of proof of the guilt of the aider or abetter. Hence the Keeys-Wilson conversation and related actions are "part of a transaction * * * in dispute," and, indeed, an essential and "precise fact in dispute."

People v. Henry, 1948, 86 Cal.App.2d 785, 195 P.2d 478, 480, illustrates this exception to the hearsay rule. In a prosecution for attempting to obtain narcotics by fraud, a pharmacist testified he received a phone call from a man, proclaiming himself a certain doctor, who prescribed a narcotic for a "Mrs. Mitchell"; the druggist testified that he checked with the actual doctor, who denied giving the prescription. In approving the admissibility of the pharmacist's conversation with the individual claiming to be the doctor, the court relied upon the departure "from the hearsay rule applying to cases in which the *very fact in controversy* is whether certain things were said or done and not as to whether these things were true or false, and in these cases the words or acts are admissible not as hearsay, but as original evidence. [Citing California cases.]" (Emphasis added.) The recent case of People v. Race, 1957, 151 Cal.App.2d 678, at page 687, 312 P.2d 322, at page 327, quotes this language with approval in sustaining a conviction for violation of the bookmaking statute.

We conclude the court properly admitted the testimony pursuant to this orthodox exception to the hearsay rule.

As we pointed out supra appellant's second attack upon the conviction is the proverbial one, so often presented in such a case as this, that the evidence does not support the conviction. We consider the three statements of the argument:

[4-6] (1) According to appellant "there is no evidence" that he committed "any acts condemned by the Statute singly or with another"; hence the requisite substantial proof is lacking. But appellant's personal performance of the prohibited acts was not a prerequisite to guilt if he aided or abetted the commission of the crime. (Pen.Code, §§ 31, 971.) There was a showing of substantial evidence on this score. In re Estate of Bristol, 1943, 23 Cal.2d 221, 143 P.2d 689. Nor did acquittal on the conspiracy count negate, or even conflict with, conviction for aiding and abetting, which "is a separate and distinct offense from that of conspiracy." People v. Villa, 1957, 156 Cal.App.2d 128, 133, 318 P.2d 828, 832.

[7] (2) According to appellant a unity of act and intent did not exist. However, "the law * * * presumes it [the act] to have been intended * * *." People v. Vogel, 1956, 46 Cal.2d 798, 802, 299 P.2d 850, 853. At the least appellant committed the act of aiding and abetting.

[8] (3) According to appellant the cigarette package and contents were improperly admitted. The question of admissibility is identical with that of the propriety of the introduction of the Keeys-Wilson conversation. We have concluded the latter was admissible.

[9] Appellant's contention that respondent failed to prove the corpus delicti fails utterly in the light of the fact that the testimony showed Wilson agreed to sell heroin to Keeys, took $10 from Keeys and then delivered a substance other than the narcotic. All the elements of a violation of section 11502 were established.

We affirm the judgment and the order denying the motion for new trial.

BRAY, P. J., and FRED B. WOOD, J., concur.

In the Matter of the ESTATE of James H. GOODHEW, Jr., Deceased.

William I. Goodhew, Executor, Petitioner.

James Henry GOODHEW, III, and Marcia Goodhew Wilson, Claimants,

D. Nicholas Goodhew, a Minor, by Jean Young Swordling, Guardian, Claimant, Respondents,

v.

Geneva S. GOODHEW, Claimant, Appellant.*

Civ. No. 23212.

District Court of Appeal, Second District, Division 2, California.

July 23, 1959.

Rehearing Granted Aug. 18, 1959.

For opinion on Rehearing. See 344 P.2d 63.

Proceeding on petition of executor to determine heirship. From adverse judgment of the Superior Court, Los Angeles County, Newcomb Condee, J., the widow appealed. The District Court of Appeal, Fox, P. J., held that where prior to marriage decedent entered into agreement under which corporation was to pay his estate annual salary paid to decedent at time of his death for a period of three years from date of death in consideration of services which decedent had previously rendered and in consideration of services to be rendered, portion of consideration given for payments consisted of personal services of decedent rendered after his marriage and such services were a community asset and his widow was entitled to a portion of money payable under agreement.

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* Opinion vacated 344 P.2d 63.

Affirmed in part and reversed in part.

1. Appeal and Error ⚷989

When a finding of fact is attacked on ground that there is not any substantial evidence to sustain it, power of reviewing court begins and ends with determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the finding of fact.

2. Husband and Wife ⚷257

Husband's share of income from property purchased prior to marriage was his separate property and was not converted into community property upon being deposited in same bank account with community funds. West's Ann.Civ.Code, § 163.

3. Husband and Wife ⚷264

In proceeding to determine heirship brought by executor for estate of husband, who prior to marriage to widow had purchased an undivided one-half interest in property and an insurance policy and who received gross income from property more than sufficient to make payments on insurance and deed of trust on property, it could not be said as a matter of law that findings that payments on property and premiums on insurance policy were made from decedent's separate property did not have adequate evidentiary support. West's Ann.Prob.Code, § 1080.

4. Appeal and Error ⚷843(2)

Where evidence was sufficient to sustain finding of court on main issue in case, other findings would be disregarded.

5. Evidence ⚷461(1)

If all or part of an agreement is ambiguous or uncertain, parol evidence is admissible as an aid in its interpretation, but such evidence may not be considered to vary or modify the terms of the agreement but only to show the true intent of the parties.

6. Evidence ⚷419(11)

In proceeding to determine heirship brought by executor for decedent, who had entered into a written agreement under which corporation agreed to pay to his estate decedent's annual salary at time of his death for a period of three years from date of death in consideration of services which decedent had rendered to corporation and in consideration of services to be rendered to corporation, there was no doubt, uncertainty, or ambiguity with respect to consideration or reason why corporation made the agreement, and trial court was not justified, on grounds of ambiguity or uncertainty, in receiving parol evidence to effect that real consideration for agreement to make payments to decedent's estate was other than that specifically stated in the agreement itself. West's Ann.Prob.Code, § 1080.

7. Evidence ⚷419(11), 432

Parol evidence is admissible to show what real consideration for a contract actually is despite the fact that it may contradict express consideration recited in agreement, but true nature of consideration may not be shown by parol evidence where in doing so the legal effect or operation of instrument for purposes therein designated would be defeated. West's Ann.Code Civ. Proc. § 1962, subd. 2.

8. Husband and Wife ⚷259

Where prior to marriage decedent entered into agreement under which corporation was to pay his estate annual salary paid to decedent at time of his death for a period of three years from date of death in consideration of services which decedent had previously rendered and in consideration of services to be rendered, portion of consideration given for payments consisted of personal services of decedent rendered after his marriage and such services were a community asset and his widow was entitled to portion of money payable under the agreement. West's Ann.Civ.Code, § 163; West's Ann.Prob.Code, § 1080.

◆

Buchalter, Nemer & Fields, Los Angeles, for appellant.

Henry O. Wackerbarth, Los Angeles, for respondents James Henry Goodhew, III, and Marcia Goodhew Wilson.

Max G. Kolliner, Los Angeles, for respondent Swordling.

William I. Goodhew, Executor, petitioner, no appearance.

FOX, Presiding Justice.

This is an appeal by Geneva S. Goodhew, widow of James H. Goodhew, Jr., from a judgment in a proceeding to determine heirship (Prob.Code, § 1080) in which the court found certain property held by the decedent at the time of his death was his separate property.

The appellant and the decedent were married on August 2, 1952. In September of 1946, decedent and his brother each purchased an undivided one-half interest in a piece of income property on Pico Boulevard for a total purchase price of $25,000. This was paid for in cash except for an $8,600 first deed of trust. The indebtedness was reduced at the rate of about $85 a month and, at the time of the decedent's death, $880.04 remained unpaid. This balance was paid off by decedent's estate and his brother, 50 per cent each. Thereafter, the property was sold for $21,000. During the existence of their marriage, decedent paid a total of $1,572 toward reduction of the above encumbrance.

In May of 1946, decedent purchased an insurance policy on his life in the face amount of $10,000. During the marriage, decedent paid $30.84 a month as premiums on the above policy.

At the time of his death, James H. Goodhew, Jr., was president of the Goodhew Ambulance Service, Inc., and was receiving a salary of $1,220 per month. Decedent and his brother owned all of the stock of the corporation. On July 14, 1950, the decedent, his brother, and the Goodhew Ambulance Service, entered into a written agreement, paragraph 9 of which provides as follows:

"9. Upon the death of either James Henry Goodhew, Jr., or William I. Goodhew, the Corporation agrees to pay to his estate the annual salary paid to such decedent at the time of his death, said payments to be made monthly and to continue for a period of three years from the date of death, in consideration of the services which said decedent has heretofore rendered to the Corporation, and in consideration of the services to be rendered to the Corporation by each of them."

The decedent and his brother also owned income property on Hoover Street which was acquired prior to the subject marriage.

After the appellant and the decedent were married, he deposited his salary from the Goodhew Ambulance Service, as well as the rentals from the real property, into a joint checking account in the name of appellant and himself. Either could draw checks on this account. All expenditures paid by check after marriage were from this account; these included, inter alia, community living expenses, payments on the deed of trust on the Pico property, life insurance premiums, child support payments for a minor child of a previous marriage, and payments to an ex-wife pursuant to a property settlement agreement.

On August 20, 1955, James H. Goodhew, Jr., died testate, leaving as his sole heirs and beneficiaries under his last will and testament the appellant, his widow, and his children by previous marriages, James H. Goodhew, III, Marcia Goodhew Wilson and D. Nicholas Goodhew, a minor child.

Pursuant to section 1080, Probate Code, the executor of the decedent's estate filed a petition for a decree determining interests therein. The appellant filed a claim of interest in the estate and claimed, inter alia, that (1) the money due under the agreement of July 14, 1950, is community property and she is entitled to one half thereof; (2) community property contributed to the payment of premiums on the $10,000 insurance policy and therefore she is entitled to a portion of the proceeds of such insurance, and (3) community property was used to reduce the indebtedness on the Pico property and therefore she is entitled to an interest in the proceeds from the sale of the property.

The trial court found that all payments on the Pico encumbrance and for premiums on the $10,000 insurance policy were made from decedent's separate property. With respect to rights under the July 14 agreement, the court found that the agreement "was executed prior to his [decedent's] marriage to [the appellant] * * * and was executed among other things in consideration of certain agreements therein contained between the parties thereto respecting the sale or disposition of the stock of Goodhew Ambulance Service, Inc., owned by them and past services rendered to Goodhew Ambulance Service, Inc., by said decedent prior to his marriage to [appellant] * * * and all right, title and interest thereto, all benefits to be derived therefrom and all payments to be made by said Goodhew Ambulance Service, Inc. to said decedent's Estate pursuant to the terms and provisions thereof were at all times material hereto and now are the separate property of said decedent and said decedent's Estate."

As grounds for reversal, appellant argues in effect that the above findings are not supported by the evidence and that the court erred in receiving parol evidence with respect to the meaning of the July 14 agreement.

[1] The appellant specifically attacks those findings which state that payments made on the Pico property and premiums paid on the $10,000 insurance policy after marriage were from the decedent's separate property. It is well settled that "[w]hen a finding of fact is attacked on the ground that there is not any substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the finding of fact. (Citation)." Grainger v. Antoyan, 48 Cal.2d 805, 807, 313 P.2d 848, 850; Hunter v. Croysdill, 169 Cal.App.2d 307, 337 P.2d 174.

[2, 3] In the instant case, from August 2, 1952, through August 20, 1955, the period of coverture, decedent's share of the income from the Pico and Hoover Street properties was in the gross amount of $9,868.13. This money was clearly his separate property (Civ.Code, § 163) and was not converted into community property upon being deposited in the same bank account with community funds for the obvious reason that the amount of separate funds so deposited can be ascertained and therefore can be traced. Thomasset v. Thomasset, 122 Cal.App.2d 116, 124, 264 P.2d 626. During this same period, decedent paid some $1,141 in premiums on the insurance policy in question, and his share of the payments on the trust deed amounted to approximately $1,572. It is clear, therefore, that decedent had available more than sufficient separate income with which to make the above payments and it would not have been necessary for him to resort to community property. The trial court found that these payments were in fact made from his separate income.

It was, of course, for the trial court to draw reasonable inferences from the testimony. Such as, for example, that it would be natural for the decedent to use a portion of the income received from the Pico property to reduce the indebtedness on that very property. Thus the Pico property would be taking care of itself, in accordance with a plan that is frequently followed.

It must also be remembered that the insurance policy in question was decedent's separate property at the time of his marriage to appellant; was payable to his estate; and that thereafter he did not change the beneficiary. Thus the court could infer that he intended to retain the same as separate property in his estate. To accomplish this the court could properly conclude that he intended to and did make the premium payments out of separate property.

Based on the evidence referred to and the inferences reasonably to be drawn therefrom, it cannot be said as a matter of law that the challenged findings do not have adequate evidentiary support.

[4] Appellant argues, however, that a further finding made by the trial court that all community property income was expended during the marriage in payment of living expenses is not supported by the evidence. The findings previously discussed amply support the judgment with respect to the Pico property and the $10,000 insurance policy. As noted above, these findings are supported by substantial evidence. This being the case, other findings may be disregarded. American National Bank of San Francisco v. Donnellan, 170 Cal. 9, 15, 148 P. 188; Harkins v. Fielder, 150 Cal.App.2d 528, 533, 310 P.2d 423; Logan v. Forster, 114 Cal.App.2d 587, 602, 250 P.2d 730, 739. As stated in Logan v. Forster, supra: "If one finding, sustained by sufficient evidence, will support the trial court's judgment * * * an appellate court will presume that the judgment was predicated on such finding, and questions relative to other findings become immaterial upon appeal and may be disregarded."

[5] With respect to the July 14 agreement, the trial court, after receiving parol evidence, found the payments provided for pursuant to paragraph 9 were the separate property of the decedent and the decedent's estate. If all or part of this agreement were ambiguous or uncertain, parol evidence would clearly be admissible as an aid in its interpretation. Chastain v. Belmont, 43 Cal.2d 45, 51, 271 P.2d 498. Such evidence, however, where otherwise admissible, may not be considered to vary or modify the terms of the agreement, but only to show the true intent of the parties. Beneficial Fire & Casualty Ins. Co. v. Kurt Hitke & Co., 46 Cal.2d 517, 524, 297 P.2d 428. As stated in Barnhart Aircraft, Inc. v. Preston, 212 Cal. 19, 22–23, 297 P. 20, 21: "This rule of evidence is invoked and employed only in cases where upon the face of the contract itself there is doubt and the evidence is used to dispel that doubt, not by showing that the parties meant something other *than* what they said, but by showing what they meant *by* what they said." See also Barham v. Barham, 33 Cal.2d 416, 423, 202 P.2d 289.

[6] Paragraph 9 in certain respects is uncertain. For instance, was decedent's estate to be paid $1,220 a month, his gross salary, or $1,025.34, his net salary? Parol evidence would properly be received on this question. However, there was no doubt, uncertainty, or ambiguity with respect to the consideration or reason why the corporation was to make these payments. The agreement provides "* * * in consideration of the services which said decedent has heretofore rendered to the Corporation, and in consideration of the services to be rendered to the Corporation. * * *" It should also be noted that paragraph 1 of this agreement contained a promise by the decedent that he would "continue to furnish * * * [his] services to the Corporation in the same manner * * * [he is] currently doing as long as the interests of the Corporation require * * * [his] services, and as long as * * * [he is] able to perform the same." It is clear, therefore, that the trial court was not justified, on the grounds of ambiguity or uncertainty, in receiving parol evidence to the effect that the real consideration for the agreement to make the payments to the decedent's estate was other than that specifically stated in the agreement itself. The agreement was entirely free from doubt in this regard.

Respondents argue, however, that parol evidence is admissible to show what the real consideration for a contract actually is despite the fact that this may contradict the expressed consideration recited in the agreement. An exception to the parol evidence rule does permit the introduction of such evidence for the purpose of showing that the true consideration is other and different from that expressed in the written agreement. See Code Civ.Proc. § 1962 (2); Hendrick v. Crowley, 31 Cal. 471, 472, 476; Blonder v. Gentile, 149 Cal.App.2d 869, 874, 309 P.2d 147.

[7] This exception to the general rule does not apply in all cases. As stated in Hendrick v. Crowley, supra, 31 Cal. at page 477: "But this is not a rule but an exception to the rule that the legal effect of a written instrument cannot be varied or defeated in whole or in part by parol evidence. The exception should never be allowed to override the rule, for that would be to dispense with the rule entirely and preserve only the exception." The true nature of the consideration may not be shown by parol evidence where, "* * * in doing so the legal effect or operation of the instrument for the purposes therein designated would be defeated, or, in other words, where the statement of consideration is of a contractual nature and more than a mere statement of fact or receipt of payment." (18 Cal.Jur.2d, pp. 755–756.) In Harding v. Robinson, 175 Cal. 534, 542, 166 P. 808, 811, our Supreme Court discussed the question as follows: "The well-recognized limitation upon the right of a party to vary by parol evidence the terms of a contract and prove the true consideration is well declared as follows: 'Where the statement in a written instrument as to the consideration is more than a mere statement of fact or acknowledgment of payment of a money consideration, and is of a contractual nature, as where the consideration consists of a specific and direct promise by one of the parties to do certain things, this part of the contract can no more be changed or modified by parol or extrinsic evidence than any other part, for the party has the right to make the consideration of his agreement of the essence of the contract, and when this is done the provision as to the consideration for the contract must stand upon the same plane as the other provisions of the contract with reference to conclusiveness and immunity from attack by parol or extrinsic evidence.' (Citation.)" See also Arnold v. Arnold, 137 Cal. 291, 296–297, 70 P. 23; Koeberle v. Hotchkiss, 4 Cal.App.2d 252, 254–256, 40 P.2d 911.

The expression of consideration in the instant agreement amounted to more than a mere statement of fact or acknowledgment of a money payment and was of a contractual nature in that there was in the written agreement a direct and specific promise by the decedent to continue in the employment of the corporation (paragraph 1) and a return promise that such continued service would be compensated for in a designated manner after his death (paragraph 9). To admit parol evidence on this issue would be to alter the legal effect and operation of the written instrument and to make a new contract for the parties which would differ materially from that which was expressed in the July 14 agreement.

[8] Therefore, giving effect to the agreement as written, without considering parol evidence, it is clear that a portion of the consideration given for the payments now in dispute consisted of the personal services of the decedent rendered after his marriage to the appellant. These services were a community asset (see, e.g., Pereira v. Pereira, 156 Cal. 1, 7, 103 P. 488, 23 L.R.A.,N.S., 880) and, as a consequence thereof, appellant is entitled to a portion of the money payable under the July 14 agreement. Upon a retrial of this aspect of the case, it will be necessary for the trial court to determine the precise amount.

That portion of the judgment pertaining to the Pico property and the $10,000 insurance policy is affirmed; the judgment with respect to the July 14, 1950, contract is reversed.

ASHBURN and HERNDON, JJ., concur.

169 Cal.App.2d 410

George E. BATCHELOR, Plaintiff and Appellant,

v.

George C. FINN and Charles C. Finn, Defendants and Respondents.

Elizabeth B. JOHNSON, Plaintiff and Appellant,

v.

Charles C. FINN and George C. Finn, Defendants and Respondents.

Civ. 23151, 23152.

District Court of Appeal, Second District, Division 2, California.

April 7, 1959.

As Modified on Denial of Rehearing May 5, 1959.

Hearing Denied June 3, 1959.

Action to quiet title to an airplane and another action for money had and received and for money loaned. From orders of the Superior Court, Los Angeles County, Leon T. David, J., vacating judgments entered in both cases the plaintiffs appealed. The District Court of Appeal, Ashburn, J., held, inter alia, that where defendants' default was made a matter of record when plaintiff's counsel caused clerk to answer default, and later on same day counsel was served with defendants' unverified answer signed by defendants "in pro. per.", and attorney to whom answer had been sent by defendants had advised in plaintiff's counsel that attorney would not file it because it was not in proper shape, and defendants' attorney got an ex parte order from presiding judge permitting the filing of answer, plaintiff's counsel was presented with dilemma in that he could not reasonably expect to obtain from any judge a default judgment so long as answer was on file, nor could he properly suppress that fact, so that appropriate procedure would have been a motion to strike the answer, which motion constitutes a waiver of default just like any other step which recognizes the pleading as properly on file.

Affirmed in one case and reversed in the other case.

1. Fraud 🔑58(1)

Fraud may and usually must be proved circumstantially.

2. Appeal and Error 🔑840(4)

When a trial judge in a proper proceeding vacates a judgment he has rendered in ignorance of material facts which he believes a party had a duty to disclose to him, and which, if known to him, would have caused him to refrain from ordering the judgment, his action will not be questioned by the Appellate Court.

3. Judgment 🔑138(1)

The fact that fraud found to have been worked upon court was intrinsic rather than extrinsic was immaterial upon motion to vacate default judgment made within six months. West's Ann.Code Civ.Proc. §§ 473, 594, subd. 1.

4. Judgment 🔑153(1)

Where motion to vacate default judgment was originally set for a day falling within the six months' period prescribed by statute, the fact that hearing was continued from time to time until after expiration of that period did not affect its timeliness, since the filing of such motion is deemed the making of the motion for all purposes. West's Ann.Code Civ.Proc. §§ 473, 473a, 1005.5.

5. Judgment 🔑148

The rule which withholds relief from default judgment to one who is in contempt of court is essentially one whose administration lies within the sound discretion of the court.

6. Judgment 🔑148

Defendants were not precluded from obtaining relief from default judgment on ground that they were in contempt of court with respect to another matter where four matters were heard contemporaneously, two of them being contempt charges, and alleged contemnors were before court resisting that charge and court was engaged in examining into its merits, and there was no abuse of discretion in court's proceeding with all four matters contemporaneously and administering appropriate relief in each when hearing was concluded.

7. Judgment ⚷138(1)

Where assignor had contracted to purchase a half interest in an airplane and gave a check in payment of such half interest, and assignee brought an action against sellers for money had and received on theory that money was given to sellers in consideration of an airplane which they had agreed to purchase and did not purchase, and had such contract of purchase been revealed to trial judge he would not have entered default judgment in favor of assignee upon sellers' failure to appear, the suppression of certain facts and the contract constituted a fraud upon the court, and hence such default judgment was properly vacated by the court. West's Ann. Code Civ.Proc. §§ 473, 473a, 594, subd. 1, 1005.5.

8. Judgment ⚷114

While an answer filed after entry of default has no immediate efficacy, it has potential value, for plaintiff's attorney may never raise the point and delay may be waived.

9. Pleading ⚷352

Where defendants' default was a matter of record when plaintiff's counsel caused clerk to enter default, and later on same day plaintiff's counsel was served with unverified answer signed by defendants "in pro. per." and attorney to whom an answer had been sent by defendants had advised plaintiff's counsel that attorney would not file it because it was not in proper shape, and defendants' attorney got an ex parte order from presiding judge permitting filing of answer, plaintiff's counsel was presented with dilemma in that he could not reasonably expect to obtain from any judge a default judgment so long as answer was on file, nor could he properly suppress that fact, so that appropriate procedure would have been a motion to strike the answer, and equally available was a motion to strike which motion constitutes a waiver of default just like any other step which recognizes the pleading as properly on file.

10. Judgment ⚷126(1)

In action to quiet title to an airplane against two individuals and some fictitious defendants, the taking of evidence was not essential to a default judgment in such action. West's Ann.Code Civ.Proc. § 738.

11. Quieting Title ⚷31

Section 749 of the Code of Civil Procedure, relating to quiet title action by adverse possessor, and section 750, relating to summons in such action, are not applicable to an action brought under section 738, relating to actions to quiet title to real or personal property, etc., since section 749 specifically provides that proceedings as to known defendants shall be governed by provisions of section 738 and relevant sections, and section 751 says its procedure shall be cumulative only so that its requirement of evidence of title does not apply to an action brought under section 738. West's Ann. Code Civ.Proc. §§ 738, 749, 750, 751.

12. Judgment ⚷126(1)
Pleading ⚷345(1.3)

In action to quiet title to an airplane, wherein defendants' answer was served and filed before plaintiff's attorney applied for default judgment, at time of filing an appearance fee was paid, appearance was "in pro. per." and answer had been prepared by defendants and sent to their attorney who filed it, and personal service had been made upon defendants, defendants' personal knowledge of action coupled with their general appearance removed defendants from class of persons to whom the statute relating to actions in which service of summons was made by publication applies, and dispensed with taking up evidence before entry of default judgment, and a fortiori it precluded any valid objection to a motion for judgment on the pleadings. West's Ann.Code Civ.Proc. §§ 585, subd. 3, 1014.

13. Judgment ⚷144

Mere error in default judgment would not be ground for vacating it.

14. Attorney and Client ⚷62

Defendants are bound by same procedural rules when acting in propria persona as is any member of the bar.

15. Motions ⚿32

The doctrine of "special appearance" applies by analogy to motion procedure.

16. Pleading ⚿350(3)

An order vacating judgment on pleadings was not warranted for plaintiff's failure to give statutorily prescribed notice of motion for judgment on pleadings even if notice given was insufficient where defendants' notice of motion to vacate the judgment on pleadings was based on fraud, mistake, inadvertence, surprise, excusable neglect and claim that the judgment was void, which amounted to seeking relief available only to one who had made a general appearance so that defendants were not prejudiced by faulty notice and were precluded from taking advantage of such fact. West's Ann.Code Civ.Proc. §§ 1012, 1013, 1015.

17. Appeal and Error ⚿767(2)

Language in respondents' brief which made derogatory remarks and veiled charges against one of superior court judges concerning a matter not before the Appellate Court, and which made certain assertions concerning difficulties of appellant with the Federal Government, which had no place in proceeding involved, would be stricken.

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A. J. Blackman, Los Angeles, for appellants.

Charles C. Finn, Hollywood, and George C. Finn, in pro. per.

ASHBURN, Justice.

Presented together in this court are appeals from orders setting aside the respective judgments in the above entitled actions. One of those judgments awards plaintiff Johnson (assignee of George E. Batchelor) recovery of $17,671.52 from defendants Finn. The other quiets in plaintiff George E. Batchelor full title to a certain aeroplane designated as a Curtiss C–46, bearing Aircraft No. 42-96563 and Civil Aeronautics Administration registration No. N 111 E. The Johnson judgment was rendered after a hearing upon the date set for trial, of which trial date defendants had due notice; they did not appear at the trial. The Batchelor judgment was rendered pursuant to a motion for judgment on the pleadings. Both actions stem from a contract for the purchase by Batchelor from the Finns of a half interest in the said aeroplane. As the trial judge's ruling in each case was based primarily upon fraud on the court and on the defendants in procuring the judgment, it is necessary that the background be understood.

Prior to November, 1951, the Finns purchased said plane from Vineland School District, of Kern County. The record before us leaves doubt as to whether the Finns actually had title on November 24, 1951, at which time they sold a one-half interest in the said plane to plaintiff George E. Batchelor upon the terms of a letter agreement bearing that date. He was to pay and did pay to the sellers forthwith the sum of $10,000 "for and in consideration of said ½ interest"; the check representing the $10,000 payment, made by Batchelor's attorney, bore this notation: "Payment per ltr. of 11/24/51 for acct. George E. Batchelor." The letter agreement was addressed to Batchelor and said that title would be recorded with the Civil Aeronautics Administration "showing title to be ½ in you [Batchelor] and ½ in us." This was done. It was further specified "that this sale is contingent upon the following:" a. Consummation of an agreement with Vineland School District to release said C–46 No. 4296563 in exchange for an equivalent C–46 under the terms of an agreement of February, 1951, between Finns and the district. The letter also says: "5. You agree that you will furnish ½ of the purchase price of said equivalent aircraft, mentioned in Paragraph 4a above, which price is to be mutually agreed between us. 6. In event that we fail to acquire title to the above aircraft within 6 months from this date, we promise to pay to your order said $10,000 on demand. 7. We shall use the above $10,000 towards the purchase of a certain Douglas C–47 school aircraft now located at Roosevelt Field, N. Y., and upon your payment to us of ½ of the price of said aircraft, (total price of said aircraft not to exceed $20,500.00) we shall give you an undivided ½ interest by bill of sale in said aircraft." The Finns were unable to acquire the C–47 mentioned in paragraph 7 just quoted, and hence no advance on that account was made by Batchelor.

Difficulties and litigation arose between the school district and the Finns. Charles Finn at the trial denied that he and his brother had given the district a bill of sale reconveying to it the Curtiss C–46, but it later appeared from his testimony that a sealed enevolpe containing such a bill of sale was delivered by the Finns to the superintendent of the Vineland school, which, according to the witness, was to be held as security for performance of the agreement. It further developed that this instrument was made on October 22, 1951, and contained a warranty of title. The exact nature of the controversy does not appear but it did involve a claim by the district that the Finns had breached their contract with the district concerning said plane and the district, asserting rights under the bill of sale just mentioned, did claim to be revested with title to the aircraft. Later the district gave notice of sale at public auction and Batchelor bid the plane in for $6,110. The notice of sale called attention of all bidders to the fact that the district would give only a quitclaim title because "claims have been made on said Aircraft by International Airports, Inc.,[1] of Burbank, California, and by George and Charles Finn of 7617 Lexington Avenue, Hollywood, California; and that the School District by this sale does not pass upon or recognize the validity of such claims, and that the School District positively will not guarantee title nor give warranties against encumbrances on said Aircraft." The bill of sale covering this transaction is dated June 19, 1956, transfers all of the district's "right, title and interest" in the plane and further says: "No warranties of title or against encumbrances are given by Seller." Upon receiving this document Batchelor took possession of the plane and endeavored without success to register it in his own name with the Civil Aeronautics Administration. So on September 26, 1956, he brought his quiet title action against the Finns, claiming to be sole owner of the aircraft. After obtaining his judgment quieting title and on the strength of same he succeeded in obtaining the desired registration. The plane was a mere "hulk", for which the Finns had paid only $500, reselling a half interest to Batchelor for $10,000. After obtaining his bill of sale from the district, actual possession of the plane, and registration of same in his own name, Batchelor, so the uncontradicted affidavits aver, spent or incurred over $200,000 in rebuilding and revamping the plane, most of which expense was incurred after the quiet title judgment and in reliance upon it. One of Batchelor's affidavits indicates, though not conclusively, that the Finns saw this work going on and stood by without asserting any claim of ownership.

Johnson v. Finn—No. 23152

Meantime, Elizabeth B. Johnson, as assignee of Batchelor, had brought an action against the Finns for money had and received and for money loaned. It was filed on February 18, 1953, and an answer duly interposed. Count I claimed $10,000 for money had and received; Count II, $1,000 for money loaned. After the cause was at issue an amended complaint was filed on September 16, 1955. It reiterates the claim for money had and received, fixes the date thereof as November 24, 1951, which is the day of the making of the above mentioned contract to purchase from the Finns a half interest in the plane. Count II increases the claim for money lent from $1,000 to $3,000; Counts III and IV seek recovery of the $3,000 upon open book account and account stated. Answer thereto was filed on October 24, 1955. After numerous delays, but pursuant to proper notice of trial, the case came on for trial on December 14, 1956. The defendants did not appear and the matter proceeded to hearing pursuant to § 594, subdivision 1, Code of Civil Procedure.

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[1] Batchelor's company.

Mr. Batchelor was the only witness. He testified that Johnson was his assignee for collection only, that the $10,000 was paid to the Finns for the purchase of a C–47 aeroplane which they represented they could purchase for $20,000 and that his $10,000 represented half of that price; that they were unable to buy the plane and spent the money in their own way, repaying none of it to him; that they were to buy that C–47 and he was to own half of it. The judge made an earnest effort to learn all the pertinent facts. "Q. What was that original deal, the whole deal? A. I have told you the whole deal, sir. Q. It was to be how much that you were going to advance? A. I was only supposed to advance $10,000.00. They thought they could buy the airplane for $10,000.00. However, they said that in no event would it be over $20,000.00. They tried to buy the airplane, but they could never buy it. It was sold to someone else." The $10,000 check was offered in evidence, bearing the explanation previously quoted herein, but no mention was made of the written agreement of November 24, 1951 (the letter) and it was not produced. The effect of the testimony was an agreement upon the terms just mentioned. Had the writing been disclosed it would have been immediately apparent that the $10,000 was the consideration for the purchase of a half interest in the Curtiss C–46 which the Finns had purchased or arranged to purchase from the Vineland School District. Batchelor was to furnish half the purchase price of the C–47, not exceeding $20,500, and to have a half interest therein. At least that seems to be a correct interpretation of the agreement and the trial judge was entitled to the information so that he could form his own judgment upon the matter. The trial judge who ruled upon the instant motion said in his memorandum of decision: "This agreement, and other letters of plaintiff's counsel, give full support to the claim of the Finns that such sum of $10,000 was the consideration paid by Batchelor for a one-half interest in plane N–111–E, resulting in the registration of Batchelor as half-owner, with the C.A.A.; and that as to it, no sum was owing to the plaintiff and her assignor." Paragraph 6 of the Batchelor-Finn agreement says: "In event that we fail to acquire title to the above aircraft within 6 months from this date, we promise to pay to your order said $10,000.00 on demand." This plainly relates to the Curtiss C–46. The agreement further provided that that plane be recorded with the Civil Aeronautics Administration showing one-half interest in Batchelor and one-half interest in the Finns and this was done. The contract was executed on Batchelor's behalf by his attorney who, when demanding possession of the C–46 from the school district on October 21, 1955, said in his letter of that date: "On or about May 24, 1952, my client, George Batchelor, purchased an undivided one-half interest in Curtiss C–46A Aircraft N 111 E from Charles C. Finn and George C. Finn." In another letter to an assistant county counsel of Kern County, dated November 10, 1955, the same attorney said: "Be that as it may, our concern about N 111 E is the same concern that you would have about $10,000 invested for three or four years without anything coming in. * * * Having gotten rid of it and permitted the Finns to resell a half interest for $10,000 to us, the District wants an appraisal."

The matter was left to the trial judge at the default hearing upon a false basis, due to the express statements of the witness and his suppression of certain facts and a document material to the hearing. That this was a fraud upon the court was held below and the inference is a reasonable one. The circumstances point to a deliberate suppression and it seems that the trial judge would not have rendered the money judgment in question had he known the terms of the written agreement of November 24, 1951.

No contention seems to be made that the defendants did not owe the $1,000 item, but the $2,000 which was included in the amended complaint occupies a different category. Mr. Batchelor testified that it had been advanced to defendants on his behalf by his brother and charged to his account; that it had never been repaid to the witness and he could not reach his brother to learn whether it was ever repaid to him; that he had demanded payment by the Finns of the $2,000 and the $1,000 and they said they did not have it. At the hearing of the motion now under review defendants produced a check for $2,000 dated February 18, 1952, running from Charles C. Finn to Harry Batchelor (George E. Batchelor's brother) and endorsed by Harry and deposited to the credit of his firm, Major Aircoach Systems, Inc. Later in the hearing counsel for Batchelor offered to remit this $2,000 from the judgment and repeated the offer several times. No question remains as to the impropriety of including that $2,000 in the judgment.

[1-3] Returning to the $10,000 item it is elemental law that fraud may and usually must be proved circumstantially. 23 Cal.Jur.2d § 80, p. 201. The language of Parsons v. Weis, 144 Cal. 410, 420, 77 P. 1007, 1012, is pertinent: "In the first place, the actual falsity of these averments was clearly shown, and appellant introduced no evidence, and made no effort whatever, to show that he did not know of such falsity." Also, Gordon v. Gordon, 145 Cal. App.2d 231, 235, 302 P.2d 355, 358: "When a trial judge in a proper proceeding vacates a judgment he has rendered in ignorance of material facts which he believes a party had a duty to disclose to him, and which, if known to him, would have caused him to refrain from ordering the judgment, we will not question his action." The fact that the fraud found to have been worked upon the court was intrinsic rather than extrinsic is immaterial upon a motion to vacate made within six months, as was the case at bar. Peterson v. Peterson, 135 Cal.App.2d 812, 816, 288 P.2d 171; Security-First National Bank of Los Angeles v. Hauer, 47 Cal.App.2d 302, 306, 117 P.2d 952.

[4] This motion was originally set for a day falling within the six months period prescribed by § 473, Code of Civil Procedure, and the fact that the hearing was continued from time to time until after expiration of that period does not affect its timeliness. Code Civ.Proc. § 1005.5; Brownell v. Superior Court, 157 Cal. 703, 710, 109 P. 91; Roseborough v. Campbell, 46 Cal.App.2d 257, 261, 115 P.2d 839; 29 Cal.Jur.2d, § 149, p. 92. Under § 1005.5, Code of Civil Procedure (enacted in 1953), the filing of the motion is deemed the making of the motion for all purposes (see 29 Cal.Jur.2d, § 149, p. 92; 3 Witkin California Procedure, p. 2110, § 58; 2 id., pp. 1647-1648, § 10). Hence the motion was timely without regard to application of § 473a.

[5, 6] Appellant's claim that respondents could not be granted any relief because they were in contempt of court with respect to another plane and other litigation concerning it, cannot be sustained in the circumstances here present. Four matters were heard contemporaneously, two of them being the said contempt charges. The rule which withholds relief to one who is in contempt of court is essentially one whose administration lies within the sound discretion of the court (cf. Borenstein v. Borenstein, 11 Cal.2d 301, 79 P.2d 388; Tobin v. Casaus, 128 Cal.App.2d 588, 590, 275 P.2d 792, 49 A.L.R.2d 1419). In the present instance the alleged contemnors were before the court resisting that charge and the court was engaged in examining into its merits. We perceive no abuse of discretion in the court's proceeding with all four matters contemporaneously and administering appropriate relief in each when the hearing was concluded. The trial judge found George Finn guilty of contempt and ordered him committed to the county jail until he should purge himself. As to Charles Finn it appeared that the District Court of Appeal had issued a writ of habeas corpus returnable at a later date, October 10, 1957; hence both contempt matters were

stayed until October 13, 1957, awaiting action of the higher court.

[7] The order vacating the default judgment in the Johnson case must be affirmed.

Batchelor v. Finn—Civ. No. 23151

In the quiet title action the Finns were served pursuant to order for publication of summons; personal delivery being made at Alexandria, Virginia, on October 17 and 18, 1956. The Finns in Washington, D. C. prepared an answer and forwarded it to attorney Winkler in Los Angeles. It was not verified and Winkler told Mr. Blackman, plaintiff's attorney, it would not be filed because not in proper form. Blackman gave him to and including the 20th of November, 1956, to do so. The answer not having been filed, plaintiff's attorney caused defendants' default to be entered early on November 21, 1956. In the afternoon of that day he learned from Winkler that he had obtained an order of court permitting the filing of the answer. It was filed on that same day, the 21st, after the default had been entered. Winkler paid the customary appearance fee on behalf of defendants. When plaintiff's attorney learned of this filing and received a copy of the answer, which was on the 21st, he prepared on the same day a motion for judgment on the pleadings returnable on the 27th. This was served upon defendants, whose answer was signed "in pro. per.", by mailing on the 21st. No further steps were taken upon the theory that default had been entered. The motion for judgment on the pleadings was heard at the appointed time and granted, the defendants not appearing and not being represented. It is said that fraud inhered in this proceeding because no mention was made of the existing entry of default and that this silence misled the court. The judgment entered on November 27 pursuant to the order granting the motion was set aside by an order which is the subject of appeal in No. 23151.

The ruling is based primarily upon the conclusion that there was a fraud upon the court. It was said by the trial judge in his memorandum: "Independently of said Motions, the Court determines that the want of disclosure as to entry of default in connection with said proceeding for Judgment on the Pleadings misled the Court as to its procedure, and was a constructive fraud upon it and on that ground the Court orders said judgment vacated." Entering into this ruling is a procedural concept which we find to be erroneous, one turning upon §§ 751 and 585(3), Code of Civil Procedure.

The defendants Finn were in default and that fact was made a matter of record early on the morning of November 21, 1956, when plaintiff's counsel caused the clerk to enter said default. Later on that same day counsel was served with an unverified answer signed by the Finns "in pro. per." The attorney to whom the answer had been sent by the Finns had advised plaintiff's attorney that he would not file it because it was not in proper shape. Mr. Blackman told him that he would take the Finns' default, which he did on the following morning. The other attorney changed his mind, got an ex parte order from the presiding judge permitting the filing of the answer and did file it on the 21st.

[8, 9] While an answer filed after an entry of default has no immediate efficacy, it has potential value for plaintiff's attorney may never raise the point and the delay may be waived. In this instance plaintiff's attorney was presented with a dilemma. He could not reasonably expect to obtain from any judge a default judgment so long as the answer was on file, nor could he properly suppress that fact. An appropriate procedure would have been a motion to strike the answer. Cf. Cudahy v. Gragg, 46 Cal.App. 578, 580, 189 P. 721; Buck v. Morrossis, 114 Cal.App. 2d 461, 464, 250 P.2d 270. Equally available was a motion for judgment on the pleadings. See, People v. Culverwell, 44 Cal. 620, 622. Such a motion constitutes a waiver of the default just like any other step which recognizes the pleading as properly on file. See, Sawtelle v. Muncy, 116 Cal. 435, 439, 48 P. 387; Madison v. Octave Oil Co., 154 Cal. 768, 770–771, 99 P. 176; Oil Tool Exchange, Inc. v. Schuh, 67 Cal.App.2d 288, 297, 153 P.2d 976; Nicholls v. Anders, 13 Cal.App.2d 440, 444, 56 P.2d 1289; 28 Cal.Jur.2d § 25, p. 646. But that motion gave promise of early determination of the action, quite contrary to the result to be expected from a motion to strike or an application to the court for a

default judgment. The defendants were and are dilatory and litigious.[2]

The transcript herein shows that there was no evidence given upon the motion for judgment on the pleadings; any other procedure would have been anomalous. But the trial court inferred that this was a strategy adopted in order to avoid proof of exclusive title to the aeroplane being in plaintiff. This was based upon the view that §§ 751 and 585(3), Code of Civil Procedure, forbid a default judgment in a quiet title action without affirmative proof of plaintiff's title and therefore a motion for judgment on the pleadings would be just a maneuver to avoid such proof; upon this is superimposed speculation that the law and motion judge, if advised of the existing default, would not have granted the motion for judgment without hearing evidence of title. This is a series of misconceptions.

[10] The instant action is an ordinary quiet title brought against two individuals, the Finns, and some fictitious defendants. It falls within the purview of § 738, Code of Civil Procedure, which in varying forms has been in the code since 1872. City of Los Angeles v. Los Angeles Farming & Milling Co., 150 Cal. 647, 649, 89 P. 615, 616, expressly holds that taking of evidence is not essential to a default judgment in such a quiet title action, saying in part: "It is claimed that the judgment is void because the record does not show that the court heard or required evidence in proof of the plaintiff's case. This was not necessary on default in an ordinary action, where the summons is personally served, except where the taking of an account, or the proof of damages or of some other fact, is necessary to enable the court to give judgment or carry it into effect. Code Civ.Proc. § 585. Here no such proof was required. The default of the defendant in an ordinary action of this character admits, so far as such defaulting defendant is concerned, the absolute verity of all the allegations of the complaint. No amount of evidence could establish the facts more effectually for the purpose of rendering the judgment as against such defendant." See, also, Hamblin v. Superior Court, 195 Cal. 364, 370, 233 P. 337, 43 A.L.R. 1509. In Strong v. Shatto, 201 Cal. 555, 558, 258 P. 71, 72, a quiet title action, it is said: "[T]he default of said defendants, who being duly served, did not appear and answer, constituted an admission of every material fact essential to such judgment." It was also shown in the Los Angeles case, supra, that §§ 749–751, Code of Civil Procedure, were not applicable to that case because "[t]here are no allegations of actual, exclusive, and adverse possession by plaintiff continuously for 20 years, nor any of the special averments required in an action under section 749. The action was begun on April 25, 1903, which was after the act of March 8, 1903, amending sections 749, 750, and 751, took effect, and therefore the question whether or not it is a proceeding under those sections is to be determined by the terms of the sections as then amended. We have no doubt it was an ordinary action, and not a proceeding as in those sections authorized." 150 Cal. at pages 648–649, 89 P. at page 616.

[11] Attempted differentiation of this case upon the ground that § 750 "has been amended since to embrace actions under C.C.P. 738 and C.C.P. 751 now refers to all cases of service of summons as provided in § 750, which includes actions under C.C.P. 738" cannot succeed. It was correctly held in Alameda County Title Insurance Co. v. United States Fidelity & Guaranty Co., 121 Cal.App. 73, 76, 8 P.2d 912, that §§ 749 and 750 Code of Civil Procedure are not applicable to an action brought under § 738.

Section 749 covers actions brought by a plaintiff who stands upon adverse possession for 20 years and seeks to quiet title to real property only. Such an action may include all "other persons unknown" who make claims to the property. It may be joined with one brought under § 738 but as to any known claimant "the proceedings in the action shall be governed by the provisions of said Section 738 and said sections pertinent thereto; and the provisions of Section 750 of this code shall not apply to the proceedings as to any such defendant." Section 749.1 (passed in 1949) relates to actions by persons who stand upon adverse possession for 10 years, which actions may include unknown claimants. The action may be joined with one under § 738 but it is confined to real property and, as in the case of § 749, the action "shall be deemed and considered brought under the provisions of Section 738 and sections pertinent thereto of this code, and as to any such defendant the proceedings in the action shall be governed by the provisions of said Section 738 and said sections pertinent thereto; and the provisions of Section 750 of this code shall not apply to the proceedings as to any such defendant."

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[2] Prior to February 9, 1959, respondents in each of these cases had been served with a notice prescribed by Rule 17(b) with respect to default in filing a respondents' brief; the 30 days had expired; No. 23151 was then pending in this Division and No. 23152 in Division Three of this court; on said February 9th a long telegram was sent to the Presiding Justice of each of said Divisions seeking a further extension of time for filing respondents' brief; the application was denied by each Division and the cause ordered upon the next calendar; thereupon respondents served and filed in each case a respondents' brief *on the following day,* February 10th."

Section 751 (amended in 1943; in Los Angeles case, supra, was decided in 1907) refers to actions brought under § 749 (this through its reference to § 750, the "preceding section," which in turn rests on 749) and provides inter alia that the court "shall have jurisdiction to examine into and determine the legality of plaintiff's title and of the title and claim of all the defendants and of all unknown persons, and to that end must not enter any judgment by default, but must in all cases require evidence of plaintiff's title and possession, and hear such evidence as may be offered respecting the claims and title of any of the defendants and must thereafter direct judgment to be entered in accordance with the evidence and the law. * * * The remedy provided in this and the two preceding sections shall be construed as cumulative and not exclusive of any other remedy, form or right of action or proceeding allowed by law." Inasmuch as § 749 specifically provides that the proceedings as to known defendants shall be governed by the provisions of § 738 and relevant sections, and § 751 says its procedure shall be cumulative only, it follows that its requirement of evidence of title does not apply to an action brought under 738, hence not to the one at bar. Let it be emphasized that § 749 and § 749.1 cover only actions involving title to real property and that § 750 and § 751 are intended merely as implementation of those sections, 749 and 749.1.

[12] Reliance upon § 585(3), Code of Civil Procedure, is equally unavailing. This subdivision relates to actions in which service of summons was made by publication. The right to a default judgment is expressly limited to motions made before the filing of any answer, demurrer or motion to strike: "In all actions where the service of the summons was by publication the plaintiff, upon the expiration of the time for answering, may, upon proof of the publication, and that no answer or demurrer has been filed, apply for judgment; and the court must thereupon require proof to be made of the allegations of the complaint; * * *." The same limitation is found in that part of the subdivision relating to quiet title actions.

In the present instance defendants' answer was served and filed before plaintiff's attorney applied for a default judgment; in fact it forestalled any such application. The filing of an answer is a general appearance (Code Civ.Proc. § 1014). At the time of its filing an appearance fee was paid. The appearance was "in pro. per." and the answer had been prepared by the Finns and sent to the attorney who filed it. Personal service had been made upon them at Alexandria, Virginia; one was served on October 17, 1956, and the other on the following day. The default was entered and their answer filed on November 21, 1956, over a month after service; also after the time to plead had expired. This unverified pleading was so evasive as to admit all the material allegations of the complaint. We conclude, upon the authority of certain cases cited by appellant, that this personal knowledge of the action coupled with their general appearance removed the respondents from the class of persons to whom subdivision 3 of § 585 applies, brought them within the rationale of City of Los Angeles v. Los Angeles Farming & Milling Co., supra, 150 Cal. 647, 649, 89 P. 615, and dispensed with the taking of evidence before entry of default judgment. A fortiori it precluded any valid objection to a motion for judgment on the pleadings.

Appellant relies in this behalf upon Zobel v. Zobel, 151 Cal. 98, 90 P. 191. In that case, an action to quiet title, defendant was personally served outside the state after order made for publication of summons. Defendant filed a demurrer and answer but did not serve them upon plaintiff's attorney; upon his motion they were stricken, default entered and default decree granted. Thereafter defendant moved to vacate the judgment upon the ground that summons had not been personally served upon him. The order was granted, but the Supreme Court reversed. Referring to that portion of § 473, Code of Civil Procedure, which is now § 473a, the court said, 151 Cal. at page 100, 90 P. at page 191: "The obvious and sole purpose of this particular provision of section 473 is to afford one who has only constructive notice of a suit brought against him an opportunity within the time designated to invoke the benefit of the section and defend upon the merits. Where, however, at any time prior to the judgment, the defendant personally appears in the action, this, of course, establishes his personal knowledge of its pendency, and so removes him from the class to which the section affords relief. * * * He based his application solely on want of personal service, and the validity of the order is to be determined by considering whether the evidence sustained that claim. We are satisfied that it did not, because it appears from the record that the defendant, notwithstanding he was originally served outside of the state, personally appeared in the action prior to the rendition of judgment, and hence was not entitled to have the judgment set aside under the provision of the section upon which his application was based." It was held that defendant had made a general appearance concerning which the court remarked that "such appearance was equivalent to personal service." Code of Civil Procedure, § 416, says: "* * * The voluntary appearance of a defendant is equivalent to personal service of the summons and copy of the complaint upon him."

While the instant case involves the necessity of taking evidence pursuant to § 585(3) upon the theory that defendants were served by publication, and the Zobel case considered the language of present § 473a relating to time for appearance by one who has been served by publication, we see no difference in principle between the two situations.

Palmer v. Lantz, 215 Cal. 320, 324, 9 P.2d 821, 823: "Service by publication and mailing a copy of the complaint and summons is not personal service [citation], however, and by reason of this fact appellant contends that under section 473, Code of Civil Procedure he is entitled to be relieved from the default as a matter of right without further showing than that he was not personally served. * * * But the provision is not designed to afford relief from a judgment which may be validly entered upon constructive service to those who with full knowledge of such service upon them, by reason of receipt of a copy of the summons and complaint through the mail, remain inactive. [Citations.]"

Concerning § 473a, the Supreme Court said, in Solot v. Linch, 46 Cal.2d 99, 105, 292 P.2d 887, 890: "Relief from default under section 473a of the Code of Civil Procedure is predicated upon the assumption that personal jurisdiction of the defendant has not been obtained. Gardner v. Gardner, 72 Cal.App.2d 270, 272, 164 P.2d 500. Its purpose is clearly to give relief to a defendant who has had only constructive, rather than actual, notice of the action against him."

To the same effect, see In re Estate of Walden, 168 Cal. 759, 761, 145 P. 100; Boland v. All Persons, 160 Cal. 486, 490, 117 P. 547; Pierson v. Fischer, 131 Cal. App.2d 208, 212, 280 P.2d 491.

We hold that respondents' general appearance before default judgment was entered brought them within the rationale of the Zobel case, dispensed with the necessity of taking evidence, and removed them from the class for whose benefit that portion of § 585(3) was enacted. There was therefore no necessity of taking evidence in this case either upon application for a default judgment or upon motion for judgment on the pleadings.

[13] As a matter of law there was no fraud inherent in the motion for judgment on the pleadings. Nor was there error in granting the same, for the answer raised no material issue. Of course mere error in that ruling would not be ground for vacating the order or ensuing judgment and we do not pause to discuss further the merits of the ruling.

One of the grounds of the ruling below was failure of plaintiff to give statutorily prescribed notice of his motion for judgment on the pleadings, ten days. Defendants' answer was served by mail. It bears the endorsement: "George C. Finn Charles C. Finn 7617 Lexington Ave. Hollywood, California Phone: Ho. 9 3746 In Pro. Per." It is signed by each defendant "In Pro. Per." Regardless of residence or domicile the place for service of notice upon defendants by mail was the address endorsed on the pleading (Code Civ.Proc. § 1013). That type of service was permissible because defendants had no attorney of record (Code Civ.Proc. §§ 1012, 1015). It may be assumed that defendants came within the ten-day notice provision of § 1005. In the present instance six days' notice was given by mail.

[14] Although it may be assumed that such a notice was insufficient, defendants proceeded in such manner as to preclude their taking advantage of the fact.[3]

The notice of motion to vacate the judgment, filed May 27, 1957, stated that same would be made "on the grounds of mistake, inadvertence, surprise and excusable neglect, and on the grounds that the judgment is void." The supplemental notice filed on June 17, 1957, specified "the grounds that the judgment is void and fraud." While the motion attached to the last mentioned notice contains the language that "defendants were not notified or given an opportunity to be heard within the meaning and intent of the requirement of 'due process of law,' nevertheless the insufficiency of the six-day mailed notice was not mentioned in presentation of the argument below." On the contrary defendants orally relied upon fraud, mistake, inadvertence, surprise, excusable neglect and the claim that the judgment is void.

[15] The "doctrine of 'special appearance' applies by analogy to motion procedure." 2 Witkin, California Procedure, p. 1642, § 4(c); and see, 1 Witkin, California Procedure, p. 347, § 78. Lacey v. Bertone, 33 Cal.2d 649, 203 P.2d 755, establishes this to be the law of California. That was a specific performance action wherein defendant obtained a preliminary injunction after trial and during submission of the cause. Plaintiff moved to dissolve the injunction because the order to show cause was not served five days before the hearing as required by § 1005, Code of Civil Procedure; but the notice of motion also specified that there was no sufficient ground for the injunction, that the extent of same was too great, and no written undertaking had been given as required by § 529, Code of Civil Procedure. The motion was denied. Upon appeal from the order granting the injunction and the order denying his motion to dissolve it, plaintiff Lacey contended "that the order granting the injunction should be reversed for failure to give proper notice of the hearing because the only notice was that served on him four days before the hearing, and that the order denying his motion to dissolve the injunction should be reversed for the same reason." 33 Cal.2d at page 651, 203 P.2d at page 756. The court said: "We are of the opinion, however, that he is in no position to raise these objections and that he waived the lack of proper notice by making a general appearance on the motion to dissolve the injunction.

"It is well settled that personal service of process may be waived and that where a person voluntarily appears generally he wil be held to have waived the objection even though there was no service upon him. [Citations.] If he requests any relief that can be given only on the hypothesis that he is properly before the court, he thereby submits to the jurisdiction of the court and must necessarily be held to have waived the irregularity of his summons. This rule is ordinarily applied when the defect consists in a failure to serve summons or give the notice required to bring the party before the court originally. [Citations.] It likewise applies when there is a failure to give proper notice of subsequent proceedings to a party who has appeared in the action. [Citations.]

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[3] The record shows that these defendants frequently had been advised by trial judges that they are bound by the same procedural rules when acting in propria persona as is any member of the bar. Of course that is the law. See, Monastero v. Los Angeles Transit Co., 131 Cal.App.2d 156, 160, 280 P.2d 187; Lombardi v. Citizens Nat. Trust & Savings Bank, 137 Cal.App.2d 206, 208, 289 P.2d 823; People v. Morgan, 140 Cal.App.2d 796, 801, 802, 296 P.2d 75; Doran v. Dreyer, 143 Cal.App.2d 289, 290, 299 P.2d 661; People v. Mattson, 51 Cal.2d 777, 336 P.2d 937; In People v. Morgan, supra, 140 Cal.App.2d at page 802, 296 P.2d at page 79 the court says: "This case exemplifies the observation made by the court in Monastero v. Los Angeles Transit Co., 131 Cal.App.2d 156, 162, 280 P.2d 187, 192: 'Experience in trial of cases indicates that all too often litigants who appear in propria persona deliberately attempt to capitalize upon their own ignorance or appearance of ignorance.' "

"In the present case, if Lacey wished to make a special appearance, he should have relied solely on the lack of proper notice as specified in the first ground of his motion. Instead, he also asked for other relief which could properly be given only if the court had jurisdiction of his person, namely, that there was no sufficient ground for the injunction and that it was too broad in scope." 33 Cal.2d at pages 651–652, 203 P.2d at page 757. Also: "On Lacey's motion to dissolve or modify the injunction he had ample opportunity to litigate the merits of the matter and, having made a general appearance, cannot now be heard to complain of defects in the service of the order to show cause." 33 Cal.2d at page 652, 203 P.2d at page 757.

Among the cases cited in support of the Lacey rule is Goble v. Appellate Dept. of Superior Court, 130 Cal.App. 737, 739, 20 P.2d 345, 346, wherein the basis for the rule is thus stated: "In other words, to translate this language into terms of the present proceeding, while petitioner had no notice preceding the order staying *remittitur,* he had his day in court under the motion to vacate it. It is for this reason that he was not prejudiced by the lack of notice. The only purpose of the notice, if one were in fact required, would have been to furnish him an opportunity to be heard. That opportunity he has had."

The Lacey case was followed by this court in Otsuka v. Balangue, 92 Cal.App.2d 788, 792, 208 P.2d 65, 67. It is there said: "Furthermore, if there had ever been any validity in plaintiffs' contention that the proof of service is insufficient by reason of the use of the term 'mail' instead of 'postoffice,' the objection has been waived. Plaintiffs did not appear specially to object to the service or the proof of service but made a general appearance and resisted the motion. * * * Since it does not appear that plaintiffs resisted the motions on the ground that proof of service was defective they waived the right to contest the jurisdiction of the court to hear the motion. Lacey v. Bertone, 33 Cal.2d 649, 652, 203 P.2d 755, 757, and cases cited. In that case the statutory service of an order to show cause why an injunction should not issue was not made, but it was held that the party enjoined waived the lack of proper and timely service by making a general appearance."

[16] In the instant case defendants' insistence upon fraud, mistake, inadvertence, surprise, excusable neglect and the claim that the judgment is void, amounted to the seeking of relief which is available only to one who has made a general appearance. They had their hearing upon those matters of substance and cannot be prejudiced by the faulty six-day notice.

The court ruled against defendants with respect to grounds asserted under § 473, Code of Civil Procedure, and we think it properly did so upon the record made before it.

Our foregoing rulings upon the questions of fraud and inadequacy of notice of motion to vacate necessitate reversal of the order now on appeal and render unnecessary any discussion of appellant's claim that respondents did not move within a reasonable time, were otherwise guilty of laches requiring a denial of their motion, or the claim that defendants were not entitled to be heard because they were in contempt of court with respect to another action concerning a different plane. Likewise unnecessary is discussion of appellant's claim that § 473, Code of Civil Procedure, and not § 473a, Code of Civil Procedure, governs this matter because defendants were personally served outside the jurisdiction pursuant to an order for publication of summons.

There was no showing of any grounds warranting the vacation of the *default* in this case.

[17] The first full paragraph of respondents' brief in No. 23151, beginning at line 21, page 1, and ending at line 7 of page 2 thereof, makes derogatory remarks and veiled charges against one of the superior court judges concerning a matter not before this court. The paragraph on page 6 of said brief which is captioned "Judicial Notice" and begins at line 11 and ends at line 19 of said page makes certain assertions concerning difficulties of appellant with the Federal Government, which have no place in this proceeding. The same statements appear in respondents' brief in No. 23152, namely at page 1, line 19 to page 2, line 5, and at page 6, lines 11 to 19, inclusive. Such matters will be stricken.

The order under appeal in Batchelor v. Finn, No. 23151, is reversed. The above mentioned portions of respondents' brief in said cause are stricken from the record.

The order under appeal in Johnson v. Finn, No. 23152, is affirmed. The above mentioned portions of respondents' brief in said cause are stricken from the record.

Respondents' petition for rehearing is denied in No. 23151.

Appellant's petition for rehearing is denied in No. 23152.

FOX, P. J. concurs.

HERNDON, J., does not participate herein.

Hearing denied: TRAYNOR and SCHAUER, JJ; dissenting.

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171 Cal.App.2d 633

PEOPLE of the State of California, Plaintiff and Respondent,

v.

James L. KOONTZ, Defendant and Appellant.

No. 3600.

District Court of Appeal, First District, Division 2, California.
July 1, 1959.

Prosecution for incest and lewd conduct with a child. The Superior Court, Alameda County, Chris B. Fox, J., entered judgment of conviction for incest, and defendant appealed. The District Court of Appeal, Dooling, J., held that in view of fact evidence was sufficient to sustain conviction for incest, trial court did not err in failing to treat defendant's motion for dismissal of such charge as a motion for an advised verdict, and in failing to advise the jury to acquit defendant on such charge.

Judgment affirmed.

1. Incest 🔑16

Where prosecuting witness, in prosecution for incest and lewd conduct with a child, testified on direct examination, not in answer to leading questions, as to penetration, but on cross-examination, in answer to whether she was sure there had been penetration, stated, "No", such conflict in the testimony of the prosecutrix was to be resolved by the trier of fact. West's Ann.Pen.Code, §§ 285, 288.

2. Incest 🔑14

Evidence sustained conviction for incest. West's Ann.Pen.Code, § 285.

3. Criminal Law 🔑1168(1)

Where evidence was sufficient to sustain conviction for incest, trial court did not err in failing to treat defendant's motion for dismissal of such charge as a motion for an advised verdict, and in failing to advise the jury to acquit defendant on such charge.

◆

John A. Waner, San Francisco, for appellant.

Stanley Mosk, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Arlo E. Smith, Deputy Atty. Gen., for respondent.

DOOLING, Justice.

Defendant was charged in two counts with violations of Penal Code sections 288 and 285, lewd conduct with a child and incest. He was found guilty of incest and not guilty on the other count.

[1] Appellant's daughter, then thirteen, testified that appellant met her and her twin brother on the street and took them to his apartment where, after sending the brother out to buy cookies, he had an act of sexual intercourse with her. Appellant's sole contention on appeal is that there was not sufficient evidence of sexual penetration.

On direct examination the little girl, not in answer to leading questions, gave clear and explicit testimony of penetration. On cross-examination in answer to leading questions as to whether she was sure that there had been penetration (i. e. "You are not sure * * * are you?") she answered "No."

While a physician testified that Vivian's physical development was such that an act of intercourse with her by an adult could have occurred this, as appellant points out, falls short of proof of actual penetration and that proof must be found in the daughter's testimony.

The case is governed by the rule that conflicts in the testimony of a single witness are to be resolved by the trier of the fact. In People v. Haywood, 131 Cal. App.2d 259, at page 261, 280 P.2d 180, at page 181 (a statutory rape case in which a sixteen year old girl gave conflicting testimony on direct and cross-examination as to whether there had been penetration) the court said: "It is, of course, fundamental that the credibility of a witness is for the determination of the trier of fact. Hence conflicts and inconsistencies in the testimony of an individual witness are to be resolved by the fact finding authority. People v. Frankfort, 114 Cal.App.2d 680, 700, 251 P.2d 401; People v. White, 115 Cal.App.2d 828, 831, 253 P.2d 108; People v. Ashley, 42 Cal.2d 246, 266, 267 P.2d 271. Thus the trial judge was entitled to accept as true the testimony of the complaining witness on direct examination rather than the conflicting testimony which she later gave. People v. Crawford, 24 Cal.App. 396, 403, 141 P. 824; People v. Holman, 72 Cal.App.2d 75, 89, 164 P.2d 297." See also the discussion with citation of authorities in People v. Holman, supra, 72 Cal.App.2d 75, 89–90, 164 P.2d 297.

[2] While we are keenly sensitive to the danger of unwarranted convictions in cases of this character, the jury in this case was not only given the customary cautionary instruction (People v. Putnam, 20 Cal.2d 885, 890–892, 129 P.2d 367), but it was clearly instructed on the lesser offense involved in count one of the information and on the necessary elements of incest, and further instructed that it could find appellant guilty on either count but not on both. The jury chose to find the appellant guilty of the greater offense charged in count two. The trial judge was satisfied with the correctness of this verdict as shown by his denial of appellant's motion for new trial. On the whole case we can find no lack of support for the jury's verdict in the testimony of the little girl.

[3] The appellant moved for a dismissal of count two which he now argues should have been treated as a motion for an advised verdict. Since the evidence was sufficient the court committed no error in not advising the jury to acquit appellant on count two.

Judgment affirmed.

KAUFMAN, P. J., and DRAPER, J., concur.

* * *

172 Cal.App.2d 1

Frances A. YOCKEL and Helen F. Lewis, Plaintiffs and Appellants,

v.

Anne Gipson HATLEY, Sylvia Kantor, also known as Sylvia Zatulovsky (sued as Jane Doe A. Kantor) and Anthony Kantor, also known as A. Zatulovsky (sued as John Doe A. Kantor), Defendants and Respondents.

Civ. 23480.

District Court of Appeal, Second District, Division 3, California.

July 13, 1959.

Action by driver and passenger in automobile proceeding in lane two of a freeway for injuries sustained in a collision which occurred when driver of automobile in lane three stepped on her power brakes to avoid colliding with automobile, which turned from lane four back into lane three, and driver of automobile in lane three swerved into lane two and came to a stop and was struck by automobile proceeding in lane two. From adverse judgment of the Superior Court, Los Angeles County, Kenneth C. Newell, J., motorist and passenger in automobile proceeding in lane two appealed. The District Court of Appeal, Shinn, P. J., held that instruction on unavoidable accident was erroneous and was prejudicial.

Judgment reversed.

1. Negligence ⟾140

It is error to give instruction on unavoidable accident except in exceptional circumstances.

2. Appeal and Error ⟾1031(6)

Where jury has been misinstructed, resulting prejudice will not be presumed and reviewing court must give consideration to what it believes would have been a reasonable and just result of the trial if the error had not been committed.

3. Appeal and Error ⟾1064(1)
Automobiles ⟾246(57)

In action by driver and passenger in automobile proceeding in lane two of a freeway for injuries sustained in a collision which occurred when driver of automobile in lane three stepped on her power brakes to avoid colliding with automobile which turned from lane four back into lane three and driver of automobile in lane three swerved into lane two and came to a stop and was struck by automobile proceeding in lane two, instruction on unavoidable accident was erroneous and was prejudicial.

◆

Fisk & Tyson, Richard P. B. Tyson, Pasadena, for appellants.

Sawyer, McGurl & Burrows, Robert E. McGurl, Los Angeles, for respondents.

SHINN, Presiding Justice.

This is an action for damages resulting from injuries received when an automobile driven by plaintiff Lewis, in which plaintiff Yockel was a passenger, collided with a car belonging to defendant Kantor, also known as Zatulovsky, and driven by defendant Hatley. The collision occurred when the car of the defendants veered into and stopped in the lane in which plaintiffs' car was traveling on the Hollywood Freeway. In a jury trial, verdict and judgment were for defendants and plaintiffs appeal.

At the request of the defendants the court gave an instruction on unavoidable accident. This error constitutes the sole ground of the appeal. Defendants say: "The giving of the complained-of instruction on unavoidable accident was proper and correct. The instruction did not mislead the jury; it did not confuse the jury; and there was no prejudicial error in the case." If we could agree we would have to affirm the judgment; but we cannot agree.

[1] It is error to give the instruction except in exceptional circumstances which do not exist in the present case. Butigan v. Yellow Cab Co., 49 Cal.2d 652, 320 P.2d 500. As in all other cases where error has been committed the question of prejudice must be examined in the light of the special facts of the case, and in accident cases these are of infinite variety.

Mrs. Hatley, 40 years of age, was housekeeper for the Kantors in Hollywood. She was driving their Cadillac westerly from downtown Los Angeles to Hollywood. We shall first give Mrs. Hatley's account of the accident. There were four lanes for westbound traffic, numbered from the middle of the freeway. She was in lane 3; as she approached the Glendale Boulevard turnoff, a ramp, a Chevrolet which was in lane 4 started to turn off and then came back into lane 3; Mrs. Hatley turned left, put on brakes, swerved into lane 2 and came to a stop; her car was stopped when it was struck by the Lewis car; she had been stopped for some period of time, it seemed to her like two minutes or something like that before the collision; she was looking toward the east and saw the Lewis car approaching and thought it would stop; if she had turned her car to the right the Lewis car would have hit her car in the rear; as it was, it struck the front fender and wheel. She thought the Lewis car was going 40 or 50; she was not injured. The Cadillac had power brakes and "that is why it swirled when I stepped on the brakes; made it swirl so easily." She was going about 35; the Chevrolet was about a car length ahead of her when it started off and it whirled right back; she had not noticed the Chevrolet until it started to turn off. She first saw the Lewis car when it was about 40 feet away: "* * I was already at a complete stop when she hit me, and I saw her coming and I just sit there to see, I mean, would she stop"; she was in lane 2 when she first saw the Lewis car; she had swirled around crossways of the traffic and come to a stop; her motor was still running. In her deposition she stated she had been stopped four or five minutes, but this obviously was an incorrect estimate; she gave no signal before turning into lane 2; the Chervolet was about 15 feet in front of her when it started to turn into lane 3. When she was afraid she would hit the Chevrolet she put on her brakes and turned to the left. After the accident she did not give Mrs. Lewis her name or address or exhibit to her her operator's license.

Mrs. Lewis, a housewife, aged 40, had been driving a car for 22 years; her 4 year old son was in the car but was not hurt. Her top speed was 45; the Cadillac had been to her right; it swerved and came right in front of her and stopped; it kind of lurched out and stopped there; the Cadillac was coming into her lane a couple of car lengths ahead of her and coming pretty fast; she put on her brakes; a truck was coming behind her on her left; she couldn't turn out and she hit the Cadillac, which was stopped at the time, across lane 2 and headed south; it came in jerking or lurching and was rocking until it stopped. She saw no other cars in her lane ahead of the Cadillac and no Chevrolet or other car coming from the right except the Hatley car. She walked over to Mrs. Hatley and asked: "What in the world did you do that for" and Mrs. Hatley replied "I don't know." Mrs. Hatley denied having made the statement.

[2] In the consideration of the question of prejudice there is little purpose to be served in discussing the facts of other cases. Where the jury has been misinstructed, the question of prejudice is often one of great difficulty. The reviewing court must to a certain extent speculate as to the probabilities that the jury was misled and that the verdict was influenced by the error. The problem is not one of law; it cannot be solved except from a consideration of the strength or weakness of the case made out by each of the contending parties. While it is true that prejudice is not presumed it is also true that it will seldom appear to a certainty that a given error in an instruction resulted in a verdict that would not otherwise have been rendered. The question of prejudice being one of probabilities as to whether a material issue was fairly tried, a reviewing court must give consideration to what it believes would have been a reasonable and just result of the trial if the error had not been committed.

Defendants cite in support of their contention that plaintiff suffered no prejudice Grasgreen v. Acme Auto Parks, 165 Cal. App.2d 680, 332 P.2d 337; Alarid v. Vanier, 50 Cal.2d 617, 327 P.2d 897 and Rayner v. Ramirez, 159 Cal.App.2d 372, 324 P.2d 83, and they say that the facts in Rayner were very similar to those of the case at bar. In each case the unavoidable accident instruction was held not to have been prejudicial. We mention these cases to point out that the reasons given for the conclusions reached are inapplicable to the facts of our case. In Grasgreen the court attributed the verdict in favor of the defendant to probable findings that Grasgreen was guilty of contributory negligence and had given obviously false testimony. These were factors which had a direct bearing upon the question of prejudice. In Alarid the court held that it could have been found from uncontradicted testimony that the defendant was not guilty of negligence. In Rayner the defendant, who was driving one truck and towing another, swerved a few feet onto the wrong side of the highway to avoid a boy on a bicycle but returned to the right side in time to have avoided an oncoming car but for the fact that the truck he was towing failed to return in time due to the breaking of the tow chain; it was the towed truck that collided with the car. We said in Halleck v. Brown, 164 Cal.App.2d 586, 330 P.2d 852, that we agreed that it was highly improbable that Ramirez would have been found guilty of negligence had the unavoidable accident instruction not been given. The cases cited are of no help to defendants.

[3] We shall not repeat what was said in Butigan as to the vice of the instruction, other than that it suggests a defense other than absence of negligence and is confusing. Here it was stated in effect that the jury could reasonably conclude that the conduct of Mrs. Hatley was unavoidable. That, in reality, was what the instruction meant in this case and the jury doubtless so understood it. It tended to divert the minds of the jurors from or minimize the following facts: anyone driving in fast moving traffic on the modern freeways must be constantly on the alert for careless driving of other cars; if another car had come into lane 3 ahead of Mrs. Hatley there was no evidence that she could not have slowed down so as to avoid striking it. In fact, a reasonable inference was that with her powerful brakes she could have come to a quick stop without leaving her lane; it did not appear that the Chevrolet was going slower than defendant's car; Mrs. Hatley testified it was going "pretty fast" and that she was going 35; a prudent driver is prepared to slow down when someone cuts in front of him. Turning suddenly from one lane to another on a high speed freeway is an exceedingly dangerous thing to do and going into another lane and suddenly stopping is suicidal; if Mrs. Hatley had turned into lane 2 and kept moving the accident might not have occurred; it was not shown that she could not have turned out around the other car and kept moving; from the testimony of Mrs. Hatley it appeared that she knew that if she suddenly activated her power brakes with the front wheels turned from a straight line the car had a tendency to swerve sideways and that she evidently fell into a panic due to her inexperience as a freeway driver. It is a well known fact that in these times of fast traffic reasonable precautions for safety require one to be prepared for the unexpected. We are not unmindful of the admitted fact that Mrs. Hatley received the benefit of an instruction which stated the rules applicable to the sudden appearance of danger. But the unavoidable accident instruction gave her an additional and undeserved advantage.

It is scarcely necessary to mention that the plaintiffs were blameless. They were entitled to have their case tried upon the sole issue of the negligence of Mrs. Hatley. There is enough to be considered before Mrs. Hatley could be found to have been free of negligence to convince us that a trial court or jury should decide that issue. We do not believe it would be fair and just to deprive plaintiffs of the right to have the issue tried again under proper instructions. We do not intimate that the result will be different but only that a different result would not be improbable. And we are necessarily of the opinion that upon the same evidence a finding that Mrs. Hatley was negligent would not be unreasonable. We are dealing with an isolated case in which no question of law is involved and the unique facts of which will in all probability never recur. And we trust that we have seen the last of the cases involving the same erroneous instruction.

We can only add in summary that we are convinced that it would more accord with justice for this court to send the case back for a retrial rather than to assume that there is slight probability that the error complained of was prejudicial.

The judgment is reversed.

PARKER WOOD and VALLÉE, JJ., concur.

172 Cal.App.2d 372

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Junior GRAYSON, also known as Leandrew Grayson, Defendant and Appellant.

Cr. 2895.

District Court of Appeal, Third District, California.

July 27, 1959.

Defendant was convicted of sales and possession of marjuana. The Superior Court, Solano County, Harlow V. Greenwood, J., entered judgment, and the defendant appealed. The District Court of Appeal, Schottky, J., held that Superior Court did not err in refusing to permit defendant, on cross-examination of special investigator for the Bureau of Narcotic Enforcement, who had testified on direct examination that he had purchased marijuana cigarettes from defendant on five occasions, concerning the recent discharge of a state narcotics agent, where discharge of state narcotics agent neither related to any fact testified to by the special investigator on direct examination nor tended to impeach him or test his credibility or recollection of the facts concerning which he testified.

Judgment affirmed.

1. Witnesses 🔑269(2), 328, 330(1)

In prosecution for sales and possession of marijuana, trial court did not err in refusing to permit cross-examination of special investigator for the Bureau of Narcotic Enforcement, who had testified on direct examination that he had purchased marijuana cigarettes from defendant on five occasions, concerning the recent discharge of a state narcotics agent, where discharge of state narcotics agent neither related to any fact testified to by the special investigator on direct examination nor tended to impeach him or test his credibility or recollection of the facts concerning which he testified. West's Ann. Health & Safety Code, § 11500.

2. Witnesses 🔑270(1)

A witness may not be cross-examined on matters which are irrelevant or outside scope of direct examination for purpose of testing credibility of witness, and unrelated matters may not be brought out for purpose of showing that witness on other occasions made contradictory statements.

3. Criminal Law 🔑1170½(1)

Where defendant's counsel, on cross-examination of prosecution witness, asked witness if he was not presently serving time in certain county jail, and witness replied that he was, and defendant's counsel then attempted to impeach testimony of witness concerning his place of residence, and trial court then stopped defendant's counsel and stated that fact that witness was in certain county jail for speeding did not change his residence and that he was still a resident of place where he had testified that he resided, there was no prejudicial error, on ground that defendant's counsel was not permitted to cross-examine the witness in regard to his incarceration in order to impeach his testimony concerning the place of his residence.

4. Witnesses 🔑269(2)

In prosecution for sales and possession of marijuana, trial court did not unduly restrict defendant's cross-examination of state narcotic inspector in attempt to elicit facts relating to question whether special investigator's wife was addicted to use of narcotics, where no such issue had been brought out on direct examination of the state narcotic inspector. West's Ann.Health & Safety Code, § 11500.

5. Witnesses 🔑374(1)

Evidence is admissible to show that witness for prosecution has a motive for testifying falsely.

6. Witnesses 🔑374(1)

In prosecution for sales and possession of marijuana, proper method of showing alleged motive of prosecution witness to testify falsely would have been to establish that witness had been promised a reward, or that an inducement or threat held out or made to witness in return for testimony favorable to the prosecution motivated him to distort or falsify his testimony. West's Ann.Health & Safety Code, § 11500.

7. Witnesses ⚷255(1)

There is no objection to a witness for the prosecution refreshing his recollection and memory prior to taking the witness stand, and there can be no objection to the use by the witness of notes for such purpose, so long as the notes are not actually used on the witness stand. West's Ann.Code Civ.Proc. § 2047.

8. Criminal Law ⚷698(1)

Generally, material and relevant evidence on an issue, even though hearsay and technically incompetent and inadmissible, will be considered in support of judgment of conviction, if offered and received without objection.

9. Poisons ⚷9

In prosecution for sales and possession of marijuana, testimony of state narcotic inspector and police officer adequately established that defendant resided in and was the sole occupant of certain hotel room, in which marijuana was discovered hidden in a chair, and evidence was therefore sufficient to support judgment of conviction on possession count. West's Ann.Health & Safety Code, § 11500.

10. Criminal Law ⚷1036(1)

Objections to the introduction of illegally obtained evidence cannot be reviewed on appeal in absence of proper objection in trial court.

11. Criminal Law ⚷1036(1)

Where, in prosecution for sales and possession of marijuana, there was no objection by defendant to introduction of marijuana cigarettes into evidence and no objection to testimony of officers who searched hotel room of defendant and found the marijuana cigarettes, objection of defendant that marijuana cigarettes had been obtained by illegal search and seizure could not be raised for first time on appeal and would be deemed to have been waived. West's Ann.Health & Safety Code, § 11500.

12. Criminal Law ⚷444, 1153(6)

Statute providing that a record of an act, condition or event, shall, in so far as relevant, be competent evidence if custodian or other qualified witness testifies to its identity and mode of its preparation, and if it was made in regular course of business, at or near time of the act, condition or event, and if, in opinion of the court, the sources of information, method and time of preparation were such as to justify its admission, places in trial court a broad discretion which will not be disturbed on appeal. West's Ann.Code Civ.Proc. § 1953f.

13. Criminal Law ⚷444

In prosecution for sales of marijuana and for possession of marijuana found in hotel room, trial court properly excluded hotel register sought to be introduced by defendant, where the only fact established by defendant through part-time manager of hotel was the identity of the hotel register, and defendant failed to show mode of preparation of register or that it had been made in regular course of business. West's Ann.Code Civ.Proc. § 1953f.

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Douglas C. Busath, Sacramento, for appellant.

Attorney General, by Doris H. Maier and G. A. Strader, Deputies Atty. Gen., for respondent.

SCHOTTKY, Justice.

An information was filed charging appellant with six counts of violation of the Health and Safety Code, section 11500. Counts I, II, III, V, and VI charged the appellant with having sold a narcotic, marijuana, on October 10, October 13, October 24, October 9, and November 5, 1957, respectively. Count IV charged the appellant with possession of a narcotic, marijuana, on November 6, 1957. Appellant was found guilty by a jury on all six counts, and this appeal is from the judgment entered on the verdicts.

At the trial Hector Reyna, a special investigator for the Bureau of Narcotic Enforcement of California, testified that he had purchased quantities of marijuana cigarettes from appellant on five occasions. The respective purchases were offered in evidence and were properly identified as marijuana.

Appellant was arrested on November 5th, after Reyna had purchased five marijuana cigarettes from him. After the appellant had been arrested, a search was made of his room by state narcotic inspector, Major McBee, in company with Vallejo police captain, Dan Horan. The arrest of the appellant occurred about 10 p. m. on November 5th, and the search of his room occurred in the early morning hours of November 6th. The officers went to the Manx Hotel, and after inspecting the register and determining that the appellant, Mr. Grayson, lived in room 12, requested and received permission of the landlady to enter the room and they did so after she opened the door for them. A search of the room resulted in the discovery by Captain Horan of 32 marijuana cigarettes hidden in an overstuffed chair in the middle of the room.

Appellant does not argue that the judgment is not supported by sufficient evidence but does contend: (1) That the trial court erred in restricting certain cross-examination; (2) That the trial court erred in permitting one of the witnesses to consult notes during the course of the trial; (3) That the trial court erred in admitting hearsay evidence relating to appellant's occupancy of a room in which marijuana was found; (4) That certain evidence was obtained by illegal search and seizure; and (5) That the trial court erred in excluding certain hotel records.

Appellant contends that the trial court unduly restricted counsel in his cross-examination of prosecution witnesses Hector Reyna and Major McBee. It is argued by the appellant that the cross-examination of Reyna was unduly restricted by the trial court in that counsel was not permitted to test the witness' recollection and credibility.

[1] Mr. Reyna testified on direct examination that he was employed by the State Bureau of Narcotic Enforcement on September 28, 1957. He came to Vallejo for the purpose of making purchases of narcotics and was given a list of places where he could make a connection. He then testified as to the various purchases of marijuana cigarettes from appellant. On cross-examination Reyna was questioned concerning his employment, and in doing so, counsel attempted to bring out facts relating to the recent discharge of a state narcotics agent, Fred Braumoeller. The appellant contends that the restricting of cross-examination on this point was error. This contention is without merit. Whether Braumoeller had been "fired" by the state neither related to any fact testified to by Reyna on direct examination nor tended to impeach the witness or test his credibility or recollection of the facts concerning which he testified.

[2] A witness may not be cross-examined on matters which are irrelevant or outside the scope of direct examination for the purpose of testing the witness' credibility, nor may unrelated matters be brought out for the purpose of showing that the witness on other occasions made contradictory statements. See People v. McCarthy, 88 Cal.App.2d 883, 200 P.2d 69; and People v. Sims, 165 Cal.App.2d 108, at pages 114, 115, 331 P.2d 799.

[3] Appellant also contends that he was not permitted to cross-examine the witness Reyna in regard to Reyna's incarceration in the Alameda County jail, arguing that the fact of Reyna's incarceration impeached his testimony to the effect that he and his wife reside in Oakland. However, the record shows the following:

> "Q. [By appellant's counsel.] Isn't it a fact that you are presently serving time in the Alameda County Jail? A. That's right, sir.

> "Q. Then you are not residing at the address?
>
> "The Court: Now, hold on. By virtue of an Alameda jail sentence for speeding, that is not a change of his residence. He is still a resident of the place of above, Mr. Raftery."

We are unable to see how appellant was prejudiced in any way. The question was asked and answered, and there was no prejudicial error in the court's refusal to permit appellant to pursue the matter further.

[4] Appellant also contends that the court unduly restricted the cross-examination of the witness McBee. Appellant's counsel was cross-examining witness McBee, a state narcotic inspector, and attempted to elicit facts relating to the question of whether the witness Reyna's wife was addicted to the use of narcotics. No such issue had been brought out upon the direct examination of this witness and the questions were obviously outside the scope of the direct examination. The appellant asserted that the purpose of the questioning was to show a motive which might induce Mr. Reyna to perjure himself. However, not only was this testimony improperly sought to be elicited from Mr. McBee on cross-examination but, if admissible at all, it should have been brought out by the appellant's own witness.

[5, 6] It is, of course, true that evidence is admissible for the purpose of showing that a witness has a motive for testifying falsely. The alleged motive in the present case was Mr. Reyna's asserted desire to prevent prosecution of his wife for narcotic addiction or otherwise win favorable treatment from police or prosecuting officials. However, the proper method of showing such motive would have been to establish that the witness had been promised a reward, or that an inducement or threat held out or made to him in return for testimony favorable to the prosecution motivated him to distort or falsify his testimony.

There was not the slightest attempt by counsel for the appellant to introduce such testimony. He merely attempted to show on cross-examination of Mr. McBee that Mr. Reyna was a user of narcotics (the witness answered that to his knowledge Mr. Reyna was not a user of narcotics), or that Reyna's wife was a narcotic addict. The questions in no way tended to show a motive adverse to the appellant and were properly excluded.

There is no merit in appellant's contention that the trial court committed error in allowing witness Reyna to consult certain memoranda during the course of the trial. He refers to the provisions of the Code of Civil Procedure, section 2047, which provides that a witness may be allowed to refresh his memory by reference to notes or writings made by himself or under his direction at the time when the facts related occurred or when the facts were fresh in his memory. During the course of the trial in the present case, it appeared that Mr. Reyna while on the witness stand had with him certain notes which had been typed by his wife from the witness' original notes made at the time that the facts related therein occurred. The appellant assumes in his argument on appeal that after objection by counsel for the appellant the court permitted the witness to use the notes on the stand and that the witness did so. The appellant has pointed to no portion of the record on appeal which would support any such contention, and an examination of the record clearly indicates that the witness did not consult his notes on the stand after the appellant's objection to the use of the notes was sustained.

[7] There is some indication from the record that this witness may have refreshed his memory during the recess or prior to coming to court. However, it is clearly established that there is no objection to a witness refreshing his recollection and memory prior to taking the witness stand, and there can be no objection to the use of notes for this purpose so long as the notes are not actually used on the witness stand.

People v. Gallardo, 41 Cal.2d 57, 257 P.2d 29.

Appellant contends further that the evidence in support of the charge of possession of narcotics is supported solely by incompetent evidence and is therefore insufficient. It is argued that there exists only hearsay evidence to show that the appellant occupied room 12 of the Manx Hotel where the narcotics were found in the chair. The testimony in support of this count consists of the testimony of Officer Horan and Inspector McBee. After the arrest of the appellant, these officers went to the Manx Hotel where they examined the register and discovered that the appellant was registered in room 12; they further ascertained from the landlady that the defendant was the only one living in the room, and with the assistance of the landlady they entered the room and searched and discovered the marijuana cigarettes. The appellant was seen entering the Manx Hotel just before his arrest.

[8, 9] However, the record shows that there was no objection by counsel for the appellant to the introduction of any of this evidence relating to Count IV charging possession of narcotics. In fact, counsel for the appellant not only failed to object, but much of the testimony on this point was brought out on cross-examination by appellant's counsel. It is a general principle of law, well established in this state, that material and relevant evidence on an issue, even though hearsay and technically incompetent and inadmissible, which is offered and received without objection will be considered in support of the judgment. People v. Stepp, 82 Cal.App.2d 49, 185 P.2d 417; People v. Kelly, 77 Cal.App.2d 23, 174 P.2d 342. In the absence of any objection by the appellant, the evidence consisting of the testimony of Inspector McBee and Officer Horan adequately established that the appellant resided in and was the sole occupant of room 12 of the Manx Hotel in which the narcotics were discovered hidden in a chair. The evidence is therefore sufficient to support the judgment on this count. People v. Vice, 147 Cal.App.2d 269, 305 P.2d 270; People v. Noland, 61 Cal.App.2d 364, 143 P.2d 86.

Appellant contends also that the evidence relating to the count of possession was obtained by illegal search and seizure. Appellant argues that even assuming that the room in which the marijuana cigarettes were found was shown to have been occupied by the defendant the evidence of the possession of the narcotics in the room was obtained by an illegal search and seizure. The record shows that the arresting officers after having arrested the appellant went to his room and there conducted the search in question.

[10] Even if it could be inferred that there was a possible illegal search and seizure in the present case, it is clearly established that this contention may not be raised for the first time on appeal. The record in the present case shows that there was no objection to the introduction of marijuana cigarettes into evidence and there was no objection to the testimony of the officers who searched the room and found the narcotics. It is now clearly established by numerous decisions that the exclusionary rule of People v. Cahan, 44 Cal.2d 434, 282 P.2d 905, 50 A.L.R.2d 513, is strictly a rule of evidence, and that objections to the introduction of illegally obtained evidence cannot be reviewed on appeal in the absence of a proper objection in the trial court. See People v. Shannon, 147 Cal.App.2d 300, 305 P.2d 101; People v. Mann, 148 Cal.App.2d 851, 307 P.2d 684; People v. Kelsey, 140 Cal.App.2d 722, 295 P.2d 462; People v. Williams, 148 Cal.App.2d 525, 307 P.2d 48; People v. Brittain, 149 Cal.App.2d 201, 308 P.2d 38.

[11] An exception to this rule has been made in cases where the trial occurred prior to the issuance of the Cahan decision. See People v. Maddox, 46 Cal.2d 301, 294 P.2d 6. However, the present case was tried long after the decision in the Cahan case, and at the time of trial the Cahan rule was well known throughout the legal profession. If there was any objection which could have been made to the introduction of this evi-

dence on the grounds of illegal search and seizure, that objection should have been made in the trial court; and in the absence of such objection the point must be deemed to have been waived and cannot be raised for the first time on appeal. People v. Howard, 150 Cal.App.2d 428, 310 P.2d 120; People v. Davis, 157 Cal.App.2d 33, 320 P. 2d 88.

Appellant's final contention is that the trial court erred in sustaining an objection to the introduction in evidence of a hotel register. The appellant sought to introduce in evidence at the trial a partial or mutilated register of the Hotel Manx. A Mrs. Bell was called as a witness and testified that she was the part-time manager of the hotel in the fall of 1957 and that she was familiar with the hotel register. She was shown a package containing pages which she identified as the hotel register for the periods of September, October, and November, 1957. The pages had been part of a book but had been cut out. The pages had been given to the witness by "her boss." The witness testified that there were two registers, one for "transients" and one for "regulars." These pages were taken from the book for "regulars."

An objection was sustained to the introduction of the pages on the ground that the pages were only a partial record and no sufficient foundation had been laid. This witness then returned to the hotel and picked up the rest of the register which she brought to court. The witness testified that these were all of the records that she knew of; that she had "access to these books" and "recognized" them. After further argument by counsel, the court denied the appellant's offer to introduce them in evidence.

The appellant states in his opening brief, "It will be admitted that an imperfect foundation was laid for the admission of the records, but the witness testified that they were full and complete records." However, the record very clearly shows that the records were mutilated and that a number of the pages had been removed from the register. The witness when asked whether these were full and complete records replied, "All I know of, yes" and "For all I know about." The trial court refused to permit the introduction of these records upon the grounds that an insufficient foundation had been laid and they were not shown to be true and complete. The records were in fact mutilated, some of the pages having been removed.

The Code of Civil Procedure, section 1953f, provides as follows:

> "A record of an act, condition or event, shall, in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity *and the mode of its preparation,* and if it was made in the regular course of business, at or near the time of the act, condition or event, *and if, in the opinion of the court, the sources of information, method and time of preparation* were such as to justify its admission." (Emphasis added.)

[12] It has been held that this section gives to the trial court a wide discretion in determining whether or not the mode of preparation of business records, etc., justifies their admission. The section specifically provides that the records are admissible "if in the opinion of the court" the sources of information, methods of preparation, etc., justify their admission. This places a broad discretion in the trial court which will not be disturbed on appeal. Richmond v. Frederick, 116 Cal.App.2d 541, 253 P.2d 977.

[13] In the present case the foundation for the admission of these alleged business records was not established. The section above quoted clearly provides that the foundation must include evidence as to the mode of preparation and the fact that the entries were made in the regular course of business at or near the time of the act, condition or event. The only fact established by the appellant in the present case was the identity of the hotel register. Having failed to show the mode of preparation, there was not sufficient foundation for the introduction of the records. Luthringer v.

Moore, 31 Cal.2d 489, 190 P.2d 1. The records were also properly excluded on the grounds that they were not shown to have been made in the regular course of business. Pruett v. Burr, 118 Cal.App.2d 188, 257 P.2d 690.

The judgment is affirmed.

VAN DYKE, P. J., concurs.

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172 Cal.App.2d 89

Geraldine SAPP, Plaintiff and Respondent,
v.
W. T. GRANT COMPANY, a corporation, Defendant and Appellant.
Civ. 18440.

District Court of Appeal, First District, Division 2, California.
July 17, 1959.

Action against storeowner by invitee for injuries allegedly received when she slipped on spool lying loose on floor. The Superior Court, County of Contra Costa, Homer W. Patterson, J., entered judgment in favor of invitee, and owner appealed. The District Court of Appeal, O'Donnell, J. pro tem held that where it was shown that customers were free to help themselves at counters, and that employees were instructed to keep aisles clean at all times, evidence supported implied finding that ordinary care dictated that owner have clerk in attendance at notions department at all times, and that if notions department, where injury occurred, had not been unattended for 20 minutes but, instead, employee had been on duty, employee probably would have seen spool and picked it up before invitee stepped on it.

Affirmed.

1. Negligence 🔑44

Storeowner owed duty to invitee who allegedly received injuries when she slipped on spool in aisle to exercise ordinary care to keep premises in safe condition.

2. Negligence 🔑128

In action against storeowner by invitee for injuries allegedly received when she slipped on spool of thread lying in aisle, testimony as to duty of employees to keep their department, including the aisles, cleared at all times was relevant on issue of negligence of storeowner.

3. Negligence 🔑134(8)

In action against storeowner by invitee for injuries allegedly received when she slipped on spool lying loose on floor, wherein it was shown that customers were free to help themselves at counters and that employees were instructed to keep aisles clean at all times, evidence supported implied finding that ordinary care dictated that owner have clerk in attendance at notions department at all times, and that if notions department, where injury occurred, had not been unattended for 20 minutes but, instead, employee had been on duty, employee probably would have seen spool and picked it up before invitee stepped on it.

Mullally & Wines, Oakland, for appellant.

Smith & Parrish, Oakland, for respondent.

O'DONNELL, Justice pro tem.

On January 29, 1957, plaintiff, while shopping at defendant's variety store, stepped on a spool of thread lying in one of the aisles and was thrown to the floor, receiving physical injuries. She brought this action for damages. The jury returned a verdict in her favor on which judgment was entered. Defendant appeals from that judgment on the sole ground that the evidence is insufficient to justify the verdict.

The store building is about 200 feet long and about 100 feet wide. There are aisles and cross-aisles throughout the store. There were 37 employees of defendant on duty on the day of the accident. The store is operated partially on a self-service basis, that is, while clerks are available to serve the customers still a customer is free to take a desired article from a counter or shelf and take it directly to the cashier to complete the purchase.

That it was a spool of thread on which plaintiff stepped, causing her fall, and that it came from the shelves of defendant's store are facts that find substantial support in the evidence and are not strenuously disputed by defendant. Plaintiff testified that when she slipped her foot went forward "right up from under me." A spool of thread was found, immediately following the accident, about three feet in front of where plaintiff lay. The thread was a brand carried by defendant. The aisle in which plaintiff fell was in the notions department. The thread display was in the notions department and is, according to the testimony of one witness, only four or five feet from where plaintiff fell. Defendant's arguments are directed principally to the contention that there is no evidence to show how the spool came to be on the floor, nor is there any evidence to show how long it had been there before plaintiff stepped on it.

[1] It is not disputed that plaintiff was an invitee of defendant while shopping in the latter's store. Defendant therefore owed plaintiff the duty of exercising ordinary care to keep the premises in a safe condition. Tuttle v. Crawford, 8 Cal.2d 126, 63 P.2d 1128.

There is no evidence in the case from which it can be inferred that the spool was dropped by one of defendant's employees, rather than by a customer of the store. Plaintiff having failed to sustain her burden of proof in that regard the liability of defendant depends on whether or not the evidence brings the case within the following rule:

> "Where the dangerous condition is brought about by natural wear and tear, or third persons, or acts of God or by other causes which are not due to the negligence of the owner, or his employees, then to impose liability the owner must have either actual or constructive knowledge of the dangerous condition or have been able by the exercise of ordinary care to discover the conditions, which if known to him, he should realize as involving an unreasonable risk to invitees on his premises. His negligence in such cases is founded upon his failure to exercise ordinary care in remedying the defect after he has discovered it or as a man of ordinary prudence should have discovered it." Hatfield v. Levy Brothers, 18 Cal.2d 798, 806, 117 P.2d 841, 845.

And in Louie v. Hagstrom's Food Stores, 81 Cal.App.2d 601, 607, 184 P.2d 708, 712, the court says: "It is generally a question of fact for the jury as to whether, under all the circumstances, the defective condition existed long enough so that a reasonable man exercising reasonable care would have discovered it." Thus, in the Louie case it appeared that plaintiff slipped on a pool of syrup that had been spilled on the floor of defendant's grocery store. The evidence was that no employee of defendant had examined this area for from 15 to 25 minutes before the accident. The court held that whether the dangerous condition existed long enough so that a person exercising ordinary care would have discovered it was a question for the jury. In Hale v. Safeway Stores, Inc., 129 Cal.App.2d 124, 276 P.2d 118, plaintiff while shopping in defendant's stores slipped on a banana. There was evidence that the banana may have been on the floor for from 30 to 45 minutes. Again it was held that whether defendant should have discovered and removed the banana within this time was a jury question.

Returning to a discussion of the facts of the case at bar, it appears that the notions department was in charge of a Mrs. Whitman. She was the only employee assigned to that department. It further appears that each clerk was allowed a twenty minute "coffee break" during the day. It was the established procedure, as testified to by Mr. Rawsen, the store manager, that when a clerk was going on her coffee break she informed one of the girls in one of the neighboring departments that she was leaving and that other girl would then see that customers were taken care of in her area. In other words, "that the floor was covered."

On the day of the accident Mrs. Whitman left the notions department for her coffee break at 3:40 p. m. She was still absent from the notions department when plaintiff fell, which was about 4 p. m. Although Mrs. Whitman testified that she didn't remember whether she did or did not notify any of the other clerks that she was leaving, the following circumstances indicate that she did not, and that the notions department was unattended during her absence. As plaintiff lay on the floor following her fall she called to a woman who was two counters away for help. The woman agreed to go for help. At about that time a Mrs. Thompson, also a clerk in the store, came down the aisle in which plaintiff lay, on the way to her coffee break. She saw no one other than plaintiff in the aisle.

With respect to the store rules regarding inspection of the aisles Mrs. Thompson testified as follows:

> "Q. Did you have any instruction at the time that you went to work there from Mr.—or Mrs. Rawsen or anybody else about inspecting the aisles periodically, making sure that the aisles are clean, making sure that there is no merchandise on the floor and that sort of thing? A. Well, it is one of your duties to keep your department clean at all times.
>
> "Q. At all times, is that right? A. Yes.
>
> "Q. That includes the aisles, I assume, is that right? A. Yes.
>
> "Q. Well, is that one reason why you tell the girl in the adjoining department that you are going on your coffee break? A. That, and to help out with the customers."

[2] The relevancy of such testimony to the ultimate issue of negligence is shown in Powell v. Pacific Electric Railway Co., 35 Cal.2d 40, 216 P.2d 448, a case dealing with the operating rules of respondent railway company governing speed of its trains at crossings. In that case the Supreme Court said (35 Cal.2d at pages 46–47, 216 P.2d at page 452): "The rule was properly admitted in evidence as bearing on the standard of care respondent thought appropriate to insure the safety of others at its track crossings. [Citations.] While a violation of such rule would not constitute negligence *per se,* it would be a circumstance for the jury to consider on the issue of respondent's negligence. [Citations.] The court so instructed the jury as to the legal effect of the rule—that while 'not the law,' a 'breach of duty' might be implied from a finding of violation of the rule."

[3] The following facts, to wit: that the customers of defendant's store are free to help themselves to articles on the shelves and counters, that a spool of thread lying loose on the floor obviously creates a hazardous condition, and that defendant's employees were instructed to keep the aisles clean "at all times" were, when considered together, sufficient to support the implied finding of the jury that ordinary care dictated that defendant have a clerk in attendance at the notions department at all times. And the jury could have further concluded, as it undoubtedly did, that had a clerk been on duty she probably would have seen the spool and picked it up before plaintiff stepped on it. See Spolter v. Four-Wheel Brake Service Co., 99 Cal.App.2d 690, 222 P.2d 307, for a discussion of the subject of a jury's power to draw inferences.

We are of course mindful of the rule, referred to hereinabove, that an invitor is entitled to have a reasonable time within which to discover and correct a dangerous condition on his premises. We are also mindful of defendant's contention that there is nothing in the evidence to indicate the length of time the spool had been on the floor. However, this latter factor loses significance when placed vis-a-vis the fact that the notions department remained unsupervised for a period of twenty minutes; for no matter what the interval of time the spool lay there it would have gone undetected during this twenty minute period. In effect, therefore, the critical question in the case was this: Was a twenty minute interval between inspections of the aisles commensurate with the exercise of ordinary care by defendant? This is a question that was properly left with the jury to decide.

The judgment is affirmed.

DOOLING, Acting P. J., and DRAPER, J., concur.

171 Cal.App.2d 834

**The PEOPLE of the State of California,
Plaintiff and Respondent,
v.
Betty A. BELL, also known as Bette E.
Bell, Defendant and Appellant.
Cr. 6483.**

District Court of Appeal, Second District,
Division 3, California.
July 9, 1959.

Prosecution of wife for fatal shooting of her husband. From a judgment of the Superior Court, Los Angeles County, Clement D. Nye, J., entered on a verdict of guilty of murder of the second degree and from an order denying wife's motion for new trial, the wife appealed. The District Court of Appeal, Shinn, P. J., held that the evidence was sufficient to sustain the conviction.

Judgment and order affirmed.

1. Criminal Law 🔑556

In prosecution of wife for fatal shooting of her husband, state, by allegedly using admission of wife of her actions which resulted in the shooting, was not bound by her explanation that it was accidental.

2. Homicide 🔑254

Evidence was sufficient to sustain conviction of wife of murder of the second degree for fatal shooting of her husband.

3. Criminal Law 🔑1173(2)

In prosecution of wife for fatal shooting of her husband, wherein wife's false testimony as to circumstances of shooting was demonstrated by other evidence, and it was established that wife fired two shots, jury could reasonably conclude that it was wife's purpose to kill her husband, and even if instructions did not cover principle that if evidence is susceptible of two reasonable interpretations, one pointing to innocence and other pointing to guilt, the former interpretation is to be adopted, such an instruction would have been of no avail to wife. West's Ann.Rules on Appeal, rule 33(b).

4. Homicide 🔑308(3)

In prosecution of wife for fatal shooting of her husband, who was struck by one shot fired by wife, who fired another shot which did not strike husband, it was not error to instruct on the law of murder.

Martin S. Ryan and Ward Sullivan, Los Angeles, for appellant.

Stanley Mosk, Atty. Gen., Arthur C. de Goede, Dep. Atty. Gen., for respondent.

SHINN, Presiding Justice.

In a jury trial defendant Betty A. Bell was found guilty of murder of the second degree. Her motion for new trial was denied and she appeals from the judgment and from the order denying her motion for new trial.

The defendant and her husband, the deceased, had resided at 2220 Vista Del Mar Avenue since 1954. On the evening of May 17, 1958, Mr. Bell was shot by a revolver held by defendant. He died from the wound two days later. Sergeant Theodore Rushton, responding to a radio call, arrived at the premises at 9:55 p. m., knocked on the door and receiving no response went to the north side of the house where he heard voices in the bedroom, asked to be permitted to enter and shortly thereafter was admitted by defendant. When questioned as to what had happened, defendant said: "He is in there. He will tell you." The officer went to the bedroom where he found Mr. Bell, clad in shorts, lying on a bed in a pool of blood; there appeared to be no disarrangement of the furniture and the premises seemed to be in order. A few minutes later Officer Berger arrived and both officers went into the bedroom where they found a black leather holster lying on the bed. In the front room they found a bullet lying on the floor under the coffee table, two or three blood spots on the rug nearby and a double action revolver. There were blood spots leading through the dining room and down the hall toward the bedroom. The revolver contained three live and two empty shells. Questioned by the officers whether she had shot her husband defendant gave vague and erratic answers, but she finally replied that she had not shot him and that "This is none of your business. Why don't you leave? This is boring me. * * *" Officer Berger formed the opinion that defendant was only partially intoxicated. Defendant was then taken to the police station where she was interrogated further at which time she denied any knowledge of the shooting of her husband, the circumstances under which he was found or the presence of the gun. Officer James Close then proceeded to question defendant from 1 a. m. to about 4 a. m. during which time defendant steadfastly reiterated her lack of knowledge of the shooting. In the several interviews defendant displayed an indifferent and callous attitude, remarking that she asked for excitement and got more than she asked for, that it was fun and that she didn't see what the fuss was about as Bell was not hurt bad anyway. On the morning of May 19th, Officer Close, in an effort to gain information, untruthfully told defendant that Mr. Bell had informed him that she had shot him, whereupon defendant stated that she had gone into the front room with the gun and sat on the couch next to her husband, that he attempted to grasp her hand or wrist and that the gun went off and he had been shot.

Officers Berger and Turner returned to the premises to search for a second bullet. An intensive examination failed to disclose any evidence that a second shot had been fired in the living room. The officers found a bullet hole in the north wall of the bedroom about two and one-half feet above the floor; a bullet was found outside the wall about six feet therefrom; at the bullet hole in the wall was freshly exposed plaster. The course of the bullet through the wall projected inward indicated that it had passed at a height of seven or eight inches above the bed. Testimony at the trial revealed that this bullet and the one recovered in the front room were fired from the revolver found on the premises. The shot which caused death entered the left side of the abdomen, ranged downward and shattered the right hip bone. Powder burns showed that the gun was held about eight inches away from the victim. There were no identifiable fingerprints found on the revolver.

Defendant testified that she and her husband had been drinking steadily for several days with little or no food; she had fallen asleep on the bed, upon awakening was in a gay and frivolous mood, was unable to find a bottle of gin from which they had been drinking and decided to confront her husband with the gun and inquire where he had hidden it; she did not know where she got the gun but had it in her hand with her finger on the trigger, walked into the living room where Mr. Bell was lying on the couch, sat down on the couch and when he saw the gun in her hand, he allowed her no explanation but jumped to his feet, grabbed her hand, forcing it to the left; the gun fired; she remembered only one shot; the next thing she remembered was his asking for the telephone to call for help; she put the telephone on the coffee table and remembered nothing thereafter until she opened the door to the officer. She did not recall any conversation with Officer Berger at her home on May 17th or anything else that happened at the house and knew nothing about a second bullet having been fired; she had no intention of shooting her husband so as to wound or kill him. She also testified that she did not know the gun carried live ammunition; that her husband had told her it was always loaded with blanks but that she knew that it was fired by pulling the trigger. A sister of defendant and a woman friend testified that a week after the shooting they obtained a house key from the police, looked through the house and found five blank cartridges of the same caliber as the gun.

Two women neighbors testified that they heard two shots spaced from two to three minutes apart. A diagram of the plan of the house showed a solid wall between the living room and the bedroom.

The foregoing is an abbreviated statement of the evidence. Our discussion will be confined to certain irrefutable facts which clearly lead to the conclusion that Mrs. Bell was guilty of murder of the second degree.

The contentions that there was insufficient evidence to prove the commission of any offense and that at most the killing was manslaughter will be considered together.

[1] It is argued first that the People made use of the admission of appellant of her actions which resulted in the shooting and were, therefore, bound by her explanation that it was accidental. Upon this point appellant cites People v. Salaz, 66 Cal.App. 173, 225 P. 777, and People v. Toledo, 85 Cal.App.2d 577, 193 P.2d 953. Neither case furnishes support for appellant's contention. If the evidence of the People convinced the jury that the shooting occurred in a manner other than that described by appellant, her testimony could properly have been rejected as false and the contradictory evidence accepted as controlling. The opinion is Salaz so holds.

[2] There was ample evidence to prove that the shooting was not accidental. The credibility of appellant was impeached by her statements to the officers in which she denied all participation in the shooting and pretended to believe that her husband had shot himself. But in addition to that, it was proved beyond doubt that the gun was not fired twice in a struggle for its possession but that one shot was fired in the living room and another in the bedroom. A careful search was made for evidence that two shots were fired in the living room and none was found. Both shots were fired from the same gun. The time interval between the shots was sufficient to permit the holder of the gun to go from one room to the other before firing the second shot. The hole in the bedroom wall was caused by a shot fired in that room. A blank wall separated the two rooms. The break in the plaster where the bullet emerged appeared to be a fresh one. The course of the bullet was across the bed and only 7 or 8 inches above it. It was the bullet fired in the living room which killed Mr. Bell. That shot could have been fired while appellant was holding the gun and Mr. Bell was trying to get it away from her. Appellant testified she heard him say: "'What the devil are you doing?' He reached over and grabbed my hand, and the way in which he did it, it frightened me. I believe I called out his name. I called him. 'Don.' I can't say it positively, but I am quite sure I called out his name. By that time he was on his feet, still holding my hand. I had it in my left hand. He was forcing my hand as far to the left as he could, and when I heard the explosion of the gun he was on his feet." Even if this was a true account of the shooting it did not prove that it was entirely accidental as to appellant. Her finger was upon the trigger. She did not release her hold upon the gun but held it almost against the body of Mr. Bell. She evidently resisted his attempt

to force it to the side and away from him. But she maintained a grip upon it sufficiently strong to operate its double action.

It may be that one shot was fired during a struggle, but there would have been no occasion for a struggle if appellant had merely intended to exhibit the gun in a spirit of fun. She did not need to point the gun at the deceased while her finger was upon the trigger. She could have let go of it and permitted it to be taken from her. If she had not resisted the efforts of the deceased he could easily have pushed the gun aside. From these facts alone the jury could have reached the conclusion that appellant intentionally pulled the trigger and that even that shot was not fired accidentally. But what of the shot in the bedroom? Appellant testified that she had no knowledge of the hole in the bedroom wall. But it was fired from the same gun and at the same time as the other one. It could only have been fired by appellant. Did she fire one shot in the bedroom to make sure that the gun was loaded, and with live ammunition, or did she fire one shot in the living room and then follow the deceased into the bedroom and fire a second shot at him to finish him off as he lay upon the bed, bleeding freely? Appellant had no answers for these questions. She did not remember that the deceased went into the bedroom and yet, according to the testimony of Officer Rushton, she and her husband were conversing in the bedroom when he arrived; she did not know of the bullet hole in the bedroom wall. Although she was the only one who could have explained how and when the hole was caused she submitted those questions to the jury without any attempt at explanation. The jury could not reasonably have doubted that she did fire that shot, and that she pretended ignorance of the bullet hole because it would have been impossible for her to show that she did not fire the bullet that made the hole. A reasonable conclusion was that this was the second one that was fired, but if so, the act was no less wicked and malicious because the shot missed the mark. And even if that was the first shot, it could have been inferred that defendant fired it to make sure the gun was loaded with live ammunition, and having ascertained that fact, she then went into the living room holding her finger on the trigger. The jury made no mistake in convicting appellant of murder of the second degree. People v. Frost, 37 Cal.App. 120, 174 P. 106; People v. Ogg, 159 Cal.App.2d 38, 323 P.2d 117.

[3] The second point is that the court of its own motion should have given an instruction on the principle that if the evidence is susceptible of two reasonable interpretations, one pointing to the innocence of the defendant and the other pointing to guilt, the former interpretation is to be adopted. It would have been a proper instruction to give if the principle had not been sufficiently stated in other instructions. It is not made to appear by appellant's briefs that the principle was not adequately covered by instructions that were given, as required by Rule 33(b), Rules on Appeal. But, however, that may be, we think the instruction would have been of no avail to appellant. The fact that she gave false testimony as to the circumstances of the shooting was demonstrated by the other evidence. There was no reasonable interpretation of the evidence under which the jury could have found that the shooting of Mr. Bell was purely accidental or was only manslaughter. From the fact that appellant fired two shots the jury could reasonably have concluded that it was her purpose to kill her husband.

[4] The third point is that it was error to instruct in the law of murder. The point is obviously without merit.

The judgment and order are affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

172 Cal.App.2d 438

John BURNHAM and Catharine Burnham, Plaintiffs and Respondents,

v.

FRANCHISE TAX BOARD of the State of California, Defendant and Appellant.

Civ. 23321.

District Court of Appeal, Second District, Division 2, California.

July 29, 1959.

Taxpayers' action to recover income taxes paid under protest following disallowance by Franchise Tax Board. The Superior Court for Los Angeles County, David Coleman, J., rendered judgment for the taxpayers and the Franchise Board appealed. The District Court of Appeal, Herndon, J., held that for purposes of statute which provided that, under certain circumstances, state residents were entitled to credit against their state income taxes for "net income taxes" paid to another country on income derived from sources from within that country, Canadian law, under Acts of 1948 and 1952, imposed on nonresidents a tax upon their gross income from Canadian sources, and consequently portions of dividends in Canadian stock corporation withheld by Canadian government before payment to residents of state were not within the quoted term and no credit could be allowed for them.

Reversed.

1. Taxation 🔑1045

For purposes of statute which provided that, under certain circumstances, state residents were entitled to credit against their state income taxes for "net income taxes" paid to another country on income derived from sources from within that country, Canadian law, under Acts of 1948 and 1952, imposed on nonresidents a tax upon their gross income from Canadian sources, and consequently portions of dividends in Canadian stock corporations withheld by Canadian government before payment to residents of state were not within the quoted term and no credit could be allowed for them. West's Ann.Rev. & Tax. Code, §§ 17041(a), 18001, 19059 et seq.

See publication Words and Phrases, for other judicial constructions and definitions of "Net Income Taxes".

2. Statutes 🔑245

Provisions of a tax statute are to be construed strictly. West's Ann.Rev. & Tax.Code, §§ 17041(a), 18001, 19059 et seq.

◆

Stanley Mosk, Atty. Gen., James E. Sabine, Asst. Atty. Gen., Dan Kaufmann, Deputy Atty. Gen., for appellant.

Torrance & Wansley, Albert W. Strang, San Diego, for respondents.

HERNDON, Justice.

This action was brought by plaintiffs, hereinafter called the "taxpayers", to recover income taxes paid under protest to the State of California following disallowance by the Franchise Tax Board, hereinafter called the "Board", of credit for certain Canadian income taxes paid by the taxpayers. The trial court decided the legal issues in accordance with the taxpayers' contentions and rendered judgment accordingly. The Board brings this appeal.

The facts are stipulated. The returns involved are for the years 1949–1953, inclusive. During these years, the taxpayers were residing and domiciled in California. In their California income tax returns for the years mentioned, they reported certain dividends from the stock of corporations incorporated in Canada and operating and maintaining their principal places of business in that country. Under provisions of the Canadian tax laws, these dividends had been subjected to a tax of 15% which was deducted and withheld by the corporations and paid over to the Canadian taxing authorities. For example, if a dividend amounted to $1,000 the corporation would withhold $150 and remit that amount to the Canadian tax authorities and would pay the balance of $850 to the stockholder.

The taxpayers filed claims for refund of part of the taxes paid on the ground that the Canadian taxes withheld from their dividend payments should be credited against their California income tax. The Board refused to allow the Canadian taxes as a *credit* but did allow them as a *deduction*[1] and granted a partial refund on that basis. Following unsuccessful resort to appropriate administrative procedures (Revenue and Taxation Code, § 19059 et seq.), the taxpayers instituted the instant action.

The California Personal Income Tax Law provides for the taxation of the entire net income of persons resident in this state. Revenue & Taxation Code, § 17041(a), formerly § 17052. At the times here involved, the California statute provided, however, that under certain specified conditions, the California resident was entitled to a credit against the California tax for *"net income taxes"* paid to another country on income derived from sources within that country. Revenue and Taxation Codes, § 18001, formerly § 17976. The relevant provisions of section 18001 of the Revenue and Taxation Code read as follows:

> "Subject to the following conditions, residents shall be allowed a credit against the taxes imposed by this part for *net income taxes* imposed by and paid to another state or country on income taxable under this part:
>
> "(a) The credit shall be allowed only for taxes paid to the other state or country on *income derived from sources within that state or country*[2] *which is taxable under its laws irrespective of the residence or domicile of the recipient.* * * *" (Emphasis added.)

Since the allowability of the credit claimed under the terms of the quoted provisions of the California statute depends upon the character of the tax exacted under the law of the foreign State, a careful analysis of the applicable Canadian tax law is a manifest necessity. And, inasmuch as the credit is allowable only for *"net income taxes"* imposed by and paid to the foreign State the primary objective of our analysis will be to answer this determinative question: *whether the Canadian income tax law in effect during the years 1949 to 1953 imposed a "net income tax"?*

A satisfactory answer to this controlling question calls for a detailed examination of the Canadian plan of taxation. And since the taxpayers rely upon certain former decisions of Division One of this court which decided the nature of Canadian income taxes paid under tax laws in effect during 1941 and earlier years (Burgess v. State of California, 71 Cal.App.2d 412, 162 P.2d 855, and Henley v. Franchise Tax Board, 122 Cal.App.2d 1, 264 P.2d 179), we must ascertain whether appellant is correct in contending that substantial changes in Canadian law since 1941 have deprived these earlier decisions of any controlling authority in the instant case.

The Burgess and Henley cases dealt with taxes imposed by Canada under the Income War Tax Act of 1917, as amended. Although that law was intended as a temporary measure to provide extra revenue to defray the heavy expenditures due to World War I, it was retained throughout the period between the world wars, and, like many such taxes, "* * * has now come to be regarded on all sides as a permanent part of Canada's fiscal system."

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[1] The difference between a deduction and a credit is significant. If a tax paid to another State or country is allowed as a deduction, the amount of the foreign tax is subtracted from the gross income in computing the net income subject to the California tax. If the tax paid to another State or country is allowed as a credit, the amount of the California Personal Income Tax is first computed without regard to the foreign tax and then from the California tax so computed the foreign tax is subtracted to determine the net amount of tax which must be paid to the State of California.

[2] In 1957, section 18001 was amended to eliminate the credit for taxes paid foreign countries by deleting the word "country" wherever it appeared in the section (1957 Stats., ch. 215, p. 877).

La Brie, The Meaning of Income in the Law of Income Tax, note 3 at page 5 (1953).

The Act of 1917, as originally enacted, did not tax Canadian dividends received by non-resident aliens such as the taxpayers here. Its impositions were then limited to Canadian residents, sojourners, and persons employed in Canada during the tax year and those who carried on a business there, or derived income from services rendered there. As amended in 1927, the Canadian law provided: "There shall be assessed, levied and paid upon the income during the preceding year of every person * * * residing or ordinarily resident in Canada * * * who sojourns in Canada * * * is employed in Canada * * * is carrying on business in Canada * * * or * * * who * * * derives income for services rendered in Canada * * * a tax at the rates * * * set forth in * * * this Act * * *." Can.Rev.Stat. c. 97, § 9, subd. (1) (1927). The act further provided that "* * * corporations and joint stock companies [resident or carrying on business in Canada] * * * shall pay a tax * * * upon income * * *." Can.Rev. Stat. c. 97, § 9, subd. (2) (1927). "For the purposes of this Act, 'income' means the annual net profit or gain * * * received by a person * * * whether derived from sources within Canada or elsewhere; and shall include the interest, dividends or profits directly or indirectly received from money at interest * * * or from stocks, or from any other investment * * *." Can.Rev.Stat. c. 97, § 3; see Stikeman, Income War Tax Act and Excess Profits Tax Act 1940—Canada—1927 to 1948 Permanent Volume (1948) 47, 158–159.

As stated in La Brie, *op. cit. supra,* page 27 "The word 'net' in this statutory definition stands out as affirming the plain ordinary meaning of profits and gains established by the English and Canadian Courts." Thus, we may observe that the scheme of taxation of residents of Canada or persons carrying on activities in that nation as provided for in the Canadian Income War Tax Act was essentially a tax on net income not substantially different in character from our federal income tax law.

By amendment in 1933 there was added a new section 9B which for the first time imposed a tax on non-residents. As amended the following year it provided in part as follows:

> "(2) In addition to any other tax imposed by this Act an income tax of five per centum is hereby imposed on all persons who are non-residents of Canada in respect of (a) All dividends * * * (b) All interest * * * (c) All interest received by a non-resident parent company * * * (d) All income * * * from any Canadian estate or trust * * *.
>
> * * * * * *
>
> "(4) In the case of interest or dividends * * * the taxes imposed by this section shall be collected by the debtor who shall withhold five per centum of the interest or dividend on the obligation and remit the same to the Receiver General of Canada.
>
> "(5) The exemptions provided by section four of this Act shall not apply in the case of the taxes imposed by this section except those exemptions provided by paragraphs (a), (b), (c) and (k) of the said section four." See Stikeman, *op. cit., supra,* 168–176.

It is to be noted that the four exemptions allowed by the last-quoted subsection did not affect non-resident American aliens. They related only to the income of certain specified Canadian and British officials, representatives of foreign governments and corporations whose assets and activities were entirely outside of Canada.

The Act of 1917 was several times amended after 1933. In 1941, the non-resident tax was increased from 5 to 15%. An amendment of particular significance in relation to the purpose of our present analysis was enacted in 1942. It amended paragraph (5) of section 9B to read as follows: "(5) No exemptions, deductions or tax credits provided by any other section of this Act shall apply in the case of the taxes imposed by this section [9B] except those exemptions provided by paragraphs (a), (b), (c) and (k) of section four of this Act."

The four exceptions to the prohibition against exemptions remained unchanged. Thus the point to be especially noted is that the 1942 amendment expressly denied to the non-resident taxpayer, not only the privilege of any *exemption* but also the benefit of any *deductions* or *tax credits.* The language of this amendment appeared to constitute a rather explicit and unequivocal declaration that non-residents were to be taxed upon gross receipts rather than upon their net income.

In the Canadian taxing statutes, an exempting provision is one which grants freedom from the duty or obligation otherwise imposed. A deduction generally defines amounts which are to be subtracted from the income received and assessable in order to arrive at the amount on which the tax is to be calculated. And a tax credit applies to the tax due in order to ascertain the sum payable. See La Brie, *supra,* The Meaning of Income in the Law of Income Tax, 223–224. All three terms were used in the Canadian Income War Tax Act, particularly in the provision 9B(5) above quoted.

In 1948 the Income War Tax Act was replaced by the Canadian Income Tax Act, which went into effect on January 1, 1949. Can.Rev.Stat. c. 52. Although they followed the same general pattern of taxation, there are important differences in these two statutes, which we will hereafter refer to as the 1917 Act and the 1948 Act. For example, in contrast to the 1917 Act, the 1948 Act contained no definition of income. See La Brie, The Meaning of Income, supra, pp. 27, 52. As it applied to resident taxpayers the 1948 Act introduced the concept of taxable income—as meaning the income of the taxpayer minus certain deductions on the basis of personal status and income expenditure. These "reliefs", to use the terminology of English jurisprudence, were not in any way related to the manner or method by which the income arose or was earned. Thus the concepts of "net income" and "taxable income" were distinguished in the 1948 Act. See La Brie, *op. cit. supra,* pp. 53–54. In the 1917 Act "income" was defined and then made subject to a variety of deductions and exemptions in the case of *resident* taxpayers. Evidently it was these provisions which necessitated the 1942 legislation adding "deductions" and "tax credits" to "exemptions" as "reliefs" to be denied *non-residents.*

A portion of the Canadian taxes involved in the case at bar were imposed by the 1948 Act and the remainder by the statute of 1952 later to be discussed. The provisions of Part I of the 1948 Act applied to *resident* taxpayers and, as we have seen, imposed a tax which might appropriately be classified as a net income tax. Part II of the 1948 Act was entitled *"Tax on Income from Canada of Non-Resident Persons"*. The pertinent provisions of Part II read as follows:

> "96. (1) Every nonresident person shall pay an income tax of 15% on every amount that a person resident in Canada pays or credits, or is deemed by Part I to pay or credit, to him as, on account or in lieu of payment of, or in satisfaction of (a) a dividend * * * (b) interest * * * (c) income of or from an estate or trust * * *.
>
> "97. (1) The tax payable under Section 96 is payable on the amounts described therein *without any deduction from those amounts whatsoever."* (Emphasis added.)

In 1952 the Canadian income tax law was again revised and its sections were renumbered. The tax on income of *residents* was imposed by the provisions of Part I and the tax upon payments to nonresidents was imposed by the provisions of Part III. See La Brie, Introduction to Income Tax Law Canada (1955) at p. 3.

Former sections 96(1) and 97(1) above quoted became sections 106(1) and 108(1), respectively. We find that the 1952 legislation effected no substantial change in the basic character of the taxes imposed by the Act of 1948.

The Canadian tax upon payments to non-residents has been described as follows by an eminent Canadian tax authority: "Part III of the *Income Tax Act* (secs. 106 to 110) imposes taxation on non-resident persons by reference to specified classes of payments by persons resident in Canada to those non-resident persons. The tax imposed under Part III is different in many ways from that imposed under Part I. *The tax under Part III is on gross income without allowances and exemptions.* Sec. 108(1) provides that the tax payable under sec. 106 is payable on the amounts prescribed therein *without any deduction from those amounts whatsoever.* This provision excludes both the deductions permitted under Part I in computing income and in computing taxable income." La Brie, Introduction to Income Tax Law Canada (1955), *supra* 310–311 (1955). (Emphasis added.)

[1] The conclusion appears to be inescapable that the Canadian tax paid by the taxpayers in the case at bar pursuant to the Act of 1948, as well as those paid under the Act of 1952, were taxes imposed on their *gross* income from the Canadian sources. These taxes, therefore, were not "net income taxes" and did not qualify as allowable credits under section 18001 of the California Revenue and Taxation Code.

[2] The settled rule that credit provisions of a tax statute are to be strictly construed strengthens the conclusion that the credits claimed in the instant case were properly disallowed. As stated in Miller v. McColgan, 17 Cal.2d 432, 441–442, 110 P.2d 419, 424, 134 A.L.R. 1424: "* * * the provision allowing a credit * * * is in effect an exemption from liability for a tax already determined and admittedly valid, and such statute must be strictly construed against the taxpayer." See, also, Santa Fe Transportation Co. v. State Board of Equalization, 51 Cal.2d 531, 539, 334 P.2d 907.

The decisions in Burgess v. State of California, supra, 71 Cal.App.2d 412, 162 P.2d 855, and Henley v. Franchise Tax Board, supra, 122 Cal.App.2d 1, 264 P.2d 179, as we have heretofore indicated, held that Canadian income taxes imposed by the 1917 Act upon the income of California residents from Canadian sources during the period 1935 to 1941 were net income taxes, and, as such, allowable as credits against the California income tax. These decisions are not controlling here because, as our analysis has shown, they dealt with an earlier Canadian statute differing very substantially from the law under which the tax with which we are here concerned was imposed.

We are in accord with the following observation of the Supreme Court of Oregon in Keyes v. Chambers, 1957, 209 Or. 640, 307 P.2d 498, at page 507: "We also note that the facts in the Henley and Burgess cases disclose that all Canadian taxes paid were under the Act of 1917 and prior to its amendment in 1942, which added subsection 5 to section 9B, previously referred to. This was a substantial change of distinguishing importance so far as nonresident Canadian taxpayers were concerned. The California cases, i. e., Burgess and Henley, are only interested in taxes imposed under the Act of 1917 and have no reference to the Act of 1948, under which Mrs. Keyes, the taxpayer here, was taxed in 1949 and 1950."

The Oregon court used the foregoing language in refusing to follow the holdings in Burgess and Henley in a case involving credits claimed under an Oregon statute, the language of which is almost identical with that of our section 18001. The taxes involved in the Oregon case were for the years 1947 to 1950, inclusive.

Our holding with respect to the nature of the Canadian taxes here involved renders it unnecessary for us to determine (1) whether the dividends which the taxpayers received from the Canadian corporations constituted income derived from sources within Canada, or (2) whether, as held by the Supreme Court of Oregon in Keyes v. Chambers, supra, the substantially different treatment which is accorded to residents and nonresidents under the applicable Canadian statutes would preclude allowance of the credits claimed by the taxpayers.

The judgment is reversed.

FOX, P. J., and ASHBURN, J., concur.

172 Cal.App.2d 446

Isabella Mackey CLEMENS, Plaintiff and Appellant,

v.

FRANCHISE TAX BOARD of the State of California, Defendant and Respondent.

Civ. 23145.

District Court of Appeal, Second District, Division 2, California.

July 29, 1959.

Income taxpayer's action against Franchise Tax Board. The Superior Court of Los Angeles County, Philbrick McCoy, J., rendered judgment for the defendant and plaintiffs appealed. The District Court of Appeal, Herndon, J., held that fact that Canadian trustee, in computing and reporting amounts to be distributed to beneficiaries of trust, first deducted from gross income certain administrative and operating expenses did not make tax imposed by Canadian government on trust income to California residents, one on net income rather than gross income for purposes of statute allowing residents credit against income taxes for "net income taxes" paid to another country.

Affirmed.

1. Taxation ⚷1045

Canadian Income Tax Act of 1948, as it applied to nonresidents, was not net income tax but was tax on gross amount of nonresident's income, whether in form of dividends declared by Canadian corporations or of distributions from Canadian trusts, for purposes of California statute allowing credit against California income tax for "net income taxes" paid to another country on income derived from sources within that country. West's Ann.Rev. & Tax.Code, §§ 17001 et seq., 18001.

See publication Words and Phrases, for other judicial constructions and definitions of "Net Income Taxes".

2. Taxation ⚷1045

That Canadian trustee, in computing and reporting amounts to be distributed to beneficiaries of trust, first deducted from gross income certain administrative and operating expenses did not make tax imposed by Canadian government on trust income to California residents one on net income rather than gross income for purposes of statute allowing residents credit against income taxes for "net income taxes" paid to another country. West's Ann. Rev. & Tax.Code, §§ 17001 et seq., 18001.

3. Taxation ⚷1022

For tax purposes, trust and beneficiary are regarded as separate and distinct legal entities. West's Ann.Rev. & Tax.Code, §§ 17001 et seq., 18001.

Fleming & Anderson, Clifford R. Anderson, Jr., Pasadena, for appellant.

Stanley Mosk, Atty. Gen., James E. Sabine, Asst. Atty. Gen., Dan Kaufmann, Deputy Atty. Gen., for respondent.

HERNDON, Justice.

The issues of law presented by this appeal are essentially the same as those involved in the companion case of Burnham v. Franchise Tax Board, Cal.App., 341 P. 2d 833.

Appellant was at all material times a California resident and domiciliary. She is a life beneficiary of a testamentary trust created by her father, a Canadian resident whose estate was probated in Canada. The trustee is the Guaranty Trust Company of Canada, a Canadian corporation and the branch administering the trust is located in Sudbury, Ontario, Canada.

During the period involved, the corpus of the trust consisted of certain real property located in Canada, certain stocks in corporations whose operations and places of business were all within Canada, mortgages and agreements of sale on real property located in Canada, and certain bonds of Canadian corporations and of the government of Canada. The income of the trust was from rents from the real properties managed by the trustee, dividends from the stock of the corporations and interest on the bonds, mortgages, etc. The trustee collected this income, paid the expenses of operating and maintaining the trust, paid Canadian income taxes, accounted to the Canadian courts and distributed a portion of the income to appellant in California.

During the years 1951 and 1952 the Canadian trustee made distributions to the appellant of her share of the trust income after first deducting from each of said distributions 15% thereof to cover the taxes imposed upon such payments by the provisions of section 96(1) (c) of the Canadian Income Tax Act of 1948. Statutes of Canada, 1947–1948, chap. 52. Said statute allowed non-residents no credit for any taxes paid under the California Personal Income Tax. Rev. & Tax.Code, § 17001 et seq. The trustee in computing the amounts available for distribution first deducted from the gross income of the trust the expenses of administration of the trust and expenses in connection with the maintenance of the properties included in the corpus of the trust.

In her California income tax returns for 1951 and 1952, appellant applied the Canadian taxes which had been withheld from her share of the trust income as credits against her California income tax. The Franchise Tax Board refused to allow the Canadian taxes as credits, but did allow them as deductions. Appellant paid under protest the additional tax assessed by the Board, and upon disallowance of her claim for refund commenced this action. The trial court held that the Canadian income taxes withheld from appellant's share of the trust income did not qualify for allowance as credits under section 18001 of the Revenue and Taxation Code because (1) the Canadian tax was not a "net" income tax; and (2) appellant's income was not derived from sources within Canada.

[1] We have concluded that the Canadian Income Tax Act of 1948, as it applied to non-residents, was not a net income tax but rather a tax on the gross amount of the non-resident's income whether in the form of dividends declared by Canadian corporations or of distributions from Canadian trusts. In our opinion in Burnham v. Franchise Tax Board, 341 P.2d at page 834, we have quoted the pertinent provisions of the applicable California and Canadian statutes. We there set forth a detailed analysis and historical review of the Canadian Income Tax laws. That discussion is equally applicable to the case at bar and need not be here repeated.

[2] Appellant here, however, has made the additional argument that, whatever may be said of the nature of the Canadian tax as it applies to the dividends of Canadian corporations paid to non-resident stockholders, the tax is a net income tax as it applies to trust income such as that received by appellant. This argument is based mainly upon the fact that the trustee, in computing and reporting the amounts to be distributed to the beneficiaries, first deducted from the gross income of the trust certain expenses of administration and various expenses of operating and maintaining the properties included in the corpus.

[3] The fallacy in this argument is that it fails to recognize that for tax purposes the trust and the beneficiary are regarded as separate and distinct legal entities, just as the corporation is treated as an entity distinct from its stockholders. "In so ruling, we do not forget that the trust is an

abstraction, and that the economic pinch is felt by men of flesh and blood. Even so, the law has seen fit to deal with this abstraction for income tax purposes as a separate existence, making its own return under the hand of the fiduciary and claiming and receiving its own appropriate deductions." Anderson v. Wilson, 289 U.S. 20, 27, 53 S. Ct. 417, 420, 77 L.Ed. 1004.

That the Canadian law treats the trust as a separate entity for tax purposes is clear, both from the provisions of the Canadian tax statutes and from the Canadian fiduciary returns which were received in evidence in this case. Under California law, also, the trust and the beneficiary are regarded as separate taxpayers. The fact that the trustee, in computing and reporting the amounts distributed to the beneficiaries, was permitted to deduct certain expenses has no bearing on the nature of the tax which Canada imposed upon the non-resident beneficiary. Corporations also are permitted to deduct business expenses in computing their net income, but when they pay dividends, the non-resident stockholders of such corporations are required to pay their Canadian tax on the entire amount of the dividends paid without any deductions whatsoever.

Other illustrations will serve to emphasize the truth that the Canadian tax was not a *net* income tax within the meaning of the California credit provision. If a California resident was a beneficiary of a Canadian trust and engaged in some business activity in Canada in which he sustained a loss, or if he incurred substantial business expenses in Canada, neither the loss nor the expenses would be deductible from the amount distributed by the Canadian trustee in computing the amount of the Canadian tax to be withheld. In other words, the 15% Canadian tax applies to the entire amount distributed by the Canadian trustee to the California beneficiary without any deductions, exemptions, or credits whatsoever. By way of contrast, it should be noted that a very different result would obtain under the California Income Tax law which imposes a *net* income tax. If a resident of Canada were a beneficiary of a California trust which received returns from California real property, and if the Canadian beneficiary was engaged in some business activity in California in which he sustained a loss or incurred necessary expenses, he would be permitted to file a California return in which he would report the amount distributed to him by the California trustee as gross income, and from this he would be permitted to deduct his California losses and business expenses and to take the personal exemptions allowed by the California statute. He would pay his California tax only on the remaining balance.

Appellant places her principal reliance on the case of Burgess v. State, 71 Cal.App. 2d 412, 162 P.2d 855. For the reasons fully stated in our opinion in Burnham v. Franchise Tax Board, 341 P.2d 833, this decision is without controlling authority here.

The judgment is affirmed

FOX, P. J., and ASHBURN, J., concur.

172 Cal.App.2d 109

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Carl DE PRIMA and Silvio Domenico, Defendants and Appellants.

Cr. 3523.

District Court of Appeal, First District, Division 2, California.

July 17, 1959.

Hearing Denied Sept. 11, 1959.

Defendants were convicted of conspiracy and burglary in the second degree and from a judgment of conviction and an order denying their motion for new trial in the Superior Court, City and County of San Francisco, C. Harold Caulfield, J., the defendants appealed. The District Court of Appeal, Kaufman, P. J., held that defendants were not denied a fair trial because of certain acts of the prosecution and that there was no error in excluding evidence relating to the defense of entrapment and that the defendants' motion for new trial was properly denied.

Judgments of conviction and order denying a motion for new trial affirmed.

1. Criminal Law ⚷1169(3)

Alleged improper attempts to bring defendant's prior criminal offense to the attention of the jury was not prejudicial where codefendant took the stand and virtually admitted both crimes in the presence of the defendant. West's Ann.Pen.Code, § 12021.

2. Criminal Law ⚷369(2)

In prosecution for conspiracy and burglary, admitting record of prior conviction of defendant was not error where it was an element of the offense charging possession of a weapon by a former felon in which the elements of the offense are conviction of a felony and ownership or possession of a firearm. West's Ann.Pen.Code, § 12021.

3. Weapons ⚷17(5)

In prosecution for possession of a weapon by a former felon, the determination of the element of possession is a question of fact for the jury. West's Ann.Pen. Code, § 12021.

4. Criminal Law ⚷1141(1)

Error will not be presumed on appeal.

5. Criminal Law ⚷1036(2)

Failure to object to alleged improper cross-examination waived the objection and defendant could not object for the first time on appeal.

6. Criminal Law ⚷696(2), 698(1)

Cross-examination of a defendant whether he knew the codefendant when they were in the state penitentiary together was not so prejudicial as to require the trial court to stop the discourse without waiting for an objection or a motion to strike.

7. Criminal Law ⚷1169(1)

In prosecution for conspiracy and burglary, cross-examination of defendant whether he knew the codefendant when they were in San Quentin together was not prejudicial error where there was overwhelming evidence of the guilt of both defendants.

8. Criminal Law ⚷404(4)

In prosecution for conspiracy and burglary, presence of a gun used in the courtroom during the proceedings was not an abuse of discretion where the verdict found defendant guilty of burglary in the second degree. West's Ann.Pen.Code, § 460.

9. Criminal Law ⚷37

"Entrapment" is the conception and planning of an offense by an officer and the procurement of its commission by one who would not have perpetrated it except for trickery, persuasion or fraud of the officer.

See publication Words and Phrases, for other judicial constructions and definitions of "Entrapment".

10. Criminal Law ⚷37

Entrapment is a positive defense only when the accused can show that he was induced by an officer of the law to commit the crime.

11. Criminal Law ⚷1170(1)

Excluding evidence of a conversation between defendant and another allegedly depriving defendant of the defense of entrapment was not prejudicial error in view of the testimony.

12. Criminal Law ⚷419(11)

In prosecution for conspiracy and burglary, evidence of conversation between defendant and another allegedly improperly depriving the defendants of the defense of entrapment was properly excluded as hearsay.

13. Criminal Law ⚷661

In prosecution for burglary and conspiracy, prosecution was not required to call a witness who allegedly would support the defendants' defense of entrapment as long as there was presented to the court the material evidence bearing on the charge for which the defendants were on trial.

14. Criminal Law ⚷368(1)

In prosecution for conspiracy and burglary, statements made by a witness allegedly supporting the defense of entrapment were not admissible as within the res gestae rule. West's Ann.Code Civ.Proc. §§ 1850, 1870, subd. 7.

15. Criminal Law ⚷938(1)

The granting or denial of a motion for new trial on the ground of newly discovered evidence is discretionary with the trial court.

16. Criminal Law ⚷940

Denying defendant's motion for a new trial for newly discovered evidence with respect to a gun was proper, where matters relating to the gun were irrelevant in that the charge of violation of possession of a weapon by former felon had been dismissed against the defendant. West's Ann.Pen. Code, § 12021.

17. Criminal Law ⚷958(6)

Denying new trial for newly discovered evidence of a witness was not error where there was nothing to advise the court as to what her testimony would be.

18. Criminal Law ⚷918(2)

Denying motion for new trial because certain witnesses had been subpoenaed to appear at trial but did not appear was not an abuse of discretion where the defendants failed to show why the witnesses were not located or subpoenaed at the time of trial or what their testimony would be.

◆

Cragen & Wadleigh, Edward L. Cragen, San Francisco, for appellants.

Stanley Mosk, Atty. Gen., Clarence A. Linn, Chief Asst. Atty. Gen., Peter T. Kennedy, Deputy Atty. Gen., for respondent.

KAUFMAN, Presiding Justice.

Defendants Carl De Prima and Silvio Domenico were indicted by the Grand Jury of the City and County of San Francisco for conspiracy and burglary. Pen. Code, §§ 182, 459. Defendant Domenico was also indicted for a violation of section 12021 of the Penal Code. Possession of a weapon by a former felon. Both pleaded not guilty and admitted the prior convictions charged by the indictment. A jury trial resulted in a verdict finding both the defendants guilty of conspiracy and burglary in the second degree. They appeal from the judgment of conviction and the order denying their motion for a new trial, arguing that they were denied a fair trial because of certain acts and arguments of the prosecution, and the trial court's erroneous exclusion of certain evidence relating to the defense of entrapment.

The facts are not in dispute. The complaining witness, Massirio, was the co-owner of the Ebb Tide Bar at 641 Bush Street on an alley called Chelsea Place in San Francisco. On the evening of September 10, 1957, he was tending bar there. About 1:30 A.M. the defendants entered. Domenico ordered a beer and De Prima went downstairs to the men's room.

After the defendants left about 2 A.M., Massirio went to the men's room and noticed that the false ceiling had been pulled down exposing the air vent which opened onto Chelsea Place. After locking up the Ebb Tide about 2:15 A.M., Massirio saw three men in a parked Chevrolet sedan. He thought two of the men were the defendants but was not certain of their identity.

Lieutenant Elbert of the burglary detail of the San Francisco Police, testified that between 1:15 and 2 A.M., he and Inspector Denser were stationed in Room 203 of the Colonial Hotel at 650 Bush Street, right across the street from the Ebb Tide. They saw Mr. Massirio lock up and about 10 minutes later saw two men going east on the south side of Bush Street. The taller of the two men went down the Chelsea Place alley to the wall of the Ebb Tide, and he began to work on a window. The shorter man walked back and forth as a lookout. There were loud metal thumps as if someone was trying to remove the grill in the basement window of the Ebb Tide. Then the taller man entered the building head first through the basement window, while the other man walked down Bush Street and out of sight. Lieutenant Elbert made contact with other police officers in the area and kept watching for about 20 minutes until the tall man emerged by the basement window.

Officer Denser also saw the defendant De Prima working on the grate, enter the air vent and later emerge. He ran to the alley and found the defendant De Prima lying on a newspaper on the pavement. A pair of combination pliers and wirecutters were found underneath the newspaper. At the trial, a criminologist testified that these cutters had made the cuts on the grate of the basement window. Roger Elauria, who lived on the 6th floor of the building where the Ebb Tide was located, heard the noise, and through his binoculars observed someone crawling into the Ebb Tide. A subsequent investigation at the Ebb Tide revealed that the grill to the basement window had been removed, an entry made through the air vent; and that an attempt had been made to break into the liquor room.

Meanwhile, Lieutenant Elbert had left to look for the other man. Lieutenant Elbert heard an engine start in a car and saw two men in a Chevrolet. He recognized one of them as the shorter man and later identified him as the defendant Domenico. Another police officer also identified the defendant Domenico as being in the area at the time of the break-in at the Ebb Tide. The other person in the car was one Maurice "Bo" Friedman, who pled guilty to the burglary charged by the indictment. A 22-caliber pistol was later found in the car under the seat where the defendant Domenico had been sitting. This weapon was admitted into evidence at the trial.

At the trial, only the defendant De Prima took the witness stand. He admitted going to the Ebb Tide about 1:30 A.M. on September 10th, and that he was to conceal himself inside the bar. He stated that he had tried to secrete himself in the ceiling of the men's room, and admitted breaking in the grill of the basement window. He also stated that Domenico was in the area.

[1] The first allegation of error on appeal relates chiefly to the prosecution's allegedly improper attempts to bring the defendant Domenico's prior criminal offense to the attention of the jury. As the defendant De Prima took the stand and by his testimony virtually admitted both crimes and the presence of the defendant Domenico, the alleged error coud not have in any way been prejudicial to him. We will therefore treat the first alleged error only in relation to the defendant Domenico.

[2-4] The error relates to the following occurrences. At the close of the prosecution's case, over objection, proof of the defendant Domenico's criminal record was introduced as part of the proof of the charge of the violation of section 12021 of the Penal Code. The district attorney then rested his case and the court adjourned for lunch. After lunch, the district attorney moved to dismiss this charge for lack of sufficient evidence to connect the defendants with the pistol found in the automobile. The motion was granted. On appeal, defendant Domenico argues that his prior record should not have been introduced as he did not take the witness stand, and that the district attorney's subsequent motion indicates lack of good faith. There is no merit to either of these arguments. It was not error to admit the record of the prior conviction where it was an element of the offense charging possession of a weapon by a former felon. Pen.Code, § 12021; People v. Garrow, 130 Cal.App.2d 75, 278 P.2d 475. The elements of this offense are conviction of a felony and ownership or possession of a firearm. People v. Schunke, 47 Cal.App.2d 542, 118 P.2d 314. The determination of the element of possession is a question of fact for the jury. People v. Glancy, 142 Cal.App.2d 669, 299 P.2d 18. The presence of the gun here raised a sufficient inference of possession by the defendant Domenico to warrant an indictment. There is nothing in the record to indicate

bad faith on the part of the prosecution, or to overcome the presumption of regularity of the actions of the district attorney. Error will not be presumed on appeal. People v. Farrara, 46 Cal.2d 265, 294 P.2d 21.

[5–7] It is also argued that the following colloquy, which occurred on cross-examination of the defendant De Prima, was prejudicial reversible error.

> "Q. Well, you knew Mr. Domenico, isn't that true, sir? A. No, sir.
>
> "Q. You knew Domenico when you were in San Quentin together? A. No, sir. Afraid you are wrong. You better check your record there."

While the question is clearly erroneous, there were no objections made to this line of cross-examination, nor was a motion to strike made, nor was the court requested to admonish the jury. The failure to object waives the objection and defendant cannot object for the first time on appeal. People v. Beal, 108 Cal.App.2d 200, 239 P.2d 84; People v. Simon, 80 Cal.App. 675, 252 P. 758. In People v. Wardwell, 167 Cal.App. 2d 20, 334 P.2d 641, a somewhat similar question was upheld as proper on cross-examination of the defendant. Even under the circumstances of this case, where the defendant Domenico did not testify, we do not think the error was so grossly prejudicial as to require the trial court to stop the discourse without waiting for an objection or a motion to strike under the doctrine of People v. Arends, 155 Cal.App.2d 496, 508, 318 P.2d 532. We cannot say here that after an examination of the entire cause, it is reasonably probable that a result more favorable to the defendant Domenico would have been reached in the absence of the error (People v. Watson, 46 Cal.2d 818, 299 P.2d 243) as there was overwhelming evidence of the guilt of both defendants.

[8] It is further argued that the presence of the gun in the court room during the proceedings was prejudicial and erroneous as to both defendants. The admission of such evidence is regulated by the sound discretion of the trial court, and we can see no abuse of discretion here. Furthermore, the verdict which found defendants guilty of burglary in the second degree (Pen.Code § 460) refutes any allegations of prejudice because of the presence of the gun.

[9–14] The second major contention on appeal is that the trial court's exclusion of a conversation between the defendant De Prima and one Jody Woods, improperly deprived the defendants of the defense of entrapment. A proper and timely objection was made in the trial court. Defendants argued there that the conversation was properly part of the res gestae. The defendant De Prima testified at the trial that he went to the Ebb Tide on the night of September 10th to keep an appointment with Jody Woods, the cocktail waitress. The facts, however, do not support even an inference of entrapment as a defense for either of the defendants. "'Entrapment is the conception and planning of an offense by an officer and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer.'" People v. Judd, 170 Cal.App.2d 212, 338 P.2d 458, 461, quoting People v. Schwartz, 109 Cal. App.2d 450, 454, 240 P.2d 1024. Entrapment is a positive defense only when the accused can show that he was induced by an officer of the law to commit the crime. People v. Braddock, 41 Cal.2d 794, 264 P. 2d 521. In view of defendant De Prima's testimony in which he admitted the burglary and the conspiracy, the exclusion of the testimony could not have been prejudicial to him. As to the defendant Domenico, the jury was entitled to disbelieve DePrima's testimony that only he, Jody Woods, and Friedman were in on the burglary. The prosecution was not compelled to call Jody Woods as a witness so long as there was presented to the court the material evidence bearing on the charge for which the defendants were on trial. People v. Lopez, 169 Cal.App.2d 4, 336 P.2d 614. The statements of Jody Woods were properly excluded as hearsay. People v. Clough, 59 Cal. 438; People v. Louie Foo, 112 Cal. 17, 44 P. 453. Nor was there a sufficient showing that the statements made by Jody Woods came within the res gestae rule (Code of Civil Procedure, §§ 1850, 1870 subd. 7; People v. Perkins, 8 Cal.2d 502, 66 P.2d 631), so that we can say that the trial court abused its discretion in excluding these statements. Dolberg v. Pacific Elec. Ry. Co., 126 Cal.App.2d 487, 272 P.2d 527; Showalter v. Western Pacific R. Co., 16 Cal.2d 460, 106 P.2d 895.

[15–18] There is no merit in the contention that the court abused its discretion in denying defendant's motion for a new trial. The motion for a new trial was made on the basis of newly discovered evidence, the affidavit of Maurice Friedman that the gun belonged to him, and that Jody Woods and Maurice Friedman were subpoenaed to appear at the trial but did not appear. At the hearing on the motion, the trial court indicated that the matters relating to the gun were irrelevant as the charge of violation of Penal Code, sec. 12021 had been dismissed against the defendant Domenico, and both defendants had been convicted of burglary. As to Jody Woods there was nothing in the record and defendants' counsel could not advise the court as to what her testimony would be. The granting or denial of a motion for a new trial on the ground of newly discovered evidence rests in the sound discretion of the trial court. People v. Greenwood, 47 Cal.2d 819, 306 P.2d 427. The defendants' failure here to show why the witnesses were not located or subpoenaed at the time of the trial (People v. Beard, 46 Cal.2d 278, 294 P.2d 29) and the failure to show what their testimony would be (People v. Miramontes, 153 Cal.App.2d 402, 314 P.2d 482) indicates that there was no abuse of discretion by the trial court in denying their motion. People v. Patterson, 169 Cal.App.2d 179, 337 P.2d 163.

In view of the foregoing, the judgments of conviction and order denying motion for new trial must be and are hereby affirmed.

DOOLING and DRAPER, JJ., concur.

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172 Cal.App.2d 47

Rose R. TOBONI, as Administratrix of the Estate of Joseph P. Toboni, Jr., Deceased, Plaintiff and Appellant,

v.

PENNINGTON MILLINERY CO., Inc., Sibyl E. Pennington, also known as Sibyl E. Pennington Amante; Walter A. Spence; Tom Cooney; Tom Cooney Company, a corporation; First Doe; Second Doe; and Third Doe, Defendants and Respondents.

Civ. No. 18230.

District Court of Appeal, First District.
Division 1, California.
July 15, 1959.

Action by stockholder for damages for herself for depreciation of value of stock, as well as for corporation for mulcting of corporate assets and misappropriation of its business and properties by two directors and competitors, wherein directors and competitors moved for order requiring stockholder to furnish them security on statutory ground that there was no reasonable probability that prosecution of action would benefit corporation or its security holders. The Superior Court, City and County of San Francisco, Milton D. Sapiro, J., rendered orders requiring stockholder to furnish security, and she appealed. The District Court of Appeal, Fred B. Wood, J., held that although stockholder's complaint sought damages for herself as well as for corporation, obligations allegedly violated by directors were duties directly owed by them to corporation, and action was stockholder's derivative suit to which the statute was applicable.

Affirmed.

1. Corporations ⚿214

Although stockholder's complaint sought damages for herself for depreciation of value of stock, as well as for corporation for mulcting of corporate assets and misappropriation of its business and properties by two directors and competitors, obligations allegedly violated by directors were duties directly owed by them to corporation, and action was stockholder's derivative suit to which statute relating to shareholder's actions and motion to require security was applicable. West's Ann.Corp. Code, § 834.

2. Corporations ⟹206(1)

It is for corporation, in first instance, to institute and maintain remedial actions, and stockholder may do so on behalf of corporation only if its responsible officials refuse or fail to act, and this is what makes such stockholder's suit "derivative".

See publication Words and Phrases, for other judicial constructions and definitions of "Derivative".

3. Corporations ⟹214

In derivative stockholder's action against corporation, two of its directors, and competitors for mulcting of corporate assets and misappropriation of its business and properties, affidavit supporting motion, which was made by directors for order requiring stockholder to furnish them security on ground that there was no reasonable probability that prosecution of suit would benefit corporation or its security holders, was evidence, not pleading, and provision of statute, relating to verification of pleadings, that affidavit must state why it was not made by one of parties to action was not applicable. West's Ann. Corp.Code, § 834(b); West's Ann.Code Civ.Proc. § 446.

4. Corporations ⟹214

In derivative stockholder's action against corporation, two of its directors, and competitors, statement in affidavit supporting motion, which was made by directors for order requiring stockholder to furnish them security on ground that there was no reasonable probability that prosecution of suit would benefit corporation or its security holders, that facts stated therein were within personal knowledge of affiant by reason of his long and close familiarity with business of directors and corporation supported trial court's implied finding that affiant was qualified as witness by affidavit. West's Ann.Corp.Code, § 834 (b).

5. Corporations ⟹214

In derivative stockholder's action against corporation, two of its directors, and competitors, fact that affidavit, which was given in support of motion by directors for order requiring stockholder to furnish them security, and contained denial of material allegations in complaint, and stated facts in support of statement that it was not reasonably probable that action would result in any benefit to corporation, contained admission that stockholder had never been sent notice of meetings of board of directors because she was not entitled thereto did not render insubstantial other statements which tended to prove that liquidation of corporation was properly and lawfully conducted for purpose of avoiding imminent bankruptcy. West's Ann.Corp. Code, § 834(b).

6. Corporations ⟹214

In derivative stockholder's action against corporation, two of its directors, and competitors, wherein directors moved for orders requiring stockholder to furnish security on ground that there was no reasonable probability that prosecution of suit would benefit corporation or its security holders, evidence sustained finding that there was no reasonable probability that prosecution of suit would benefit corporation or its security holders. West's Ann. Corp.Code, § 834(b).

7. Corporations ⟹214

In derivative stockholder's action against corporation, two of its directors, and competitors for mulcting of corporate assets and misappropriation of its business and properties, fact that competitors had no interest in corporation did not bar them from obtaining order, which required stockholder to furnish them security on ground that there was no reasonable probability that prosecution of suit would benefit corporation or its security holders. West's Ann.Corp.Code, § 834(b).

◆

Raymond D. Williamson, Robert J. Smith, San Francisco, for appellant.

Crozier C. Culp, Oakland, for respondent, Pennington.

David M. Hoffman, Los Angeles, for respondent, Cooney.

FRED B. WOOD, Justice.

Plaintiff has appealed from two orders requiring her to furnish security to the defendants pursuant to the provisions of section 834 of the Corporations Code: A $500 surety bond to defendants Pennington Millinery Co., Sibyl E. Pennington Amante and Walter A. Spence, and a $500 surety bond to defendants Tom Cooney Company and Tom Cooney individually.

In support of her appeal plaintiff claims: (1) This is not a stockholder's derivative suit within the meaning of section 834, Corporations Code. (2) The affidavit of one Wright in support of the Amante-Spence-Pennington Co. motion for security is insufficient. (3) Defendants Tom Cooney and Tom Cooney Company have no right to security. Our examination of the record convinces us that none of these points is well taken. The judgment should be affirmed.

(1) *This is a stockholder's derivative suit. The provisions of section 834 of the Corporations Code are applicable.*

[1, 2] Although plaintiff seeks damages for herself as well as for the Pennington Company, the gravamen of her complaint is a wrong done the corporation, a mulcting of its assets, a misappropriation of its business and properties by two of its directors, aided and assisted by Tom Cooney and the Tom Cooney Company, a business competitor of the Pennington Company. Plaintiff has merely a stockholder's interest in the allegedly mismanaged and mulcted corporation. Although her shares may have greatly depreciated in value, the obligations allegedly violated by the defendant directors Amante and Spence were duties which they owed directly and immediately to the Pennington Company.* It is for the corporation, in the first instance, to institute and maintain remedial actions. A stockholder may do so on behalf of the corporation only if its responsible officials refuse or fail to act. This is what makes such a stockholder's suit "derivative." The cause of action here pleaded, like those in Campbell v. Clark, 159 Cal.App.2d 432, 324 P.2d 51, is "derivative in nature in that the gravamen of the complaint is injury to the corporation and to the whole body of its stockholders. * * *

"The action being derivative in nature, plaintiff could not maintain * * * the action without fulfilling the requirements of subdivision (a) of section 834 of the Corporations Code. [In our case plaintiff does allege facts that appear to meet those requirements]" (159 Cal.App.2d at page 437, 324 P.2d at page 53. See also the authorities there cited.)

—Plaintiff alleges that defendants Spence and Amante mismanaged the business of Pennington Company, and commenced the dissolution of the Company without notice to plaintiff, Administratrix of the Estate of Joseph P. Toboni, Jr., Deceased, who until his death was the owner of shares of stock of said Company; that all of the foregoing was done by Spence and Amante pursuant to a fraudulent scheme of said defendant major stockholders and directors and Tom Cooney and the Cooney Company, to appropriate the assets (including equipment, facilities, good will and customer lists) of Pennington Company, to promote the business of Cooney Company, with resulting great personal gain to Spence and Amante, detrimental to the business and welfare of the corporation.

Plaintiff alleges this action is brought on behalf of herself and of the corporation, Pennington Company.

She concludes with a prayer that Amante and Spence account for their management and disposition of the properties of the corporation and restore to the corporation any money and the value of any property of the corporation which they have acquired, disposed of or wasted; that they be enjoined from disposing of any of the corporation's property pending this action; that a receiver of the corporation's property be appointed; that plaintiff and the corporation recover damages in the sum of $50,000; and for general relief.

Plaintiff mistakenly relies upon Sutter v. General Petroleum Corporation, 28 Cal. 2d 525, 170 P.2d 898, 167 A.L.R. 271. It does not support her thesis. There the plaintiff sued for damages directly and individually sustained by him, caused by the fraud of the defendant which induced plaintiff to organize and invest in a corporation to take over an oil and gas lease and abandon his own petroleum development projects. The stock in the new corporation thus formed became valueless because of that fraud. The Supreme Court carefully distinguished that case from the case of a stockholder's derivative suit, saying in part:

"Generally, a stockholder may not maintain an action in his own behalf for a wrong done by a third person to the corporation on the theory that such wrong devalued his stock and the stock of the other shareholders, for such an action would authorize multitudinous litigation and ignore the corporate entity. Under proper circumstances a stockholder may bring a representative action or derivative action on behalf of the corporation. [Citations] * * * '* * * The action is derivative, i. e., in the corporate right, if the gravamen of the complaint is injury to the corporation, or to *the whole body of its stock or property without any severance or distribution among individual holders, or if it seeks to recover assets for the corporation or to prevent the dissipation of its assets.*'" (28 Cal.2d 530, 170 P.2d 900.) (Emphasis added.)

In a stockholder's derivative suit, the provisions of subdivision (b) of section 834 of the Corporations Code are applicable. They authorize "the corporation or any defendant" to move for an order requiring the plaintiff to furnish security upon the ground "(1) That there is no reasonable probability that the prosecution of the * * * action * * * will benefit the corporation or its security holders;" or "(2) That the moving party, if other than the corporation, did not participate in the transaction complained of in any capacity."

(2) *Does the evidence support the order to furnish security to Amante, Spence and the Pennington Company? Yes.*

The applicable statute says that at the hearing upon the motion for security the court shall consider "such evidence, written or oral, by witnesses or affidavit, as may be material" to the grounds upon which the motion is based or to a determination of the probable reasonable expenses, including attorney's fees, of the corporation and the moving party which will be incurred in the defense of the action. (Corp.Code, § 834).

[3, 4] The evidence tendered by defendants Amante, Spence and the Pennington Company included an affidavit by Milton A. Wright. Plaintiff challenges this affidavit upon the ground that Wright is neither a party to the action nor an officer of Pennington Company and failed to state in his affidavit *why it was not* "made by one of the parties" as required by section 446 of the C.C.P. That section applies to the verification of *pleadings.* Wright's affidavit is not a pleading. It is an affidavit used as evidence. Section 446 does not apply. Wright did state that he "* * * is now and for more than twenty-five years continuously last past has been the accountant and auditor of and for the defendants" Amante, Spence and Pennington Company, and that the facts stated in his affidavit "are within the personal knowledge of this affiant by reason of his long and close familiarity with the business of said defendants." That supports the trial court's implied finding that he was qualified as a witness by affidavit.

[5, 6] Plaintiff challenges the affidavit upon the additional ground that although Wright denied material allegations of the complaint and affirmatively stated other facts in support of his statement that "there is no reasonable probability" that prosecution of the action "will result in any benefit whatsoever" to the Pennington Company or its security holders, he expressly admitted that after the death of Joseph P.

Toboni, Jr., notices of meetings of the Board of Directors of Pennington Company were not given to plaintiff herein "for the reason that she was not and never was a member of the Board of Directors * * * and for said reason not entitled to notice of such meeting." Such an admission did not render insubstantial other statements in the affidavit which tended to prove that liquidation of the Pennington Company was properly and lawfully conducted for the purpose of avoiding imminent insolvency and bankruptcy. It was the function of the trial court to weigh that and any other evidence adduced at the hearing of the motion. Plaintiff has failed to show a basis for a reviewing court to disturb the trial court's findings and conclusions.

[7] (3) *Defendants Tom Cooney and Tom Cooney Company were not barred from seeking and obtaining an order for security because of a lack of "interest" in the Pennington Company.*

Plaintiff says that these two defendants "are not entitled to security of any kind or character from Plaintiff as they have no interest whatsoever in the corporation." If by that she means that only a defendant who is a "security holder" of the corporation involved may obtain security, she is mistaken. Section 834 of the Code imposes no such limitation. Subdivision (b) of that section accords that privilege to "any defendant," after he or it has been served with summons. Any doubt that anyone may have entertained upon this subject was dispelled by our Supreme Court when it approved the dismissal of an action upon plaintiff's failure to comply with an order directing him to furnish security to a "third person" defendant. Beyerbach v. Juno Oil Co., 42 Cal.2d 11, 265 P.2d 1. The Supreme Court said, in part: "* * * the Legislature, for the protection of third persons who have dealt with the corporation as well as for the protection of the corporation and its officers and employes, can constitutionally require that the stockholder who would act as in the nature of a guardian ad litem must, as a condition of prosecuting the action on behalf of the corporation, either show a reasonable probability that the suit will be successful or secure the payment of the defendants' expenses should they prevail. The Legislature, of course, can attribute some weight to the fact that the corporation has not seen fit to institute action on a cause which either belongs to it or to no one." (42 Cal.2d at pages 23–24, 265 P.2d at page 8).

The orders appealed from are affirmed.

BRAY, P. J., and TOBRINER, J., concur.

172 Cal.App.2d 369

PEOPLE of the State of California, Plaintiff and Respondent,
v.
Cecil Garcia CONTRERAI, Defendant and Appellant.
Cr. 6564.

District Court of Appeal, Second District, Division 3, California.
July 27, 1959.

Prosecution for possession of heroin. From adverse judgment of the Superior Court, Los Angeles County, William E. Fox, J., the defendant appealed. The District Court of Appeal, Vallée, J., held that where defendant at no time objected to various continuances, nor did he move to dismiss, and he expressly consented to two continuances, defendant waived his right to be brought to trial within 60 days after filing of information.

Affirmed.

1. Criminal Law 🔑576(5)

Where defendant at no time objected to various continuances, nor did he move to dismiss, and he expressly consented to two continuances, defendant waived his right to be brought to trial within 60 days after filing of information. West's Ann. Pen.Code, § 1382.

2. Criminal Law ⚷576(5)

Right of defendant to trial within 60 days after filing of information may be waived and consent of defendant that his trial be set for a date beyond 60-day limit is equivalent to postponement upon his application. West's Ann.Pen.Code, § 1382.

3. Criminal Law ⚷576(5)

Under statute requiring that a defendant be brought to trial within 60 days after filing of information, if a defendant fails to object at time cause is set for trial beyond statutory period, the consent is presumed. West's Ann.Pen.Code, § 1382.

4. Criminal Law ⚷576(11)

Application for dismissal for failure to bring defendant to trial within 60 days after filing of information must be made in the trial court, and if not made before trial begins, the right to a dismissal is waived. West's Ann.Pen.Code, § 1382.

5. Criminal Law ⚷576(8)

Under statute requiring that defendant be brought to trial within 60 days after filing of information, court is under no duty to dismiss for failure to bring defendant to trial within that time unless the defendant demands it. West's Ann.Pen.Code, § 1382.

Virgil V. Becker, Wilmington, under appointment by the District Court of Appeal, for appellant.

Stanley Mosk, Atty. Gen., and Elizabeth Miller and Norman L. Epstein, Deputy Attys. Gen., for respondent.

VALLÉE, Justice.

In a nonjury trial defendant was convicted of possessing heroin. He was sentenced to state prison. He appeals from the judgment. His only point is that he was not brought to trial within 60 days after the filing of the information, as required by section 1382 of the Penal Code.

[1] The information was filed on July 7, 1958. Defendant was arraigned on July 9, 1958 and his time for plea was continued to July 16. On July 16 time for plea was continued to July 21; and on the latter date, was continued to July 24. On July 24 defendant pleaded not guilty and trial was set for September 18, 1958. On September 18 in department 43 defendant waived a trial by jury and the following stipulation was entered into:

> "By stipulation of all counsel the cause is submitted on the testimony contained in the transcript of the proceedings had at the preliminary hearing, subject to this Court's rulings, with each side reserving the right to offer additional evidence, and all stipulations entered into at the preliminary hearing be deemed entered into in these proceedings. It is further stipulated that all exhibits received at the preliminary hearing are deemed received in evidence in these proceedings, subject to this Court's rulings."

The cause was then transferred to department 47. On the same day in department 47, on motion of defendant, the trial was continued to September 25. The minutes of September 18 say, "Time waived." On September 25 the trial was continued to October 2, 1958. The minutes of September 25 say, "Time waived." The minutes of October 2 say, "Trial resumed from September 25, 1958," and "The Court has read and considered the transcript"; that additional evidence was received, and that defendant was found guilty. Defendant was represented by counsel at all proceedings.

Penal Code, section 1382, provides:

> "The court, unless good cause to the contrary is shown, must order the action to be dismissed in the following cases: * * *
>
> "2. If a defendant, whose trial has not been postponed upon his application, is not brought to trial in a superior court within 60 days after the finding

of the indictment, or filing of the information * * *."

[2, 3] The right of a defendant to a trial within the 60-day period may be waived. People v. Tenedor, 107 Cal.App.2d 581, 583, 237 P.2d 679; People v. Greene, 108 Cal.App.2d 136, 140, 238 P.2d 616. The consent of a defendant that his trial be set for a date beyond the 60-day limit is equivalent to a postponement upon his application within the meaning of section 1382. People v. George, 91 Cal.App.2d 537, 540, 205 P.2d 464. "When a defendant fails to object at the time a cause is set for trial beyond the statutory period, consent is presumed." People v. Taylor, 52 Cal.2d 91, 338 P.2d 377, 378.

[4, 5] Application for dismissal for failure to bring to trial within 60 days must be made in the trial court, and if not made before the trial begins the right to a dismissal is waived. The court is under no duty to dismiss unless the defendant demands it. People v. Newell, 192 Cal. 659, 669, 221 P. 622; People v. Villarico, 140 Cal.App.2d 233, 235–236, 295 P.2d 76; Ex parte Apakean, 63 Cal.App. 438, 440, 218 P. 767. In People v. O'Leary, 130 Cal.App. 2d 430, at page 436, 278 P.2d 933, at page 937, this court said:

> "The purpose of an objection to a trial date beyond the 60-day period is to give the court an opportunity to fix an earlier date. If an objection is not made within the 60-day period, it cannot validly be made at all."

"It is not the policy of the law to permit a person thus to keep his silence, take his chance on getting a favorable verdict and, if he loses, at some later time (perhaps after the statute of limitations has run) come in and void the judgment by raising a point which if timely raised would have allowed the filing of a new information before the running of the statute and while the state's witnesses were still available." People v. Martinez, 145 Cal.App.2d 361, 365, 302 P.2d 643, 645.

Defendant at no time objected to the various continuances, nor did he move to dismiss. On September 18 and 25 he expressly consented to the continuances and waived the time. On the record it must be held that defendant waived his right to be brought to trial within 60 days after the filing of the information.

Affirmed.

SHINN, P.J., and PARKER WOOD, J., concur.

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171 Cal.App.2d 842

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Joseph TRAVIS and Abraham Kilberg, Defendants and Appellants.

Cr. 3458.

District Court of Appeal, First District, Division 1, California.

July 13, 1959.

Defendants who had been indicted for conspiracy to commit theft were convicted in Superior Court, City and County of San Francisco, Harry J. Neubarth, J., of attempted petty theft, and they appealed. The District Court of Appeal, Bray, P. J., held that where indictment did not charge defendants with substantive crime of theft, judgment of attempted petty theft could not stand.

Reversed with instructions.

1. Criminal Law 🔑881(2)

A person cannot be convicted of offense, other than necessarily included offense, not charged against him by indictment or information, whether or not there was evidence at his trial to show that he had committed that offense.

2. Conspiracy 🔑28

Conspiracy is distinct offense from actual commission of offense forming object of conspiracy, and guilty parties may be legally convicted of both offenses.

3. Indictment and Information ⚷191

Theft is not included offense in conspiracy to commit theft. West's Ann.Pen. Code, § 484.

4. Criminal Law ⚷991

Where indictment for conspiracy to commit theft did not charge defendants with substantive crime of theft, judgment of attempted petty theft could not stand. West's Ann.Pen.Code, § 484.

5. Criminal Law ⚷1184

Where trial judge had not intended to find defendants guilty of conspiracy to commit attempted petty theft when he found them guilty of attempted petty theft on incorrect theory that attempted petty theft was lesser and included offense to crime of conspiracy to commit theft, judgment could not be corrected to show conviction for conspiracy to commit attempted petty theft. West's Ann.Pen.Code, § 484.

◆

Leslie C. Gillen, San Francisco, for appellant, Kilberg.

Henry Gross, San Francisco, Rodney H. Washburn, San Francisco, of counsel, for appellant, Travis.

Stanley Mosk, Atty. Gen., Clarence A. Linn, Chief Asst. Atty. Gen., Peter T. Kennedy, Dep. Atty. Gen., for respondent.

BRAY, Presiding Justice.

Defendants were indicted for violation of section 182, Penal Code, conspiracy to commit theft (Pen.Code, § 484), to commit bribery (Pen.Code § 67½), and to pervert and obstruct justice and the due administration of the laws (Pen.Code § 182, subd. 5). They waived a jury. The court, after a trial, found both guilty of attempted petty theft, which it found was a lesser included offense. Motions for new trial were denied. Defendants were sentenced to the county jail for 90 days, one day to be suspended. They appeal from the judgment of conviction and the order denying new trial.

Questions Presented.

1. Is attempted petty theft an included offense in the crime of criminal conspiracy?

2. Can the judgment be corrected?

Facts.

The prosecution arose out of two traffic citations issued to Robert Marsili, whose driver's license had been revoked. Defendant Travis said that he could "fix" the tickets, and asked Marsili to meet him at defendant Kilberg's liquor store. At that meeting Kilberg told Marsili that it would cost $250 to fix the tickets. Marsili gave Kilberg the tickets. Marsili's employer contacted the police, and Marsili told the police his story. The police told Marsili to get his tickets back. Both defendants told Marsili that to get the tickets back it would cost $50 for the trouble incurred; Kilberg added "for the different sergeants and everything like that, you know." Travis said that through Kilberg the tickets still could be fixed if Marsili could raise the $250. The police gave Marsili that sum which Marsili gave to Travis, who was then arrested. Later Kilberg was arrested. The court found defendants "guilty of a lesser and included offense of the crime of Misdemeanor, to-wit: Attempted Petty Theft."

1. Is Petty Theft Included?

[1] The attorney general concedes that it is not. The indictment charged defendants with a *conspiracy* to do three acts. The rule is well established in this state that a person cannot be convicted of an offense (other than a necessarily included offense) not charged against him by indictment or information whether or not there was evidence at his trial to show that he had committed that offense. In re Hess, 45 Cal.2d 171, 175, 288 P.2d 5.

[2] It is also a well established rule that conspiracy is a distinct offense from the actual commission of the offense forming the object of the conspiracy and that guilty parties may be legally convicted of both offenses. People v. Robinson, 43 Cal.2d 132, 271 P.2d 865; People v. Moore, 143 Cal.App.2d 333, 299 P.2d 691. In People v. Shaw, 115 Cal.App.2d 597, 252 P.2d 670, we held that criminal conspiracy to commit grand theft and grand theft are separate and distinct crimes. In People v. Kefry,

166 Cal.App.2d 179, 332 P.2d 848, we held that the defendant could be convicted of conspiracy to receive stolen property and of receiving stolen property and burglary.

[3, 4] Since theft is not an included offense in conspiracy to commit theft, and since the indictment did not charge defendants with the substantive crime of theft, the judgment of attempted petty theft may not stand.

2. Can the Judgment Be Corrected?

[5] Plaintiff contends that the judge intended to acquit defendants of the conspiracy to obstruct justice and to commit bribery but to convict them of conspiracy to commit attempted petty theft. An examination of the record fails to support this contention. After the taking of evidence counsel asked and received permission to submit briefs. Thereafter court convened and the judge stated to the defendants that he had discussed the case in chambers with counsel. He then stated "there has been no evidence as far as the charge to prevent and obstruct justice is concerned * * *. Now, I'm finding you not guilty on that charge. On the other charge of bribery, that also holds true, that there's no evidence showing that any act was done to bribe anyone. Now, on the first charge of theft * * *. It seems to me that you are guilty of petty theft * * *. I'm finding you not guilty of the two charges and I'm finding you guilty of an attempt of petty theft." Then a discussion ensued between the court and counsel as to whether attempted petty theft was an included offense, the district attorney contending that it was not, defense counsel contending that there was no evidence of such an attempt. The clerk then asked the court if he should "[a]rraign them on the attempted petty theft? Found guilty?" The court: "Very well." The clerk then informed defendants that they had been found guilty of the crime of misdemeanor, to-wit, attempted petty theft, and asked if they had any reason why judgment should not be pronounced. After a discussion about bail and a time for hearing of a motion for new trial, defense counsel stated that they understood the court's action to be an acquittal of defendants on the conspiracy to commit theft and a finding of guilty of an attempt to commit petty theft, a substantive offense. Further colloquy ensued in which the court said: "I intended to find them guilty on that first—on an attempted petty theft, which I feel that I can, under that first charge." Defense counsel then stated: "* * * your Honor is then finding them guilty of a misdemeanor and a substantive offense." The court: "An included offense * * *" "Mr. Gillen [counsel for defendant Kilberg]: So I think that it is tantamount to an acquittal of conspiracy; and I think it should be worded in the record. The Court: No, because then I can visualize that you'd say, 'Well, you found them not guilty on all three charges; so, therefore, you couldn't find them guilty on the petty theft.' Mr. Gillen: No, you could, you could find them guilty on an included offense. The Court: That might be the effect of that. Mr. Gillen: I don't think so. I don't see how you can let that stand without—The Court: I would prefer to do it that way."

A couple of months later after defendants had withdrawn their motions for probation, judgment was pronounced as follows: "That whereas, Joseph Travis and Abraham Kilberg, having been convicted of the crime of Misdemeanor, to wit: Attempted Petty Theft. It is therefore ordered adjudged and decreed that they be punished by imprisonment in the County Jail * * *."

Assuming, but not deciding, that had the court intended to find defendants guilty of conspiracy to commit attempted petty theft[1] instead of the substantive offense, it could change its judgment to so show, it is obvious from the statements of the judge, the "arraignment" by the clerk and the judgment itself, that the judge had no such intention. The judge definitely was of the opinion, in spite of the contention of the district attorney to the contrary, that the substantive crime of attempted petty theft was an included offense in conspiracy to commit theft and of that was what he desired to find defendants guilty. He did not wish to find defendants not guilty of conspiracy to commit theft for fear that such finding would release defendants from the lesser offense which he considered included therein. He knew that the finding of defendants guilty of an included offense would automatically constitute an acquittal of the greater offense.

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[1] And assuming also that there is such a crime as conspiracy to attempt to commit petty theft. Conspiracy imports an agreement to commit a crime and it seems doubtful, to say the least, that persons would agree to merely *attempt* to commit a crime as distinguished from agreeing to commit it. Moreover, if persons conspire to commit a particular

In view of our determination of the foregoing issues, it becomes unnecessary to discuss the other contentions of the defendants.

The judgment is reversed. The trial court is instructed to discharge the defendants.

FRED B. WOOD and TOBRINER, JJ., concur.

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172 Cal.App.2d Supp. 808

Fred W. ALKIRE, Plaintiff and Respondent,

v.

OWL MATERIALS CO., a corporation, Defendant and Appellant.

Civ. A. 63.

Appellate Department, Superior Court, San Bernardino County, California.

July 8, 1959.

Action for undercharge or for difference between $8.50 and $10 per hour for transporting rock, sand and gravel. From adverse judgment of the Trial Court, the defendant appealed. The Appellate Department of the Superior Court, Mitchell, J., held that evidence was sufficient to sustain finding as to number of hours involved in hauling materials.

Judgment affirmed.

1. Carriers 🔑196

In action for undercharge or for difference between $8.50 and $10 per hour for transporting rock, sand and gravel, evidence was sufficient to sustain finding as to number of hours involved in hauling materials.

2. Appeal and Error 🔑995, 996

In action for undercharge for transporting rock, sand and gravel, inferences to be drawn from testimony and weight to be given to that testimony were matters within legal discretion of trial court and were not subject to review upon appeal.

3. Carriers 🔑12(1)

Any attempt to write into any agreement for the transportation of materials of a rate not authorized by Public Utility Commission is illegal and void and under such circumstances law deems minimum rate to have been a part of the contract.

Best, Best & Krieger, Riverside, for defendant and appellant.

Herbert Cameron, Los Angeles, for plaintiff and respondent.

PER CURIAM.

This is an appeal from a judgment in favor of the plaintiff for the sum of $1,616.72 which was the amount of an "undercharge" or the difference between $8.50 and $10 per hour for transporting rock, sand and gravel.

The written contract provided for the payment of:

> "the minimum rates established for such service by the California Public Utilities Commission, unless a different

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crime, they could be guilty of the conspiracy regardless of whether the substantive crime was actually consummated or not.

rate is agreed upon by the parties and is specified at the conclusion hereof". (Par. 7.)

The minimum rate prescribed by the Public Utility Commission for the transportation involved here was $10 per hour.

The contract also contained a provision as follows:

> "It is agreed that the price to be paid for the performance of hauling service hereunder shall be 8.30 per Hour plus 1.25 for overtime instead of as prescribed in Paragraph 7 hereof".

This contract was dated April 10, 1956.

On April 10, 1956, the shipper, the defendant, issued and served on plaintiff a notice of the shipper's intention to ship under the rates prescribed by the C.P.U.C.

Appellant, in its Answer, concedes that the correct rate was $10 per hour, but alleges that the plaintiff was actually paid "in excess of $10.00 per hour". (Answer, p. 2, L. 9.)

As an additional defense, appellant alleged that

> "despite the contract plaintiff desired to be paid upon the basis of tons carried", and "the plaintiff was in fact paid upon to*n*age basis".

The issues, thus framed, were submitted to the trial court and judgment was rendered as follows:

> "It is hereby ordered, adjudged and decreed that plaintiff Fred W. Alkire do have and recover from defendant Owl Materials Co. the sum of $1,616.72 * * *".

While no formal Findings of Fact were made, nevertheless the Settled Statement contains this language:

> "* * * plaintiff was paid * * * at the rate of $8.50 an hour in accordance with the terms of said written contract * * *. That the actual rate * * * according to Minimum Rate Tariff No. 7 * * * provides that he should have been paid not less than $10.00 an hour, or a total of $11,005.20, which left an undercharge due and owing to plaintiff by defendant of $1,616.72". (P. 21, Ls. 14–21.)

The entire paragraph containing this sentence is couched in language used in Findings.

It is clear that the trial court thus found that the only contract between the parties was that contained in the writing to the effect that the plaintiff was to have been paid on an hourly basis at the rate prescribed by the C.P.U.C.

Appellant bases his appeal on an alleged insufficiency of the evidence.

However, appellant admits the existence of the written contract providing for payment on an hourly basis and by his argument as to the weight of the evidence concerning the number of hours actually worked, admits the existence of such evidence.

> "* * * a witness for the defendant demonstrated * * * the arithmetic used by Respondent in deriving the numbers * * * of hours worked * * *". (Appellant's Opening Brief, Page 4, lines 25–27.)

Moreover, the Settled Statement recites as follows:

> "Matt Castellaw * * * testified as follows * * * the plaintiff did not work the *hours he claimed* and that the *time sheets* as submitted by plaintiff were not correct". (Page 2, L. 22–25.)

In its Opening Brief, appellant argues that the evidence as to the number of hours worked is "improbable" (p. 5, L. 12–14) and is "false" (P. 5, L. 24–26).

Such arguments concede the existence of evidence on the point.

Among the exhibits is an invoice reciting the amount due on each of the days upon which respondent worked from April 10, 1956, to August 31, 1956. (Exhibit No. 8.)

[1, 2] By their pleadings, the parties agree that the rate governing in this matter was to be on an hourly basis, and at the rate of $10 per hour rather than $8.50 per hour as stated in their written contract.

The sole dispute relates to the number of hours involved in hauling materials as agreed. From the Settled Statement of Facts it appears that the plaintiff testified he performed the services in question under the contract providing for payment on an hourly basis at $8.50 per hour; that he kept a record of the time consumed on time sheets; that these time sheets were approved by a representative of the defendant; that he was paid for the service performed at $8.50 per hour; and that he received $9,388.48 in payment. This testimony supports the judgment. The payment of $9,388.48 for service at an hourly rate of $8.50 was payment for 1,104.53 plus hours of service. The fact that this computation results in a several digit decimal does not render the testimony inherently improbable. It is not unreasonable to assume that the total payment figure may have been the result of a minor error. The final computation by the Court was not mathematically correct as 1,104.53 hours at $1.50 plus the amount unpaid on the hourly rate, is $1,656.80, which is more than the amount of the judgment, but conforms to the limit fixed by the prayer of plaintiff's complaint. The inferences to be drawn from the testimony and the weight to be given that testimony were matters within the legal discretion of the trial court, not subject to review upon appeal.

Appellant also urges that the trial court erred in "granting respondent relief in equity". Appellant fails to point out any order or judgment granting such relief and we find none in the record. The Settled Statement contains no reference to such an issue; the judgment (supra) contains no such relief.

[3] This is not a judgment reforming a contract since my attempt to write into the agreement a rate not authorized by C.P. U.C. would be illegal and void. Under such circumstances, the law deems the minimum rate to have been a part of the contract.

The judgment is affirmed.

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52 Cal.2d 514

In re Wayne M. FREIBURGHOUSE, on Disbarment.

L. A. 25369.

Supreme Court of California,
In Bank.
July 8, 1959.

Disciplinary proceeding. The Supreme Court, Per Curiam, held that where attorney pleaded guilty to two counts of grand theft, disbarment was ordered.

Attorney disbarred.

1. Attorney and Client 🔑44(2)

An attorney's misappropriation of a client's funds is an offense involving moral turpitude and warrants disbarment in the absence of extenuating circumstances. West's Ann.Bus. & Prof.Code, §§ 6101, 6102.

2. Attorney and Client 🔑39

Where attorney pleaded guilty to two counts of grand theft, probation was denied and he was sentenced to prison for the term prescribed by law, the attorney was disbarred. West's Ann.Bus. & Prof. Code, §§ 6101, 6102.

◆

Lionel T. Campbell, Los Angeles, for petitioner.

Garrett H. Elmore, San Francisco, for respondent State Bar.

PER CURIAM.

Wayne M. Freiburghouse, an attorney admitted to practice law in this state, was charged with four counts of grand theft and three counts of forgery of endorsements in connected transactions. He pleaded guilty to two counts of grand theft involving sums aggregating $20,000, and the other counts, which involved the taking of an additional $16,000, were dismissed. Probation was denied, and he was sentenced to prison for the term prescribed by law.

Upon the filing of the record of conviction under sections 6101, 6102 of the State Bar Act, Freiburghouse was suspended from practice and directed to show cause why a final order of disbarment or suspension should not be made. Following the filing of his written return to the order to show cause, the matter was referred to The State Bar for recommendation as to the discipline to be imposed. A hearing was had before a local committee of the bar, which recommended that the interim suspension order made by this court should be continued indefinitely, without prejudice to Freiburghouse's right to apply for reinstatement. The record before the local committee includes a transcript of the proceedings at the probation hearing in the criminal action, a transcript of the hearings in a disciplinary proceeding which was discontinued when Freiburghouse was convicted of grand theft, various letters and some medical reports. The Board of Governors reviewed the evidence presented before the local committee and recommended that Freiburghouse be disbarred.

Freiburghouse had been a successful attorney and enjoyed the respect and confidence of the people in his community. In 1953 he appropriated to his own use and lost in gambling $4,000 which had been entrusted to him for investment. In 1954 a client gave him a check for $16,000 for deposit in escrow, and Freiburghouse forged the endorsement of the payee's name on the check, misappropriated the proceeds, and lost a large portion of the money in gambling. These two transactions formed the basis for the criminal convictions.

In explaining his misconduct Freiburghouse made the following statements. In 1952 he borrowed $45,000 from a client on an unsecured note for use in a business venture which had not been successful. He became "obsessed with the necessity" of securing money to repay the client, and a "goodly portion" of the $45,000 was spent in gambling in an effort to accumulate enough to pay the debt. About the time the last of the $45,000 was spent, Freiburghouse was holding $22,000 for investment. This money was misappropriated and was also spent in gambling for the purpose of attempting to secure enough to repay his obligations. In May 1954 he called in the parties concerned, told them what had occurred and was given another chance. He paid off about $10,000 of the debts, and then "by some overwhelming compulsion" he was "impelled" to take another $16,000 which had come to him in a business transaction. Nearly $14,000 of this money was lost in an hour at Las Vegas.

It is urged in behalf of Freiburghouse that, while he knew he was doing wrong and could be punished, he was suffering from "a mental illness" or "compulsive, obsessive neurosis" and therefore lacked substantial capacity to "conform his conduct to the requirements of the law." After these offenses were committed, he spent a month in a sanitarium, and later he received psychiatric treatment from time to time both before and after his arrest. One of the psychiatrists who testified at the probation hearing said that in his opinion Freiburghouse knew right from wrong and that he was not insane under the standards set down in the M'Naughton case, 8 Eng. Rep. 718. Another psychiatrist testified that Freiburghouse was "not a psychopathic personality, far from it. * * * Mr. Freiburghouse certainly knew intellectually that he was doing wrong and would be punished, but he could not stop it. * * * He did not have a mental illness in my opinion but he could not control his actions in my opinion." He added, "From the psychiatric point of view if Mr. Freiburghouse is ever going to get well he has to face his problem and simply getting him out from under is not going to get him well. He has to face his problem."

Freiburghouse's offer to show that he is now a fit and proper person to practice law was properly rejected by the Board of Governors on the ground that such evidence was immaterial to the question before the board.

[1] An attorney's misappropriation of a client's funds is an offense which involves moral turpitude and clearly warrants disbarment in the absence of extenuating circumstances. No such circumstances are shown by the record in the present case.

[2] It is ordered that Wayne M. Freiburghouse be disbarred and that his name be stricken from the roll of attorneys of this state, the order to become effective 30 days after the filing of this opinion.

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172 Cal.App.2d 177

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Grady Newman HALCOMB, Defendant and Appellant.

Cr. 6476.

District Court of Appeal, Second District, Division 3, California.

July 20, 1959.

Prosecution of convicted felon for unlawful possession of firearm capable of being concealed about the person. The Superior Court of Los Angeles County, Thomas L. Ambrose, J., entered judgment of conviction, and the defendant appealed.

The District Court of Appeal, Parker Wood, J., held that under the statute the information was not required to allege, and the state was not required to prove, that the pistol was not an antique.

Affirmed.

1. Weapons ⚷17(1)

Under the statutes, information charging convicted felon with unlawful possession of firearm capable of being concealed upon the person was not required to allege, and state was not required to prove, that the pistol was not an antique. West's Ann. Pen.Code, §§ 12001, 12021.

2. Weapons ⚷17(4)

In prosecution of convicted felon for unlawful possession of firearm capable of being concealed upon the person, evidence was sufficient to show that the pistol was a firearm. West's Ann.Pen.Code, § 12021.

3. Criminal Law ⚷565

In prosecution of convicted felon for unlawful possession of firearm capable of being concealed upon the person, evidence was sufficient to show that the offense was committed on or about April 5, 1958, the date alleged in the information. West's Ann.Pen.Code, § 12021.

4. Criminal Law ⚷680(2)

The order of proof is within the discretion of the trial judge, and a defendant may not complain because proof of the corpus delicti did not precede the evidence of an admission or confession.

5. Criminal Law ⚷1182

Affirmance of judgment carries with it affirmance of the sentence.

◆

Al Matthews, Los Angeles, for appellant.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., and Philip C. Griffin, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

The information alleged that on or about April 5, 1958, the defendant did unlawfully own and have in his possession a firearm, to wit, a P 38 automatic pistol capable of being concealed upon the person, and said firearm having a barrel less than twelve inches in length, and the defendant having theretofore been convicted of felonies, to wit, Grand Theft and Burglary on April 21, 1950, in Los Angeles County, California. (Violation of section 12021 of the Penal Code.) It was also alleged therein that defendant had been convicted of escape in 1942 in San Bernardino County, and had been convicted of burglary in 1945 in Marin County.

In a trial without a jury, defendant was convicted. The allegations of previous convictions were found to be true. Defendant appeals from the judgment and sentence.

Appellant contends (1) that the corpus delicti was not established—it was not established as to the date of the alleged offense, or as to whether the firearm was capable of "firing or discharging a cartridge"; and (2) that the court erred in "allowing into evidence statements of defendant before the corpus delicti was established."

Officer Spiller testified that he was a deputy sheriff and was so employed on or about April 5, 1958; he was one of the arresting officers; he was patrolling Santa Fe Avenue in a radio car and was checking the establishments on that avenue; about 5:10 a. m. he observed two vehicles which were parked, side by side, on the parking lot at the American Legion Hall on that avenue; the officers approached the vehicles and saw two men sitting in an Oldsmobile and saw one man lying on the seat of a "pickup" truck; the three men appeared to be asleep; the officers awakened two of them with comparative ease, but the defendant, who was intoxicated, "wouldn't wake up"; defendant was sitting on the passenger side of the two-door Oldsmobile; when Officer Spiller (witness) opened the door on that side of the Oldsmobile he saw "four rounds" of nine millimeter ammunition on the floor near defendant's feet; the officer shook defendant several times and awakened him; then the officer asked the owner of the Oldsmobile (Fry, one of the three men) for permission to search the vehicle; after receiving such permission the officer found a P 38 automatic pistol directly under the seat where defendant was sitting; the pistol was fully loaded—one round in the clip and one round in the chamber; the defendant and the two other men denied ownership of the pistol; the officers arrested the men and searched them; they found five rounds of nine millimeter ammunition in defendant's coat pocket and four rounds in his pants pocket; the nine millimeter size did "coincide" with the pistol; they found one round of .32 caliber ammunition on Campbell (one of the men), who had been sitting behind the steering wheel of the Oldsmobile; Officer Spiller (witness) asked defendant where he got the "bullets" for the gun; defendant replied, "Well, if you think I'm going to cop out to having that gun, you're crazy."

Officer Human testified that in a conversation with defendant on April 7, when Officer Aure was present, the defendant at first denied ownership of the gun, but later he said that he had picked up the gun "from the restroom of the Cracker Box Cafe, approximately a month previous to this time"—there had been a brawl at the cafe, and he later went into the restroom and found the gun and ammunition there; in that conversation, defendant also said that he was going to dispose of the gun.

There was evidence that defendant had been convicted of grand theft in 1940, escape in 1942, and burglary in 1945, as alleged in the information.

Defendant testified that he had been a bartender at the Cracker Box Cafe; he was arrested on April 15, 1958; he and the man (Campbell) who was with him in the automobile had been at the Cracker Box Cafe; he saw the gun after the officers found it; he did not purchase or borrow or have possession of the gun; he did not find the gun in the restroom of the cafe; he did not tell the officers that he found the gun in the restroom; the "bullets" which were in his coat pocket had been there about a week—he had found them in the cafe when he was "helping clean up that night."

Richard Campbell, a witness called by defendant, testified that before he was arrested he had been helping defendant clean the Cracker Box Cafe; he (witness) did not see anyone pick up ammunition at the cafe; he had a .32 caliber "bullet" in his pocket when he was arrested; he was carrying it as a good luck charm; he and Fry were arrested, but they were released.

Section 12021 of the Penal Code provides: "Any person who * * * has been convicted of a felony under the laws of the * * * State of California * * who owns or has in his possession or under his custody or control any pistol, revolver, or other firearm capable of being concealed upon the person is guilty of a public offense, and shall be punishable by imprisonment in the state prison * * * or in a county jail * * * or by a fine * * * or by both."

[1,2] Appellant argues, with reference to his contention that the corpus delicti had not been established, that there was no evidence that "a shot was or could be discharged from the gun." He cites section 12001 of the Penal Code, which provides: "'Pistol,' 'revolver,' and 'firearms capable of being concealed upon the person' as used in this chapter apply to and include all firearms having a barrel less than 12 inches in length. This chapter does not apply to antique pistols or revolvers incapable of use as such." Appellant argues further to the effect that the prosecution did not prove that the gun was not an antique.

The P 38 automatic pistol, which was found under the automobile seat on which defendant was sitting, was received in evidence at the preliminary examination. It was stipulated at the trial that the People's case in chief might be submitted upon the transcript of the preliminary examination and that the exhibits received at the preliminary examination (including the pistol) were received in evidence at the trial, and that the parties might introduce additional evidence. Also, at the trial, the attorney for defendant asked if the gun was in court. The clerk of the court said that he (clerk) had not ordered it but he could order it, and that it would take about five minutes. The attorney for defendant replied, "All right." It will be assumed that the pistol was brought into the courtroom and was observed by the trial judge. At the preliminary examination, the deputy district attorney said that the officer had indicated that he wanted to fire a shot from the gun for comparison purposes. Then the deputy asked if the gun might be released for that purpose. The municipal judge replied that he did not have authority to release the gun to the officer for that purpose. The pistol was loaded with nine-millimeter cartridges when it was found in the automobile. The four cartridges which were on the automobile floor near defendant's feet, and the nine cartridges which were in his pockets, were the same size as the cartridges which were in the pistol. There was no evidence that the pistol was an antique, and there was no assertion at the trial (or preliminary) to the effect that the pistol came within the exception or proviso, regarding antique pistols, as stated in the last sentence of said section 12001. That sentence, as above shown, was as follows: "This chapter does not apply to antique pistols or revolvers incapable of use as such." That provision or sentence is in section 12001 of the Penal Code. The information alleges a violation of section 12021 of that code. It thus appears that the provision regarding "antique pistols" is in a section that is separate and distinct from the section designated in the information. Also, section 12001 (which refers to antique pistols) is in a separate and distinct article of the Penal Code from the article in which section 12021 is set forth.

In People v. James, 71 Cal.App. 374, 235 P. 81, the defendant was accused of possessing a revolver capable of being concealed on his person. In that case the information was premised upon section 2 (of the former Dangerous Weapons Act). It was said therein (71 Cal.App. at page 379, 235 P. at page 83): "Section 15 of the act provides as follows: 'This act shall not apply to antique pistols or revolvers incapable of use as such.' Absence from the information of an averment of the fact that the revolver did not come within the exception did not, as claimed, affect its sufficiency. It is not required to be negatived as it is a mere proviso [citation]."

In People v. Priestley, 17 Cal.App. 171, at page 174, 118 P. 965, 966, it was said: "In a proceeding based upon a penal statute, say the elementary works on pleading, the subject of an exception in the enacting or prohibitory clause of the act must in the charging paper be excluded by averment, but of any proviso or qualification in a separate substantive clause the information or indictment need take no notice."

In re Lord, 199 Cal. 773, 250 P. 714, was a habeas corpus proceeding based upon asserted insufficiency of a complaint charging a physician with unlawfully prescribing morphine. In section 8 of the act allegedly violated, it was stated that the provisions of the section shall not be construed to prevent a physician from prescribing in good faith for a user of a narcotic drug such substances as the physician may deem necessary for the treatment of such user. In section 8½ of the act, it was stated that a physician treating any user under the provisions of section 8 shall not prescribe more than four grains of morphine daily; provided, however, that a physician may prescribe for his patient who is suffering from some incurable disease any narcotic drugs mentioned in section 8 in such quantity as may be necessary. The petitioner therein (Lord) contended that the complaint, as to section 8, should negative the good faith of the physician, and, as to section 8½, the complaint should negative the provision regarding incurable disease. It was said therein, 199 Cal. at page 777, 250 P. at page 716, "The authorities in this state are without conflict 'that such exceptions and provisos were to be negatived in the pleading only where they are descriptive of the offense or define it, and that where they afford matter of excuse merely they are to be relied on in defense.'"

In People v. Pierce, 14 Cal.2d 639, at page 643, 96 P.2d 784, 785, it was said: "By a long line of authorities in California, it has been repeatedly held that it is not necessary that a complaint, information or indictment shall specifically negative the various exceptions contained in the act describing the offense."

In re Jingles, 27 Cal.2d 496, 165 P.2d 12, was a habeas corpus proceeding relative to a misdemeanor conviction of possessing a revolver in violation of the Dangerous Weapons' Control Law. The court said, 27 Cal.2d at page 499, 165 P.2d at page 14: "The complaint was clearly sufficient 'to give the accused notice of the offense of which he is accused' [citation] and it was not necessary for the complaint to negative the exceptions specified in the statute."

In the present case, the prosecution was not required to allege that the pistol was not an antique. The prosecution was not required to prove that which it need not allege. The trial judge could determine from his observation of the pistol whether it was new or old. As above stated, the pistol was loaded and the defendant was carrying cartridges that would fit the pistol. Under the evidence the judge could find that the pistol was a firearm. The contention that the corpus delicti had not been established is not sustainable.

[3] Appellant contends further that "the corpus delicti was not established as to the date of the alleged offense." It was alleged in the information that the crime was committed on or about April 5, 1958. Officer Spiller testified that he was a deputy sheriff and was so employed on or about April 5, 1958. He was then asked if he was one of the arresting officers, and he replied in the affirmative. Then he was asked when and where the arrest took place. He replied that it was at the American Legion on Santa Fe about 5:10 a. m. It is clear that the only date that was then being discussed was April 5, 1958. Also, Officer Human testified that he had a conversation with defendant on April 7th regarding the pistol. The evidence was sufficient to prove that the date of the alleged offense was on or about April 5, 1958. This contention with reference to the date of the offense is not sustainable.

[4] Appellant also contends that the court erred in receiving evidence of statements of defendant before the corpus delicti was established. "The order of proof is within the discretion of the trial judge and a defendant may not complain because proof of the corpus delicti did not precede the evidence of an admission or confession." People v. Cucco, 85 Cal.App.2d 448, 453, 193 P.2d 86, 89; People v. Stuart, 116 Cal.App.2d 820, 254 P.2d 583. This contention is not sustainable.

The evidence was sufficient to support the judgment.

[5] The notice of appeal states that the appeal is from the judgment and sentence. "Affirmance of the judgment carries with it affirmance of the sentence." People v. Perkins, 147 Cal.App.2d 793, 798, 305 P.2d 932, 935.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

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172 Cal.App.2d 588

Walter W. SCOTT, Individually and as Executor of the Estate of Walter W. Scott, Deceased, and Patricia Scott Farrington, Plaintiffs and Appellants,

v.

Faye M. SCOTT, Defendant and Respondent.

Civ. No. 5897.

District Court of Appeal, Fourth District, California.

Aug. 4, 1959.

Action by heirs of deceased against wife of deceased for specific performance of compromise agreement with respect to payment of taxes and in the alternative for damages for breach thereof. The Superior Court of San Diego County, Philip Smith, J. pro tem., entered judgment against heirs and they appealed. The District Court of Appeal, Mussell, Acting P. J., held that where under compromise agreement widow agreed to pay estate taxes and estate income taxes due to operation of hotel properties but did not pay certain federal or state income taxes with respect to such properties for a year in which decedent died, her duty to pay taxes arose when they were assessed and executor would be charged with penalties on taxes due to late filing of income tax returns.

Reversed.

1. Limitation of Actions ⚿46(3)

Where widow of decedent by compromise agreement with executor and individual heirs agreed to pay federal and state income taxes due from operation of decedent's hotel properties, duty to pay income taxes for year of decedent's death arose when they were assessed by the taxing authorities, and when such assessment was within four years of commencement of action heirs' cause of action against widow for specific performance of compromise agreement was not barred by statute of limitations.

2. Action ⚿63

To sustain defense of laches requires more than showing of mere delay since there must be a delay that is disadvantageous to defendant.

3. Internal Revenue ⚿1745
Taxation ⚿1011

Where heirs of decedent and executor of his estate entered into agreement with decedent's widow in which widow agreed to pay state and federal income taxes due to operation of decedent's hotel properties and in fact did pay federal income taxes for years subsequent to decedent's death, widow's duty to pay federal and state income taxes for year of decedent's death arose when such taxes were assessed by taxing authorities, and since duty rested upon the executor to file returns on estate income, executor would be charged with penalties due to his late filing of return and widow would be required to pay principal amount of assessment due plus any penalty or interest occasioned by her failure to pay sums after assessments were made. 26 U.S.C.A. (I.R.C.1954) § 6012(b) (1); West's Ann.Rev. & Tax.Code, § 18405.

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White & Froehlich and Charles W. Froehlich, Jr., San Diego, for appellants.

Davies & Burch and Robert B. Burch, Jr., San Diego, for respondent.

MUSSELL, Acting Presiding Justice.

This is an action for specific performance of a contract and in the alternative, for damages for breach thereof. Trial was had by the court sitting without a jury and plaintiffs appeal from the judgment for defendant denying plaintiffs' prayer both for specific performance and damages.

There is no dispute as to the following material facts. Walter W. Scott died on May 18, 1948. He was survived by a son, Walter W. Scott, Jr.; a daughter, Patricia Jean Scott (then a minor; now Patricia Scott Farrington); and Lulu Mae Scott, mother of Walter W. Scott, Jr., and Patricia Jean Scott. Also surviving was Faye M. Scott, the second wife of decedent.

Walter W. Scott, Jr., was appointed executor of his father's will on June 11, 1948. The property claimed by the executor as being in the estate consisted primarily of two hotels, the San Carlos Hotel in Monterey and the Riviera Apartments in San Diego. Faye M. Scott contended that these hotels had been held in joint tenancy and hence were not in the estate but were her sole property. Actions to resolve this dispute were initiated by the executor and by Faye M. Scott. This controversy was resolved by a "Compromise Agreement", dated July 17, 1950. It was signed by Walter W. Scott, Jr., individually and as executor; by Lulu Mae Scott, as the mother and natural guardian of Patricia Jean Scott, a minor; and by Faye M. Scott

The compromise agreement provided for the transfer of the real properties in question to Faye M. Scott in return for two notes in the total sum of $80,000 and payable over a long period of time to Walter W. Scott, Jr., individually, and Lulu Mae Scott as guardian of the estate of Patricia Jean Scott, a minor. All actions involving title to the properties have been determined; title thereto has been transferred to Faye M. Scott; and the said notes have been transferred to Walter W. Scott, Jr., and Patricia Scott Farrington, all as agreed. The two promissory notes were secured by a second trust deed on the Riviera Apartments and by chattel mortgage on the furniture and furnishings on the Riviera Apartments. Faye M. Scott further agreed to pay all Federal estate taxes which may become due by reason of the death of Walter W. Scott; all California inheritance taxes which may become due and payable by reason of the real and personal properties comprising the San Carlos Hotel in Monterey and the Riviera Apartments in San Diego, and all Federal and State income taxes which may become due or payable by reason of the operation of the Riviera Apartments in San Diego and the San Carlos Hotel in Monterey, and agreed to hold Walter W. Scott, Jr., as executor of the estate of Walter W. Scott, individually, and Patricia Jean Scott harmless from the payment of any of such taxes.

In paragraph eleven of the agreement it is provided: "Walter W. Scott, Jr., as executor of the estate of Walter W. Scott, deceased, and individually, and Lulu Mae Scott, as guardian of the estate of Patricia Jean Scott, a minor, hereby waive all accountings by and payments from Walter W. Scott in the operation of the San Carlos Hotel and Riviera Apartments."

Paragraph twelve of the agreement provides: "The parties hereto agree to execute any instruments or documents necessary to carry out the terms of this agreement and further agree to execute escrow instructions to facilitate the completion of the provisions herein contained."

Walter W. Scott, Jr., and Faye M. Scott operated on the basis of a fiscal year starting December 1 and ending on November 30. Two taxing periods are here involved—the portion of the fiscal year ending with Walter W. Scott's death from December 1, 1947 to May 18, 1948, and the balance of the year 1948 from May 19, 1948 to December 31, 1948. These periods will be described hereinafter as the 1947 and 1948 taxing periods respectively.

Walter W. Scott, Jr., as executor, filed no income tax returns until 1955. Meanwhile, in the year 1953, both the Federal and State taxing authorities made independent investigations and assessed income tax, interest and penalties as follows: Federal income tax upon income derived from the two hotel properties for the 1947 taxing period were assessed on April 25, 1953, in the sum of $935.29, which included $675, principal; $260.29, interest and penalty. Scott, as executor, paid $116.50 of this amount on the theory, not disproved by the evidence, that this is a portion of the tax attributable to income other than from the hotels.

California state income taxes upon the same income for the 1947 taxing period were assessed November 30, 1953, in the total sum of $134.29, made up of $75, principal; $37.50, penalty; and $21.79, interest. Nothing has been paid on this assessment and interest at the rate of 6% per annum accrues on the original assessment amount from the date of the assessment.

Federal income taxes upon income from the two hotel properties for the 1948 taxing period were assessed on April 25, 1953, in the sum of $13,629.04, made up of principal in the sum of $8,656.45; penalty of $2,164.11; and interest of $2,808.48. The original principal amount was paid by Faye M. Scott but the balance of penalty, interest, and interest on penalty remains to be paid (which, as of January 28, 1957, amounted to $6,087.28, with interest accruing from April 25, 1953, at 6% per annum.

State income tax upon the same income for the 1948 taxing period resulted in an assessment on November 30, 1953, of $1,808.45, made up of $1,010, principal, $505, penalty; and $293.45, interest. None of these amounts has been paid and the interest on them at 6% per annum accrues from November 30, 1953.

The trial court found that it was the intention of the parties on entering into said compromise agreement, and the agreement was interpreted to mean, that the executor would prepare and file timely tax returns covering the taxes in question and that the obligation of the defendant to pay a pro rata share of said taxes was contingent upon the filing of returns by the executor. The court further found that the obligation of the executor to file tax returns existed on July 17, 1950, the date of the filing of the compromise agreement; that he failed and neglected to file the said tax returns and that this failure was due to his neglect of duty; that by reason of his neglect and failure to file returns the Federal and California taxing authorities assessed penalties and interest. The court also found that plaintiffs had been guilty of laches and unreasonable delay in bringing the action and that so much time now elapsed that it is impossible to ascertain the pro rata share of said taxes which was to be paid by defendant and to obtain a waiver of penalties and interest. The court then found that the plaintiffs were not entitled to recover from the defendant because of the failure of the executor to file tax returns and that plaintiffs were estopped by reason of their own conduct from recovery from the defendant; that the plaintiffs were guilty of laches and unreasonable delay such as would preclude their recovery from defendant; and that plaintiffs' cause of action was barred by the statute of limitations. Plaintiffs appeal from the judgment then entered for defendant and against the plaintiffs.

[1,2] The finding that the plaintiffs' cause of action was barred by the statute of limitations is not supported by the record. The defense of the statute of limitations is based on the four-year statute. The complaint herein was filed on December 4, 1956 and the defendant's duty to pay the taxes accrued when they were assessed by the taxing authorities in 1953, well within the four-year limitation. The defense of laches requires more than mere delay. It must be a delay that is disadvantageous to the defendant and is analogous to the statute of limitations. 18 Cal.Jur.2d Equity, p. 202, secs. 36, 37. This doctrine can be invoked only when it is held the claim would be, because of the claimant's own acts, to permit an unwarranted injustice. It is usually applied where a plaintiff, with knowledge that his rights have been invaded, or his trust repudiated, has submitted to unconscionable delay, during which other rights have arisen, founded somewhat on his silence and acquiescence. Hovey v. Bradbury, 112 Cal. 620, 625, 44 P. 1077. It does not appear from the record that Faye M. Scott changed her position by reason of delay in bringing the present action nor does it appear from the record that it is impossible to ascertain the pro rata share of the taxes which should be paid by the defendant.

[3] The record shows that Faye M. Scott agreed to pay and did pay the estate taxes. She also agreed to pay the estate income taxes which were due to the operation of the hotel. She has paid the Federal income taxes for the years 1948 and subsequent thereto, but has not paid the Federal income tax for the year 1947 or the State income tax for the years 1947 and 1948. Her duty to pay these taxes arose when they were assessed in 1953. The compromise agreement supports the conclusion that the parties contemplated that the executor should file the income tax returns, since, under the laws applicable at the time the agreement was entered into, the duty rested on the executor to file tax returns on estate income. Int.Rev.Code, sec. 6012(b) (1), 26 U.S.C.A. § 6012(b) (1); Rev. & Tax.Code, sec. 18405. Therefore, plaintiff Walter W. Scott, Jr., should be charged with the penalties due to his late filing of returns. He should be required to pay all penalties and interest accruing up to the date of the assessment in 1953. Defendant should be required to pay the prin-

cipal amount of the assessment due to the income from the hotels involved, plus any penalty or interest occasioned by her failure to pay these sums after the assessment was made in 1953. The agreement involved is silent as to the duty of the executor to file returns and the filing thereof was not made a condition precedent qualifying defendant's promise to pay the principal of the tax attributable to the operation of the hotel.

Since the judgment failed to require defendant to pay any of the taxes involved, it must be and is reversed.

SHEPARD, J., concurs.

172 Cal.App.2d 235

FAMILY RECORD PLAN, INCORPORATED, a corporation, Plaintiff and Respondent,

v.

Ray M. MITCHELL, International Association of Photographers, a corporation, doing business under the firm name and style of Family Album Plan, International Association of Photographers, a corporation, Doe One, Doe Two, Doe Three Corporation, and Doe Four Company, Defendants.

Ray M. Mitchell and International Association of Photographers, a corporation, doing business as Family Album Plan, Appellants.

Civ. 23650.

District Court of Appeal, Second District, Division 1, California.

July 22, 1959.

Rehearing Denied Aug. 14, 1959.

Hearing Denied Sept. 16, 1959.

Action by "Family Record Plan, Incorporated", a corporation engaged in selling photograph albums together with coupons entitling purchasers periodically to have photographs made, against firms and individual engaged in similar business and using name "Family Album Plan", to enjoin asserted infringement of trade name and unfair competition. The Superior Court of Los Angeles County, Otto B. Willett, J., rendered preliminary injunction embodying all relief prayed and defendants appealed. The District Court of Appeal, Lillie, J., held that evidence presented on application for preliminary injunction justified finding that plaintiff's name had first made sufficient impact on substantial segment of purchasing public so that there arose required association between its name and single source and that defendants' use of name "Family Album Plan" in its advertising resulted in public confusion.

Affirmed.

1. Appeal and Error 🔑920(3)

In ascertaining whether facts warranted order granting preliminary injunction, it is incumbent upon reviewing court to view such facts most favorably to plaintiff.

2. Appeal and Error 🔑931(1)

In reviewing order involving decision of question of fact made on affidavits, all conflicts must be resolved in favor of prevailing party and all reasonable inferences which are to be drawn must be in support of order.

3. Injunction 🔑1

Injunction is extraordinary power which should always be exercised with great caution.

4. Appeal and Error 🔑1024(2)

Where there is substantial conflict in evidence regarding issue which may affect discretion of court in ordering temporary injunction, order should not be overthrown on appeal merely because there may be considerable or even preponderating evidence which, if believed, would have led to contrary conclusion.

5. Injunction 🔑23

Court, in balancing convenience and injuries, in ruling on application for injunction, must determine which party is more likely to be injured by exercise of discretion and must then exercise such discretion in favor of that party.

6. Trade-Marks and Trade-Names and Unfair Competition ⚷3(1)

Generic or descriptive words can acquire a secondary meaning. West's Ann. Bus. & Prof.Code, §§ 14400, 14402.

7. Trade-Marks and Trade-Names and Unfair Competition ⚷3(1)

"Family" is a word which may be appropriated in a trade name. West's Ann. Bus. & Prof.Code, §§ 14400, 14402.

8. Trade-Marks and Trade-Names and Unfair Competition ⚷3(1)

Whether title has acquired secondary meaning is question of fact in each case. West's Ann.Bus. & Prof.Code, §§ 14400, 14402.

9. Trade-Marks and Trade-Names and Unfair Competition ⚷3(1)

In actions for trade name infringement, length of time within which secondary meaning can attach is factual one. West's Ann.Bus. & Prof.Code, §§ 14400, 14402.

10. Trade-Marks and Trade-Names and Unfair Competition ⚷92

In trade name infringement action, basic issue was determination of whether plaintiff's or defendants' name, regardless of its adoption in point of time, first made sufficient impact on substantial segment of purchasing public that there thus arose required association between title or name and its single source. West's Ann.Bus. & Prof.Code, §§ 14400, 14402.

11. Trade-Marks and Trade-Names and Unfair Competition ⚷93(3)

In action by "Family Record Plan, Incorporated", a corporation engaged in selling photograph albums together with coupons entitling purchasers periodically to have photographs made, against firms and individual engaged in similar business and using name "Family Album Plan", to enjoin asserted infringement of trade name and unfair competition, evidence presented on application for preliminary injunction justified finding that plaintiff's name had first made sufficient impact on substantial segment of purchasing public so that there arose required association between its name and single source and that defendants' use of name "Family Album Plan" and its advertising methods resulted in confusion to public. West's Ann.Bus. & Prof.Code, §§ 14400, 14402.

12. Trade-Marks and Trade-Names and Unfair Competition ⚷93(2)

Areas reached and extent of sales are material in determination of issue of trade-name infringement. West's Ann.Bus. & Prof.Code, §§ 14400, 14402.

13. Trade-Marks and Trade-Names and Unfair Competition ⚷53, 67

Law of trade name infringement and unfair competition is not made for protection of experts but of public. West's Ann. Bus. & Prof.Code, §§ 14400, 14402.

14. Trade-Marks and Trade-Names and Unfair Competition ⚷93(3)

In action by "Family Record Plan, Incorporated", a corporation engaged in selling photograph albums together with coupons entitling purchasers periodically to have photographs made, against firms and individual engaged in similar business and using name "Family Album Plan", to enjoin asserted infringement of trade name and unfair competition, evidence presented on application for preliminary injunction to enjoin unfair competition was sufficient to sustain finding that defendants' advertising methods, including use of picture of individual defendant who had been founder of plaintiff's predecessor, in advertising brochure indicating that he was founder and past president of plaintiff, resulted in unfair competition and that such practices should be enjoined. West's Ann.Civ.Code, § 3369.

15. Trade-Marks and Trade-Names and Unfair Competition ⚷84

Under statute authorizing injunctive relief against unfair competition and defining unfair competition as unfair or fraudulent business practices, the fact that defendants' motives may have been innocent or free from fraud will not prevent injunction. West's Ann.Civ.Code, § 3369.

16. Corporations ⚿116

One who sold his stock in company was, at very least, bound by implied covenant of good faith and fair dealing not to do anything which would injure rights of others to receive benefits of agreement.

17. Trade-Marks and Trade-Names and Unfair Competition ⚿86

Acquiescence or laches, barring right to enjoin trade name infringement must be accompanied by some circumstances amounting to abandonment of rights in trade name. West's Ann.Bus. & Prof.Code, § 14400.

18. Trade-Marks and Trade-Names and Unfair Competition ⚿93(3)

In action by "Family Record Plan, Incorporated", a corporation engaged in selling photograph albums together with coupons entitling purchasers periodically to have photographs made, against firms engaged in similar business and using name "Family Album Plan", to enjoin asserted infringement of trade name and unfair competition, evidence on application for preliminary injunction against trade name infringement and unfair competition failed to show any abandonment of rights in trade name. West's Ann.Bus. & Prof.Code, §§ 14400, 14402.

19. Trade-Marks and Trade-Names and Unfair Competition ⚿86

Laches or delay may constitute a defense, on proper proof, to trade name holder's claims for accounting and damages against one using infringing mark, but mere delay and silence do not amount to consent and are no bar to injunctive relief against continuance of infringement. West's Ann.Bus. & Prof.Code, § 14400; West's Ann.Civ.Code, § 3369.

20. Appeal and Error ⚿1024(2)

In action by "Family Record Plan, Incorporated", a corporation engaged in selling photograph albums together with coupons entitling purchasers periodically to have photographs made, against firms engaged in similar business and using name "Family Album Plan", to enjoin asserted infringement of trade name and unfair competition, whether to accept defendants' allegations that plaintiff had itself been guilty of fraud or deceit was for trial court. West's Ann.Bus. & Prof.Code, § 14400; West's Ann.Civ.Code, § 3369.

21. Injunction ⚿157

Granting of preliminary injunction embodying all relief prayed is not to be condemned where proper circumstances are shown upon proper consideration of equities between parties.

22. Trade-Marks and Trade-Names and Unfair Competition ⚿95(1)

In action by "Family Record Plan, Incorporated", a corporation engaged in selling photograph albums together with coupons entitling purchasers periodically to have photographs made, against firms engaged in similar business and using name "Family Album Plan", to enjoin asserted infringement of trade name and unfair competition, record revealed no abuse of discretion in granting preliminary injunction embodying all relief prayed for against the asserted trade name infringement and unfair competition. West's Ann.Bus. & Prof.Code, § 14400; West's Ann.Civ.Code, § 3369.

◆

Alvin H. Weissman, Culver City, Richard B. Hoegh, Los Angeles, for appellants.

Harold Easton, John P. McGinley, Loeb & Loeb, Herman F. Selvin, Los Angeles, for respondent.

LILLIE, Justice.

The lower court granted to plaintiff a preliminary injunction prohibiting defendants from the continuance of certain acts claimed to constitute the infringement of a trade name (Bus. & Prof.Code, § 14400) and unfair competition (Civ.Code, § 3369). The parties are each engaged in the same business in this state and in the same general areas elsewhere, namely, selling photograph albums along with photograph certificates which, as part of a package deal, entitle the purchaser periodically to a specified number of photographs, usually of the purchaser's children, taken at studios under contract with the parties. The matter was submitted upon the amended complaint and verified answer (which likewise seeks injunctive relief), various affidavits and counteraffidavits, excerpts from depositions and numerous exhibits. Following the submission, the trial court enjoined defendants from using the name "Family Album Plan or any name confusingly or substantially similar to the name Family Record Plan," copying or imitating the advertising material used by plaintiff (particularly a certain advertising brochure described in the order), and representing to the public that defendant Mitchell was the founder and first president of plaintiff corporation.

Defendants have appealed from the order directing the issuance of the temporary injunction. They contend mainly that in advance of the trial on the merits, an insufficient showing was made to justify the implied factual determination and that the court, therefore, abused its discretion in granting the extensive relief prayed for by plaintiff. This court issued a writ of supersedeas as to certain of the foregoing prohibitions during the pendency of this appeal (January 28, 1959).

[1, 2] The factual summary which follows is necessarily governed by settled rules on appeal; thus, in ascertaining whether the facts warrant an order granting a preliminary injunction, it is incumbent upon this court to view such facts most favorably to the plaintiff (Isthmian S. S. Co. v. Nat. Marine Engineers, Beneficial Ass'n, 40 Cal. 2d 433, 435, 254 P.2d 578); and in considering an order involving the decision of a question of fact, made on affidavits, all conflicts must be resolved in favor of the prevailing party (Voeltz v. Bakery and Confectionery Workers International Union, 40 Cal.2d 382, 386, 254 P.2d 553), and all reasonable inferences which are to be drawn must be in support of the trial court's order (Hale v. Bohannon, 38 Cal.2d 458, 466, 241 P.2d 4).

In the early part of 1946, plaintiff's predecessor, then known as Photographic Artists' Association, was organized as a partnership. Later that year it incorporated, defendant Mitchell becoming its president as well as a large stockholder, but the next year, in 1947, he severed all connections with the concern. In the early months of 1948, according to the affidavit of one Kirby, who was then one of its executives, plaintiff first commenced the practice of entitling its albums "Our Family." In 1952, the business was changed back to a partnership, and in December of 1953 the partners again formed a corporation bearing the present corporate name "Family Record Plan, Incorporated." Meantime, and almost immediately following his disassociation from plaintiff's predecessor, Mitchell started a similar business as a sole proprietorship under the firm name and style of International Association of Photographers. In connection therewith he claims to have used the phrase "Our Family" in 1948 although he later admitted its earliest use was more likely in November 1949; reference was also made by him to the business use of the same phrase in 1951, but the supporting affidavit indicates that it was merely the title of an office record of some sort, namely, "Verification of Family Album Account." That year, also, the sole proprietorship was transferred to a corporation of the same name. Early in 1952, as Mitchell avers, the corporation decided upon the name "Family Treasury Album Plan" to identify its goods and services; that same year dealers were furnished with an advertising folder or brochure (to which reference will later be made) inviting the public to communicate with "Family Treasure Album" at a designated postoffice box in Hollywood, California.

In or about April of 1954, due to the tendency of employees, dealers and the public to use the shorter title, the trade name "Family Album Plan" was adopted and has been used by defendants continuously ever since. This was done with knowledge that plaintiff, in 1953, had adopted and was using the name "Family Record Plan." The names, defendants admit in their answer, may be confusingly similar. At the hearing below, however, their counsel argued that his clients had previously appropriated the phrase's key word, to wit, "Family," asserting "This is the key word and that is what causes the confusion." Plaintiff, on the other hand, contended that it was first to use the key word; also, that its corporate name, unlike defendants', had as early as 1954 acquired a secondary meaning necessarily associating its products and services in the minds of a substantial segment of the public which, in turn, has been confused and misled as a result of defendants' activities. Instances of such confusion on the part of customers and prospective customers in nine different states, including California, were testified to by various affiants.

As to the claim of unfair competition (count two), there was documentary evidence of marked similarity between the parties' distinctive advertising material. Here again, defendants maintain that they were first in the field. As previously mentioned, in 1952 they brought out the asserted forerunner of the brochure which they are now enjoined from using; it shows a prominently placed picture of a photograph album with the words "Our Family" on the cover pictures of growing children from infancy through early school years, a facsimile of a portrait certificate issued by the company, and other items not necessary to list. Mention is made by defendants of plaintiffs' 1954 brochure, said to have been received as an exhibit, which lacks the features found in defendants' 1952 publication. Be that as it may, in 1956 plaintiff commenced distribution of a new brochure which, although much larger in size, is similar in several respects to defendants' first brochure. Therein are likewise depicted a photograph album with the words "Our Family" (although in different script), a facsimile of a portrait certificate and pictures of growing children, and other items. Later in 1956, possibly by way of retaliation, defendants also brought out a new brochure. As a side-by-side comparison will show, it strikingly parallels plaintiff's brochure in design, format coloring and content. In fact, the baby picture prominently featured therein is an exact duplicate of that used by plaintiff and was secured from the same source; too, Mitchell admitted that this pamphlet was prepared after examination and discussion of plaintiff's publication with his own advertising agency. He now contends that the two brochures "taken as a whole" are not similar "though both have their origins in the early 1952 brochure."

As noted earlier, the chief attack upon the order appealed from is premised on the claim that the case is a close one on its facts and that the power to enjoin should not have been exercised under such circumstances. While there are certain subsidiary contentions, appellants argue that (1) their prior appropriation of "Family Album Plan" gave them an unqualified right to use that name; (2) respondent has not shown that its name had acquired a secondary meaning at the time appellants' name was adopted; (3) neither their name nor their advertising methods are confusingly similar with that of respondents'; and (4) comparative injuries and conveniences were not balanced and considered, it being urged in that respect that respondent has engaged in unfair and monopolistic practices.

[3–5] It is, of course, true that injunction is an extraordinary power and should always be exercised with great caution (Mallon v. City of Long Beach, 164 Cal.App.2d 178, 190, 330 P.2d 423); but it is likewise true that "(w)here there is a substantial conflict in the evidence regarding an issue which may affect the discretion of the court * * * the order made will not on appeal be overthrown merely because there may be considerable or even preponderating evidence which, if believed, would have led to a contrary conclusion" (Miller & Lux v. Madera Canal & Irrigation Co., 155 Cal. 59, 62–63, 99 P. 502, 511, 22 L.R.A.,N.S., 391). To the same effect are Daniels v. Williams, 125 Cal.App.2d 310, 313, 270 P.2d 556, and Watts v. Hollywood Boulevard Travel Service, 81 Cal.

App.2d 100, 183 P.2d 353. In the last analysis the trial court must determine which party is the more likely to be injured by the exercise of its discretion (McCoy v. Matich, 128 Cal.App.2d 50, 52, 274 P.2d 714) and it must then be exercised in favor of that party (McCoy v. Matich, supra).

[6, 7] Section 14400, Business and Professions Code, declares that "(a)ny person who has first adopted and used a trade name, whether within or beyond the limits of the State, is its original owner." Protective relief by way of injunction is made available to the owner upon proof of infringement (Bus. & Prof.Code, § 14402). Respondent submits that the parties' names represent a combination of ordinary generic words constituting a trade name, as distinguished from a technical trade mark, within the meaning of section 14400. Appellants contend, however, that each name or title is descriptive of the type of business in which the parties engaged, that their use of the identifying phrase antedated that of the respondent and furthermore, the words being merely descriptive are not subject to exclusive appropriation (Applebaum v. Senior, 154 Cal.App.2d 371, 316 P.2d 410). But, as the Applebaum decision points out, generic or descriptive words can acquire a secondary meaning, citing Academy of Motion Picture Arts and Sciences v. Benson, 15 Cal.2d 685, 688–690, 104 P.2d 650, and H. Moffat Co. v. Koftinow, 104 Cal.App.2d 560, 564, 565, 232 P.2d 15. Strikingly similar is Rosenthal v. Brasley-Krieger Shoe Co., 19 Cal. App.2d 257, 64 P.2d 1109, in which the court rejected the claim that the word "Family" was generic and therefore incapable of being appropriated for use in connection with other words as a trade name. In the case at bar respondent maintained, and the court impliedly found, that a secondary meaning had attached to its name; accordingly, if there is substantial evidence to support that finding, appellants' contention must fail.

Apparently recognizing this, appellants next contend that there was a failure of proof by respondent that its name had acquired a secondary meaning. While section 14400, supra, provides that the acquisition of a trade name is dependent upon its first use, the courts generally apply the common law rule of secondary meaning to trade names not subject to technical appropriation, and priority of adoption (as in the case of trade marks) becomes less controlling (47 Cal.Jur.2d 723 "Trademarks"). The principle is well set forth in the Restatement, Torts, section 717(f): "A designation is a trade name only if * * * it has acquired a special significance as a name of the goods, services or business of one person. Until the designation has acquired this special significance, it is not protected as a trade name. Acquisition of this special significance, rather than priority of use, is, therefore, a necessary condition of protection * * *" Stated otherwise, "Anyone may use a title if there is no secondary significance." Curtis v. 20th Century-Fox Film Corp., 140 Cal.App.2d 461, 469, 295 P.2d 62, 67.

[8–10] It is now firmly established that the question whether a title has acquired a secondary meaning is one of fact in each case (Jackson v. Universal Internat. Pictures, 36 Cal.2d 116, 121, 222 P.2d 433); likewise a factual question consists of the length of time within which such special significance can attach (Jackson v. Universal Internat. Pictures, supra, 36 Cal.2d 122–123, 222 P.2d 437; Restatement, Torts, Sec. 716(b)). In the light of the foregoing rules the basic problem appears to be a determination of which title or name, regardless of its adoption in point of time, first made a sufficient impact on a substantial segment of the purchasing public that there thus arose the required association between the title or name and its single source.

[11, 12] Upon the record before us, we are unable to say that as a matter of law respondent did not fulfill its burden of establishing the "required association" in the public mind during the period in question. Thus, there was a showing by respondent that over 700,000 families had participated in its program. In 1954, a critical year

because in May thereof appellants formally adopted their present name, respondent averaged over 1,500 sales a week, it had 700 studios under contract and employed 300 salesmen in some 48 sales districts. By 1958 the volume of individual sales had increased to 2,300 per week; it now has 900 studios under contract and its sales force has grown to 457 persons. Annual sales now total $5,000,000. Additionally, and particularly germane to the issue at hand, is evidence establishing the expenditure of $369,000 in advertising and the distribution of 300,000 brochures. The foregoing utilization of all the accepted media of communication—sales, advertising and other forms of publicity—amply supported the conclusion that a sufficient impact had been made upon the public mind, and a secondary meaning thereby acquired. Too, contrary evidence by appellants fell short of the impressive showing by respondent, both as to the areas reached and the extent of sales, which factors are material in a determination of the problem (North American Aircoach System v. North American Aviation, 9 Cir., 231 F.2d 205).

[13, 14] Also, there is the further element of the likelihood of public confusion to which secondary meaning is closely related. "Whether it (secondary meaning) exists depends on whether the public is likely to be deceived" (47 Cal.Jur.2d 746, "Trademarks"). In the case at bar there was proof that actual confusion occurred among customers and prospective customers at various locations across the nation. Indeed, it was averred by an employee of a Better Business Bureau that she had mistakenly referred to respondent a complaint about the activities of appellants' company which required an adjustment. In this regard, and *a fortiori*, "The law is not made for the protection of experts, but for the public—that vast multitude which includes the ignorant, the unthinking and the credulous who, in making purchases, do not stop to analyze, but are governed by appearance and general impressions" (Stork Restaurant, Inc. v. Sahati, 9 Cir., 166 F.2d 348, 359). Finally on this point, and as hereinbefore, appellants admit that the parties' names "may" be confusingly similar; this concession alone lends strong support to the finding now unsuccessfully challenged.

Appellants further argue, in opposition to the claim of unfair competition, that their advertising methods did not result in confusion. Section 3369 of the Civil Code in pertinent part provides that preventive relief can be granted in the case of unfair competition which "shall mean and include unfair or fraudulent business practice and unfair, untrue or misleading advertising * * *." In Wood v. Peffer, 55 Cal.App.2d 116, 123, 130 P.2d 220, 225, (quoting from Pohl v. Anderson, 13 Cal.App.2d 241, 56 P.2d 992), the court said: "No inflexible rule can be laid down as to what conduct will constitute unfair competition. Each case is, in a measure, a law unto itself. Unfair competition is a question of fact. * * * The universal test question is whether the public is likely to be deceived." See also Schwartz v. Slenderella Systems of Calif. Inc., 43 Cal.2d 107, 271 P.2d 857.

[15, 16] Much of the evidence submitted to the trial court on the issue of trade name infringement, to which we have already referred, was also relevant to the question of unfair competition. As observed in D & W Food Corporation v. Graham, 134 Cal.App.2d 668, 672, 286 P.2d 77, the two problems frequently overlap, and this is particularly true in the case at bar. Applying the test stated in Wood v. Peffer, supra, 55 Cal.App.2d 123, 130 P.2d 224, numerous instances of consumer confusion, or confusion of source, were set forth in affidavits received in support of the order sought. These affiants consisted of customers, possible customers and photograph dealers. According to their averments, they had observed many occasions in which people had purchased appellants' products and services under the belief that they were dealing with respondent. Several of the affiants themselves had been confused or misled. Reference has already been to the occurrence involving an employee of a Better Business Bureau. Further, absent any showing that appellant's trade name (as

distinguished from that of respondent) had acquired a secondary meaning, no justification existed for the use of that name in their 1956 folder or brochure, even though there may have been some understandable chagrin on appellants' part that respondent had invited such retaliatory tactics by assertedly copying the general format of their 1952 brochure. Their motives may have been innocent, that is, free from fraud; but section 3369, supra, as it now reads, protects against unfair *or* fraudulent business practices, thus rendering inapplicable earlier cases relied on by appellants. It also follows that the trial court was warranted in concluding that the use of Mr. Mitchell's picture in this same 1956 brochure was enjoinable under all the circumstances, particularly as it identified him as the "Founder and past president of the Photographic Artists Association later known as Family Record Plan." Appellants make little, if any defense, of this seeming violation of ordinary business ethics; they simply state that it was "natural" for him, in view of respondent's alleged false advertising, to include the "true" statement of his past connection with his chief competitor. However, having sold his stock in respondent's predecessor company, he was at the very least bound by the implied covenant "of good faith and fair dealing that neither party will do anything which injuries the right of the other to receive the benefits of the agreement." Brown v. Superior Court, 34 Cal.2d 559, 564, 212 P.2d 878, 881. See also Karsh v. Haiden, 120 Cal.App.2d 75, 82–83, 260 P.2d 633.

[17–19] At this juncture we dispose of the somewhat subsidiary claim by appellants that respondent should be denied extensive, or any, relief in view of its asserted acquiescence in the use of the name Family Album Plan for a period of some four years following its first adoption. But acquiescence, or laches, must be accompanied by circumstances amounting to an abandonment of rights in a trade name (87 C.J.S. Trade-Marks, etc. § 183B, p. 524), and we have already made mention of the increase in respondent's sales, its continued commercialization of its name, and other activities which serve to indicate that no abandonment occurred. Also, although the fact of laches or delay will constitute a defense, upon proper proof, of respondent's claims for an accounting and damages, mere delay and silence do not amount to consent and are no bar to injunctive relief against a continuance of the infringement (Hall v. Holstrom, 106 Cal.App. 563, 571, 289 P. 668; H. Moffat Co. v. Koftinow, supra, 104 Cal.App.2d 560, 566, 232 P.2d 15).

[20] Likewise untenable is the additional subsidiary claim that equitable relief should have been denied because the respondent itself was guilty of fraud and deceit; appellants' averments in this regard were either directly and categorically denied by rebuttal affidavits filed by respondent or must be deemed denied as affirmative matter set forth in appellants' answer (Code of Civil Procedure, Sec. 462). Too, we cannot say as a matter of law that the trial court should have accepted as true the allegations in appellants' pleading in preference to the averments of the verified complaint which on its face justified the issuance of a preliminary injunction (Porters Bar Dredging Co. v. Beaudry, 15 Cal.App. 751, 759, 115 P. 951).

[21, 22] Appellants finally contend that the trial court abused its discretion in granting the sweeping relief contained in its order. Similar claims were advanced in Elsis v. Evans, 157 Cal.App.2d 399, at page 408, 321 P.2d 514, at page 520, in which Mr. Presiding Justice White restated the recognized rule that the granting of a preliminary injunction embodying all the relief prayed for is not to be condemned "where proper circumstances are shown upon a proper consideration of the equities between the parties". Appellants, by failure to deny, admit that respondent has been and will continue to be injured by their use of a confusingly similar name. By way of contrast, the fact of injury to the appellants was and is problematical, being dependent upon a final determination that

their use of their trade name and business methods was not wrongful. As respondent well puts it, there is thus presented "the choice between two tenable conclusions" which calls for the exercise of discretion in its true sense. Squarely in point are Fresno Canal & Irrigation Co. v. People's Ditch Co., 174 Cal. 441, 450–451, 163 P. 497 and Williams v. L. A. R. Co., 150 Cal. 592, 596, 89 P. 330.

We find, upon a consideration of the entire record, that the trial court did not abuse its discretion and for the foregoing reasons the order appealed from is affirmed.

WHITE, P. J., and FOURT, J., concur.

Hearing denied; WHITE, J., not participating.

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172 Cal.App.2d 65

Julene K. VOGAN, Plaintiff and Respondent,

v.

Vorle B. McLAUGHLIN and Elsie L. McLaughlin, husband and wife, Omer R. Ford and Vina M. Ford, husband and wife, Inglewood Federal Savings and Loan Association, a Federal Savings & Loan Association, Defendants,

Vorle B. McLaughlin, Elsie L. McLaughlin, Omer R. Ford and Vina M. Ford, Defendants and Appellants.

Civ. 23136.

District Court of Appeal, Second District, Division 3, California.

July 15, 1959.

Hearing Denied Sept. 11, 1959.

Action by purchaser against vendors for rescission of agreement for purchase of motel on ground of misrepresentation as to income from and value of motel, for money had and received in the transaction, and for damages for fraud in event rescission could not be had. From adverse judgment of the Superior Court, Los Angeles County, Otto J. Emme, J., the vendors appealed. The District Court of Appeal, Parker Wood, J., held that evidence was sufficient to support finding that purchaser was induced to purchase motel by reason of false representation of vendors as to gross income from motel.

Judgment affirmed.

1. Fraud 🔑58(4)
Vendor and Purchaser 🔑44

In action by purchaser against vendors for rescission of agreement for purchase of motel on ground of misrepresentation as to income from and value of motel, for money had and received in the transaction, and for damages for fraud in event rescission could not be had, evidence was sufficient to support finding that purchaser was induced to purchase motel by reason of false representation of vendors as to gross income from motel.

2. Witnesses 🔑221

In action by purchaser against vendors for rescission of contract for purchase of motel on ground of misrepresentation as to income therefrom, for money had and received in the transaction, and for damages for fraud in event rescission could not be had, court did not err in compelling vendors to produce copies of their income tax returns for year of sale and preceding year when vendors did not object to producing copies of returns on ground that copies were privileged or on ground that copies were inadmissible by reason of statute prohibiting disclosure of information set forth in returns, nor did court err in receiving copies in evidence when neither of such objections were made by vendors. West's Ann.Rev. & Tax.Code, §§ 19282, 19283.

3. Appeal and Error 🔑232(2)

In action by purchaser against vendors for rescission of contract for purchase of motel on ground of misrepresentation as to income therefrom, for money had and received in the transaction, and for damages for fraud in event rescission could not be had, wherein vendors did not object to producing copies of their income tax returns for year of sale and prior year or introduction of such copies in evidence on ground that they were privileged or inadmissible under statute, vendors waived right to contend on appeal that copies were privileged or inadmissible by reason of statute. West's Ann.Rev. & Tax.Code, §§ 19282, 19283.

4. Evidence ⟹174(1), 271(18)
Fraud ⟹53
Vendor and Purchaser ⟹44

In action by purchaser against vendors for rescission of contract for purchase of motel on ground of misrepresentation as to income therefrom, for money had and received in transaction, and for damages for fraud in event rescission could not be had, copy of income tax returns filed by vendors for year of sale and preceding year were material as to income from motel and were not self-serving declarations as to purchaser and were not secondary evidence of books and records.

◆

A. P. G. Steffes, Los Angeles, for appellants.

Dolley, Jessen & Painter, and Louis Miller, Los Angeles, for respondent.

PARKER WOOD, Justice.

Plaintiff's first cause of action was for rescission of an agreement for the purchase of the Brentwood Motel. (The alleged ground of rescission was misrepresentation as to the income from, and the value of, the motel.) The second cause of action was for money had and received in the motel transaction. The third cause of action was for damages for fraud in that transaction, in the event rescission could not be had.

In a nonjury trial, judgment was for plaintiff for $18,000 damages, on the third cause of action, against the defendants Mr. and Mrs. McLaughlin and Mr. and Mrs. Ford, who were the sellers of the motel. (Another defendant was the Inglewood Savings and Loan Association which held for collection, on behalf of the sellers, a purchase money note that was made by the plaintiff. The judgment provided that the amount of the judgment should be credited on the note.)

The said sellers (defendants McLaughlin and defendants Ford) will be referred to herein as the defendants. They appeal from the judgment.

Appellants (defendants) contend that the evidence does not support the finding that plaintiff was induced to purchase the motel by reason of false representations as to the gross income from the motel for 1953 and 1954. They also contend that the court erred in compelling defendants to produce copies of their income tax returns; and erred in receiving the copies in evidence.

[1] In October, 1954, plaintiff Mrs. Vogan purchased the motel and furniture therein from defendants for $118,000, and she paid therefor $35,000 in cash, and executed a note for $18,139.33, payable to defendants and secured by a trust deed on the real property. The remainder of the purchase price was the amount of encumbrances which were then upon the motel property, which encumbrances plaintiff agreed to pay.

This action was commenced on October 3, 1955.

The court found that plaintiff was induced to purchase the motel by reason of false representations made by defendants and their agent Mr. Findeisen, as follows: that the gross income from the motel for the year 1953 was $24,806; the gross income for the first eight months of 1954 was $16,876.50; the gross income from September 1, 1953, to September 1, 1954, had averaged in excess of $2,000 a month; the real and personal property were worth $125,000. The court also found that the gross income for the year 1953 was not in excess of $20,918.15; the gross income for the first nine months of 1954 was not in excess of $14,289.61; the gross income from September 1, 1953, to September 1, 1954, had not averaged in excess of $1,500 a month; the value of the real and personal property was $100,000; plaintiff had paid $118,000 for the property; plaintiff was damaged in the amount of $18,000 (the difference between the amount plaintiff paid and the value of the property) by reason of the fraud of defendants.

Defendants had acquired the Brentwood Motel in October, 1948. Thereafter, and until the sale to plaintiff, defendants Mr. and Mrs. McLaughlin operated the motel and kept the records of the income.

In July, 1954, the plaintiff, in response to an advertisement, went to the office of Mr. Findeisen, a real estate broker, and talked to him regarding the purchase of a motel. Mr. Findeisen showed the Brentwood Motel to her and said that the gross annual income therefrom was between $24,000 and $25,000, and that the purchase price was $135,000. Plaintiff told him that the income was "O.K.", but the price was too high. Prior to September, 1954, Mr. McLaughlin had discussed the sale of the motel with Mr. Findeisen, and on September 23, 1954, Mr McLaughlin listed the motel for sale with him. The gross annual receipts from the motel for 1953, as stated in that listing, were $24,887, and the selling price was $125,000. (The record does not show whether defendants had previously listed the property for sale with Mr. Findeisen.) In September, 1954, in response to plaintiff's inquiry by telephone, Mr. Findeisen said that he still had the Brentwood Motel for sale. Plaintiff went to his office and said that she was still interested in the motel, but the price was too high. Mr. Findeisen replied that he thought he could get a better price for her. Then he and plaintiff went to the motel and inspected it. After they returned to his office and he had made a telephone call, he told plaintiff that he thought "he could get the place for $120,000," and that the income was "close" to $25,000 a year. On September 28, 1954, plaintiff told Mr. Findeisen that she wanted to see a "breakdown" of the costs of operation and to see "some proof of the income." A "breakdown" of the costs of operation, which he gave to her, showed a total cost of $1,350 a month. He said that he could not show the books until she had made a deposit. He also said that the value of the motel, based on five times the gross annual income, was about $120,000. She submitted an offer of $115,000 for the motel, and she gave him a check for $5,000 as a deposit. He and plaintiff signed a deposit receipt which recited, among other things, that the offer was $115,000 and was "subject to proof of 1953 gross receipts as submitted." He told her that he would have to "contact" Mr. and Mrs. McLaughlin. After making a telephone call, Mr. Findeisen told her that the McLaughlins said they would have to talk to Mr. and Mrs. Ford. On October 1, 1954, he told her that the McLaughlins thought that they should have $120,000 for the motel. Plaintiff increased her offer to $118,000, and wrote the offer on the back of the deposit receipt which she and Mr. Findeisen had signed on September 28. On October 2, Mr. McLaughlin, upon behalf of the sellers, accepted the offer of $118,000. Later on the same day, plaintiff and Mr. Findeisen went to the motel and examined the books, which were produced by Mr. McLaughlin. Plaintiff testified that Mr. Findeisen "called off" the monthly income figures from the books and she wrote the figures on slips of paper; then she "called off" the figures from the books and Mr. Findeisen wrote the figures on slips of paper. The slips of paper which were written by plaintiff were received in evidence as plaintiff's Exhibits 5 and 6. The income, as shown by those exhibits, was $24,806 for 1953, and was $16,876.50 for the first eight months of 1954. On October 4, an escrow was opened, and immediately thereafter plaintiff and Mr. Findeisen went to the motel and again inspected the books. They checked the income figures and inspected registration cards. When they had inspected the cards for the letters "A" and "B" they stopped checking the cards. Plaintiff testified that, "Well, we got through the A's and B's, I believe, and we just stopped because I said I was perfectly satisfied that the income was there because I took it from the books twice."

The escrow was closed on October 14, 1954, and plaintiff operated the motel from that date to and including the time of trial (June, 1957). The average gross monthly income from the motel during that period was, as follows: for the last two and one-half months of 1954, $1,394; for 1955, $1,588; for 1956, $1,555.75; for the first five months of 1957, $1,395.88.

On September 30, 1955, plaintiff gave defendants a notice of rescission of the transaction.

Copies of defendants' income tax returns for 1953 and 1954 were introduced in evidence by plaintiff. The returns had been filed by defendants in the tax offices before this action was commenced. Those copies stated that the gross income from the motel for 1953 was $20,918.15, and for 1954 was $14,289.51. Copies of defendants' amended returns for 1953 and 1954 were introduced in evidence by defendants. The amended returns were filed by defendants in the tax offices after this action had been commenced. Those copies stated that the gross income from the motel for 1953 was $25,050.65, and for 1954 was $19,648.19. Three books of defendants which pertain to the income from the motel were introduced in evidence by plaintiff. One book was for the period from January 1, to June 8, 1953; another one was for the period from June 9 to December 25, 1953; the other one was for the period from July 14, 1954, to October 14, 1954. (It thus appears that the periods of time covered by those three books did not include the period from December 25, 1953, to July 14, 1954. According to the testimony of Mr. and Mrs. McLaughlin the book covering that period had been lost.) Plaintiff testified that the three books, which she introduced in evidence, had been shown to her by Mr. McLaughlin, and that another book had been shown to her which was for the period between December 25, 1953, and July 14, 1954. (This was the period covered by the book that allegedly had been lost.) The monthly income, as shown by the three books which plaintiff introduced in evidence, was the same as the monthly income shown by the slips of paper (for those same periods) which plaintiff prepared at the time she and Mr. Findeisen examined the books. Another book which pertains to the income (and disbursements) was introduced in evidence by defendants. The income, as shown by that book, was $25,050.65 for 1953, and $19,648.19 for nine and one-half months in 1954. Mrs. McLaughlin, testified that on October 4, 1954 (the day the escrow was opened), plaintiff "looked through" that book.

Plaintiff introduced evidence that on May 13, 1954, Mr. McLaughlin listed the motel for sale with a real estate broker (not Mr. Findeisen), and that the receipts from the motel for 1953, as stated in that listing, were $25,000, and the selling price was $130,000. Plaintiff also introduced evidence that on July 26, 1954, Mr. McLaughlin listed the motel for sale with another broker (not Mr. Findeisen), and that the receipts from the motel for the 12 months preceding July 26, 1954, as stated in the listing, were $24,899, and the selling price was $130,000.

Plaintiff testified as to the manner in which she operated the motel after she purchased it. Her testimony was to the effect that she operated it efficiently.

In support of their contention that the evidence does not support said finding that plaintiff was induced to purchase the motel by reason of false representations, appellants (defendants) argue that the evidence shows that plaintiff relied solely on defendants' gross income records in determining the income from the motel; that since no direct attack was made by plaintiff upon any single item in those records, the records constitute positive evidence that the income was as shown by those records; there was no evidence that the income was not as set forth in those records, except the original income tax returns; the statements of income in those returns were "mere conclusions" of defendants, and such conclusions could not be considered as substantial evidence contrary to the income records; in order to draw an inference of fraud from the original income tax returns, it would have been necessary to find that defendants had correctly stated their gross income in those returns; all of the evidence, with the exception of the "bare statements" of gross income in the original returns, was to the contrary. The question as to the amount of income from the motel was one of fact for the determination of the trial judge. There was evidence that after plaintiff took possession of the motel she operated it efficiently, and that the gross income therefrom was considerably less than the gross income as shown by defendants' books. Also, the original income tax returns showed that the gross income was considerably less than the gross income as shown by the books which were exhibited to plaintiff. Under the evidence the trial judge might well have concluded that defendants' books and records, which were exhibited to plaintiff, did not set forth correctly the income from the motel, and that the income as shown in the original income tax returns was the income received from the motel. The evidence was sufficient to support the finding to the effect that plaintiff was induced to purchase the motel by reason of false representations of defendants.

[2] Appellants contend that the court erred in compelling them to produce copies of their income tax returns for 1953 and 1954; and erred in receiving the copies in evidence. During the taking of the depositions of defendants Mr. McLaughlin and Mrs. Ford, each of said defendants was requested by plaintiff's attorney to produce copies of his or her income tax returns for 1953 and 1954. Defendants' attorney objected on the ground that the copies of the returns were immaterial as to any issues involved in the action. Each of said defendants refused to produce the returns Thereafter, plaintiff obtained orders of court requiring each defendant (whose deposition was being taken) to show cause why he or she should not "answer the questions." At the hearing of the orders to show cause, said defendants were ordered "to answer." Thereafter, the taking of the deposition of Mr. McLaughlin was resumed. At that time, he produced copies of the income tax returns of the defendants McLaughlin for 1953 and 1954, and he also produced copies of the returns of the Brentwood Hotel, a partnership, for those years. At that time plaintiff's attorney asked Mr. McLaughlin whether the returns had been amended. On advice of counsel, he refused to answer that question. Thereafter, the taking of the deposition of Mr. McLaughlin was resumed, and he testified that the returns he had previously produced were amended returns. Plaintiff's attorney then requested Mr. McLaughlin to apply to the federal and state governments for copies of the original returns. Thereafter, defendants' attorney delivered to plaintiff's attorney copies of the original federal and state income tax returns of defendants and of the Brentwood Hotel, a partnership, for 1953 and 1954. At the trial, when plaintiff's attorney offered the copies of the returns in evidence, defendants objected to the offer on the following grounds: that copies of the returns were "immaterial as far as any issues in this case are concerned"; the copies were "self-serving declarations on the part of defendants"; and the copies were "secondary evidence" and that "the books and records would be the primary evidence." The objections were overruled and the copies were received in evidence. Appellants argue that the copies of the income tax returns were privileged and that the privilege was based on public policy and could not be waived.

[3, 4] In Webb v. Standard Oil Co., 49 Cal.2d 509, 319 P.2d 621, plaintiffs sought to recover damages which were sustained when their house was destroyed by a fire that allegedly was caused by the negligence of defendants. In that action the trial court refused to order plaintiffs to produce copies of their state and federal income tax returns for the year of the fire. In affirming a judgment for plaintiffs, it was said, 49 Cal.2d at page 513, 319 P.2d at page 624: "The purpose of the amended statutory provisions [sections 19282 and 19283 of the Revenue and Taxation Code] prohibiting disclosure [of information set

forth in the returns] is to facilitate tax enforcement by encouraging a taxpayer to make full and truthful declarations in his return, without fear that his statements will be revealed or used against him for other purposes. If the information can be secured by forcing the taxpayer to produce a copy of his return, the primary legislative purpose of the secrecy provisions will be defeated. The effect of the statutory prohibition is to render the returns privileged, and the privilege should not be nullified by permitting third parties to obtain the information by adopting the indirect procedure of demanding copies of the tax returns." In that case it was also said, 49 Cal.2d at page 512, 319 P.2d at page 623: "We shall assume, for purposes of discussion, that such returns were admissible if not privileged." In Atherley v. MacDonald, Young & Nelson, 142 Cal. App.2d 575, at page 585, 298 P.2d 700, 706, it was said: "A general objection does not raise specific grounds not urged [citation], and an objection specifying the wrong ground is as bad as a general objection, and amounts to a waiver of all grounds not urged. [Citations.]" In the present case, as above stated, defendants did not object to producing the copies of the returns on the ground that the copies were privileged or on the ground that the copies were inadmissible by reason of the provisions of sections 19282 and 19283 of the Revenue and Taxation Code; nor did they object to the offer of the copies in evidence on either of said grounds. Since the questions as to whether the income tax returns were privileged or were inadmissible, by reason of said code sections, were not raised at the trial, those questions will not be determined on appeal. By not making such an objection in the trial court, defendants waived the right to contend on appeal that the copies were privileged or inadmissible by reason of the said code provisions. The copies of the returns were material, as prior statements made by defendants under oath, as to the income from the motel. It is to be noted that defendants introduced copies of their amended tax returns in evidence. The copies, which were introduced in evidence by plaintiff, were not self-serving declarations as to her. The copies were not secondary evidence of the books and records. The court did not err in receiving the copies of the returns in evidence.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

Anne R. HECKLEY, Petitioner and Appellant,

v.

BOARD OF EDUCATION OF the OAKLAND UNIFIED SCHOOL DISTRICT, County of Alameda, State of California; Richard L. Grodin, John J. King, Marjorie Hirschler, Peter C. Jurs, Carl B. Munck, Cora A. Riser, and Kenneth L. Thompson, as members of said Board; Oakland Unified School District, County of Alameda, State of California; and Selmer H. Berg, as Secretary of said Board and as Superintendent of Schools of said School District, Respondents.*

Civ. 18553.

District Court of Appeal, First District, Division 2, California.

July 17, 1959.

Hearing Denied Sept. 11, 1959.

Proceeding on petition by schoolteacher for a writ of mandate directing a Board of Education and certain of its officials to pay her certain additional salary. The Superior Court, Alameda County, Charles Wade Snook, J., held that section of constitution setting a rate of annual salary for a person serving full time leaves the definition of the term "full time" to the Legislature, and in view of fact the legislature defined "full time" to mean not less than a minimum school day, and fixed the minimum school day for kindergarten pupils at 180 minutes, a teacher who in accordance with her contract with the Board, taught a full morning session of kindergarten, qualified as a full time teacher, and was entitled to pay on such basis, notwithstanding fact that other teachers in order to qualify for such pay were required by their contracts to teach both morning and afternoon sessions.

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* Opinion vacated 1 Cal.Rptr. 4, 347 P.2d 4.

Judgment reversed with directions.

1. Schools and School Districts ⚷19(1)

Under the education code, a teacher who has taught a kindergarten class for 180 minutes in one day qualifies her district for state financial aid for one full school day. West's Ann.Education Code, § 6814.

2. Schools and School Districts ⚷144(4)

In view of fact section of constitution setting a rate of annual salary for a person serving full time leaves the definition of the term "full time" to the legislature, and the legislature defined "full time" to mean not less that minimum school day and fixed the minimum school day for kindergarten pupils at 180 minutes, a teacher who in accordance with her contract with the Board taught a full morning session of kindergarten qualified as a full time teacher, and was entitled to pay on such basis, notwithstanding fact that other teachers in order to qualify for such pay were required by their contracts to teach both morning and afternoon sessions. West's Ann.Const. art. 9, § 6; West's Ann.Education Code, §§ 6802, 6813, 13842.

3. Schools and School Districts ⚷162

Section of the education code defining a minimum school day for pupils of kindergarten does not set the minimum school day for pupils rather than teachers, but, by providing for a 180 minute day for a one class kindergarten and only 130 minutes for each class where there are two classes taught by the same teacher, provides for the teacher's benefit, rather than the benefit of the pupils. West's Ann.Education Code, § 6813.

Arthur Lyle Robson, Wegner & Robson, Lafayette, for appellant.

J. F. Coakley, Dist. Atty., R. Robert Hunter, Chief Asst. Dist. Atty., Richard H. Klippert, Dep. Dist. Atty., County of Alameda, Oakland, for respondents.

O'DONNELL, Justice pro tem.

In January 1955 appellant, a fully accredited school teacher, applied to respondent school district for a position as teacher in one of the Oakland elementary schools for the spring semester of the 1954–1955 school year. She was offered assignments to several different schools in the district which involved teaching a full day, that is, both morning and afternoon sessions. She stated that she preferred a position where she would have a morning session only. Appellant was thereupon employed by the district and assigned to teach the morning kindergarten class at the Willow Manor School. Her session began at 9:00 o'clock A.M. and finished at 12:00 o'clock noon. The fact that appellant fully performed the duties assigned her is not questioned by respondents.

Appellant was paid $934.26—that sum being one-half of one-half of the district's regular annual salary schedule—on the basis that she taught only one-half a school day (morning session) for one-half a school year (spring semester). Appellant claimed that her morning session constituted a full day's teaching under the statutes hereinafter to be discussed and that she was entitled to be paid one-half (spring semester) the minimum annual salary of $3,400 fixed by section 13842 of the Education Code. Appellant petitioned the lower court for a writ of mandate directing respondents to pay appellant the sum of $765.74, that being the difference between the amount actually paid her and one-half the statutory minimum of $3,400. Appellant was denied a writ and this appeal followed.

The first paragraph of section 6 of Art. IX of the California Constitution reads: "Each person, other than a substitute employee, employed by a school district as a teacher or in any other position requiring certification qualifications shall be paid a salary which shall be at the rate of an annual salary of not less than twenty-four hundred dollars ($2,400) for a person serving full time, as defined by law."

At the times here involved section 13842 of the Education Code read: "The governing board of each school district shall pay to each person employed in a day school of the district for full time in a position requiring certification qualifications and serving under other than an emergency or provisional credential an annual salary of not less than three thousand four hundred dollars ($3,400).

"The governing board of each school district shall pay to each person employed for less than full time in a position requiring certification qualifications and serving under other than an emergency or provisional credential an annual salary of not less than an amount which bears the same ratio to three thousand four hundred dollars ($3,400) as the time required of the person bears to the time required of a person employed full time.

" 'Full time' means not less than the minimum school day for each day the schools of the district are maintained during the school year.

"The provisions of this section shall not be construed as applying to substitute employees of a school district."

Section 6813 of the Education Code reads: "The minimum school day for pupils of kindergartens is 180 minutes, inclusive of recesses except that if a school district maintains two kindergarten classes on the same day which are taught by the same teacher, the minimum school day for each of such classes shall be 130 minutes inclusive of recesses."

Appellant's contention is basically this: The Constitutional provision leaves the definition of the term "full time" to the Legislature; the Legislature has, in section 13842 defined "full time" to mean not less than the minimum school day, and in section 6813 fixed the minimum school day for kindergarten pupils at 180 minutes; therefore appellant, by teaching kindergarten 180 minutes per day, qualifies as a full time teacher.

Respondents on the other hand call attention to section 6802 of the Education Code reading: "The governing board of each school district shall, subject to the provisions of this chapter, fix the length of the school day for the several grades and classes of the schools maintained by the district." He then directs our attention to the fact that the governing board of respondent district had established a full school day for teachers within the district as extending from 8:45 a. m. to 3:30 p. m and for half time teachers as extending from 8:45 a. m. to 12:00 noon.

We have concluded that appellant's contention is correct.

As we have seen, section 13842 provides that " 'Full time' means not less than the minimum school day * * *" To put it the other way, this provision states that a minimum school day constitutes full time employment. The section, paraphrased, therefore provides that every certificated employee who is employed for a minimum school day is a full time employee and as such is entitled to a minimum annual salary of $3,400.*

Respondents state, as we have above noted, that the governing board of respondent district has fixed the length of the school day within the district at 8:45 a. m. to 3:30 p. m. They then contend that a teacher within the district must put in the full school day in order to qualify as a full time teacher. That contention is out of harmony with section 13842. That section provides, as we have already seen, that whoever works not less than the minimum school day is a full time employee. And we have also seen that a minimum school day for kindergarten is 180 minutes.

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* It is not disputed that the $3,400 minimum salary provision of section 13842, rather than the $2,400 minimum salary provision of the Constitution, prevailed.

[1, 2] Respondents' contention overlooks the following basic factors. The state furnishes financial aid to the various school districts throughout the state. The amount of such aid is dependent in large part upon the average daily attendance of pupils within the district. (Education Code, Div. 3, Ch. 15.) Section 6814 of the Education Code provides that "A day of attendance in a kindergarten is 180 minutes of attendance." Therefore, a teacher who has taught a kindergarten class for 180 minutes in one day has qualified her district for state financial aid for one full school day. The state has also seen fit to establish a policy that no teacher who teaches a minimum school day shall be paid less than $3,400 annually. Respondents would, if their contention were to be sustained, find themselves in the inconsistent position of classifying appellant as a full time teacher for the purpose of receiving state aid, and classifying her as a part time teacher for the purpose of fixing her salary.

It is true, of course, that appellant, whether wittingly or unwittingly, negotiated a contract with respondent district that is much more favorable than the contracts of those who are required to teach both morning and afternoon sessions. However, that is no reason for denying her her statutory right to a full minimum salary. Moreover, within the bounds of reasonableness appellant's superiors could have assigned other professional duties to her over and above her kindergarten class. McGrath v. Burkhard, 131 Cal.App.2d 367, 280 P.2d 864; 26 Op.Atty.Gen. 27. Further, respondent district could have refused to contract for appellant's services at all, except on the basis that she would teach both morning and afternoon sessions.

[3] Respondents' contention that section 6813, quoted above, sets the minimum school day for pupils rather than for teachers is without merit. In fact, the section strongly suggests the converse to be true, for it provides for an 180 minute day for a one class kindergarten and only 130 minutes for each class where there are two classes taught by the same teacher. The shorter session, where there are two classes served by one teacher is clearly for the teacher's benefit, and not the pupils'.

The judgment is reversed with directions to the lower court to issue its peremptory writ of mandate directing respondent Board of Education of the Oakland Unified School District and respondent members of said board, to issue, or cause to be issued, the warrant of said district, payable to appellant, in the sum of $765.74.

DOOLING, Acting P. J., and DRAPER, J., concur.

172 Cal.App.2d 22

MARSHALLAN MANUFACTURING COMPANY OF CALIFORNIA, INC.,
Appellant,
v.
Hans BRACK, doing business as Brack Manufacturing Company,
Respondent.
Civ. 23941.

District Court of Appeal, Second District,
Division 1, California.
July 14, 1959.

Proceeding on respondent's motion to dismiss appeal. The District Court of Appeal, Fourt, J., held that where appellant requested preparation of reporter's transcript of testimony of only some of the witnesses and not of all of the witnesses, and appellant did not state the points to be raised by him on the appeal as required by the rule on appeal, appellant would be permitted to amend so as to designate the points to be raised on appeal, and after such designation respondent would be permitted to have before the District Court of Appeal any or all of the portions of the oral proceedings not designated in the appellant's notices as provided for in the rule.

Motion denied on condition that appellant comply with the rule on appeal.

1. Appeal and Error 🔑654

Where appellant requested preparation of reporter's transcript of testimony of only some of the witnesses and not of all of the witnesses, and appellant did not state the points to be raised by him on the appeal as required by the rule on appeal, appellant would be permitted to amend so as to designate the points to be raised on appeal, and after such designation respondent would be permitted to have before the District Court of Appeal any or all of the portions of the oral proceedings not designated in the appellant's notices as provided for in the rule. West's Ann.Rules on Appeal, rule 4(b).

2. Appeal and Error 🔑1

Rules on appeal are essentially to expedite and make for orderly conduct of the work of appellate courts, and such rules should be observed; however, the policy of the law is to favor hearings on appeal upon their merits when such can be done without violence to the rules. West's Ann. Rules on Appeal, rule 4(b).

Hill & Attias, Beverly Hills, for appellant.

William K. Gumpert, Los Angeles, for respondent.

FOURT, Justice.

[1] Respondent made a motion to dismiss the appeal in this cause. The motion was made upon the ground that appellant did not comply with Rule 4(b) of the Rules on Appeal.

Respondent asserts and the record indicates that he is correct, that appellant requested the preparation of the Reporter's Transcript of the testimony of only some of the witnesses and not of all of the witnesses, and that appellant did not state "the points to be raised by him on the appeal."

Rule 4(b) of Rules on Appeal provides insofar as we are here concerned, as follows:

"* * * If the appellant, in his notice to the clerk, states the points to be raised by him on the appeal, he may designate the portions of the oral proceedings to be transcribed, or direct the omission of any portions which he deems unnecessary, and in such event shall be precluded from presenting any grounds for reversal not embraced within the points stated by him, unless the reviewing court on motion shall permit the appellant to present additional errors or grounds of appeal on such terms as it may prescribe."

Appellant's counsel admits his failure to state the points to be raised on the appeal and with frankness assumes the entire blame for such omission without reference to any secretarial deficiencies, weighty matters in his office, or a heavy trial schedule. He asks leave to amend so as to designate the points to be raised on the appeal.

[2] Rules on Appeal are essentially to expedite and make for orderly conduct of the work of Appellate Courts and such rules should be observed, however, it is also true that the policy of our law is to favor hearings on appeal upon their merits when such can be done without violence to the rules. Lundy v. Lakin, 89 Cal.App.2d 849, 852, 202 P.2d 369; Jarkieh v. Badagliacco, 68 Cal.App.2d 426, 431, 156 P.2d 969.

We are of the opinion that no substantial harm can come from permitting the appellant to amend as heretofore indicated. The respondent, of course, should be permitted to have before this Court any or all of the portions of the oral proceedings not designated in the appellant's notices as provided for in Rule 4(b) and he can make that determination after the appellant makes its declaration of "the points to be raised on the appeal."

It is therefore ordered that if appellant, within ten days from and after the filing of this opinion, shall comply with Rule 4(b), Rules on Appeal, then and in that event, the motion to dismiss the appeal will be denied. Otherwise, the motion to dismiss the appeal will be granted without further hearing.

WHITE, P. J., and LILLIE, J., concur.

SUBSEQUENT INJURIES FUND OF the State of CALIFORNIA, Petitioner,

v.

INDUSTRIAL ACCIDENT COMMISSION of the State OF CALIFORNIA, Raymond Baldes and Bethlehem Pacific Coast Steel Corporation, a corporation, Respondents.*

Civ. 23547.

District Court of Appeal, Second District, Division 1, California.

July 16, 1959.

Rehearing Denied Aug. 14, 1959.

Hearing Granted Sept. 14, 1959.

Proceeding on petition by State Subsequent Injuries Fund to annul award of Industrial Accident Commission to employee of steel company from the Fund for disability beyond disability caused by industrial injury to eye. The District Court of Appeal, Nourse, J. pro tem., held that where employee was not permanently partially disabled or suffering from any labor disabling condition because of mental disease prior to sustaining industrial eye injury, but most that could be said was that injury to eye precipitated psychotic break which resulted in disability beyond that caused by eye injury, employee was not entitled to award from the Fund for disability beyond that caused by eye injury.

Award annulled.

1. Workmen's Compensation ⚷1030

In proceeding upon application of employee for hearing against State Subsequent Injuries Fund wherein employee alleged that, prior to industrial eye injury, he had been permanently and partially disabled with mental disease, and that combined disability resulting from existing nonindustrial mental disease and eye injury exceeded 70 per cent of total disability, evidence did not sustain finding of industrial accident commission that employee had had permanent disability or had suffered from labor disabling condition prior to eye injury. West's Ann.Labor Code, § 4751.

2. Workmen's Compensation ⚷1030

Where employee was not permanently partially disabled or suffering from any labor disabling condition because of mental disease prior to sustaining industrial eye injury, but most that could be said was that injury to eye precipitated psychotic break which resulted in disability beyond that caused by injury to eye, employee was not entitled to award from State Subsequent Injuries Fund for disability beyond that caused by eye injury. West's Ann.Labor Code, § 4751.

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Stanley Mosk, Atty. Gen., Gerald F. Carreras, B. Franklin Walker, and Richard A. Gadbois, Jr., Deputy Attys. Gen., for petitioner.

Everett A. Corten, San Francisco, and Edward A. Sarkisian, Los Angeles, for respondent Industrial Accident Commission.

NOURSE, Justice pro tem.

Subsequent Injuries Fund of the State of California (hereinafter called the "Fund"), by its petition here seeks to annul an award to the respondent Baldes against it.

On November 6, 1953, while in the employ of the respondent Bethlehem Pacific Coast Steel Corporation (hereinafter called "Bethlehem"), petitioner sustained an injury which resulted in the loss of the sight of his right eye. After hospitalization for this injury he returned to work and then developed a nervous condition which was diagnosed as schizophrenic psychosis. On December 28, 1954, pursuant to the provisions of section 4751 of the Labor Code, Baldes filed an application for hearing against the Fund, alleging that prior to the industrial injury to his eye he was permanently and partially disabled with a mental disease which he described as follows: "Psychotic depressive reaction manifested by depression, psychomotor retardation, anxiety, worry, transient hallucinations, and delusions, feelings of helplessness, and inability to cope with difficulties, in partial remission." He further alleged that the combined disability resulting from the existing nonindustrial condition and the industrial disability due to the injury to his eye was in excess of 70 per cent of total disability. The commission found that Baldes had suffered from a prior permanent disability and that the total disability resulting from his industrial injury and the prior nonindustrial disability amounted to 79 per cent of total disability. There was no evidence offered before the commission as to whether Bethlehem had knowledge of the prior nonindustrial disability and the commission made no findings upon that issue.

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* Opinion vacated 1 Cal.Rptr. 833, 348 P.2d 193.

On a writ of certiorari issued on the Fund's petition, this court annulled the award against the Fund upon the ground that the Fund could only be held liable in cases where the "preexisting injury was known or would have been known to the employer" and the cause was "remanded to the respondent commission for further proceedings not inconsistent with the views expressed herein." State of California, etc. v. Industrial Acc. Comm., 150 Cal.App.2d 716, 311 P.2d 26. The decision of this court was based upon three prior decisions rendered in the appellate courts of the state, to-wit: State Subsequent Injuries Fund v. Industrial Acc. Comm., 135 Cal.App.2d 544, 288 P.2d 31; Urquiza v. Industrial Acc. Comm., 144 Cal.App.2d 322, 300 P.2d 871 and State v. Industrial Acc. Comm., 147 Cal.App.2d 818, 306 P.2d 64.

Upon the remittitur from this court being filed with the commission, it gave notice of intent to issue its decision that the applicant take nothing from the Fund unless good cause could be shown to it within 7 days why such a decision should not be made. No further evidence having been offered the commission entered its decision denying applicant any recovery from the Fund.

On June 6, 1958, the Supreme Court of this state rendered its decision in the case of Ferguson v. Industrial Acc. Comm., by which it ruled that knowledge by the employer of a preexisting permanent disability of the employee was not required as a condition to an award against the Fund. 50 Cal.2d 469, 326 P.2d 145, 148.

On June 27, 1958, applicant petitioned the commission to reopen the matter of his application against the Fund upon the ground that the decision denying petitioner an award against the Fund was made under a mistake of law. His petition was granted and an award was made to applicant against the Fund in the sum of $3,960 payable at the rate of $30 per week beginning June 5, 1957, and continuing until the whole of the award had been paid and thereafter the sum of $8.77 per week for the balance of his life; this award being based upon findings that the applicant had a previous permanent disability and that that disability together with the industrial injury to his eye had resulted in a permanent disability equal to 79 per cent of total and that the previous permanent disability was equal to 33 per cent of total disability.

The Fund petitioned the commission for reconsideration. Its petition was denied. In its petition for reconsideration and in its petition here the Fund asserts that the findings of the commission that "applicant had a previous permanent partial disability" is unsupported by the evidence.

In Ferguson the Supreme Court held that in order for an employee to qualify for resort to the Subsequent Injuries Fund he must show that prior to the occurrence of an industrial injury he had attained the *factual status* of the *permanently partially disabled* and that such previous disability was *in fact labor disabling.* In so holding the court said in part:

"The fund, in support of its argument favoring an employer-knowledge rule, refers to the fact that as pointed out in the Strauss case [State Subsequent Injuries Fund v. Industrial Acc. Comm.] (135 Cal. App.2d 544, 553, 288 P.2d 31), in the 'Subsequent Injuries Fund Report of the Subcommittee of Assembly Interim Committee on Finance and Insurance' (vol. 15, No. 7, 1953–1955, Assembly Interim Committee Reports), attention is called to the wide variety of pathologies (most of them asymptomatic, i. e., unmanifested) which have been urged as a basis for commission awards against the Subsequent Injuries Fund: 'heart disease; arthritic processes; nervous tremors; Parkinson's disease; tuberculosis; syphilis; varicosities; diabetes; hysteria, and other forms of mental derangement; harelip; speech impediments; weak abdominal walls; decreased mental capacity; epilepsy; nervousness; hemorrhoids; false teeth; general debility and undernourishment; flat feet; tonsilitis; calluses and bunions on feet; knock-knees; and schizophrenia of the paranoid type.' The report further states that to apply the provision for preexisting permanent partial disability to more than *easily recognizable permanent objective disabilities* would convert the Subsequent Injuries Law into a state health insurance plan, applicable only to one class, the employed. In addition, it would provide life annuity benefits when the combined effect of a previous disease and subsequent injury results in a permanent disability of 70 per cent or more of total disability. *Such a legislative intent should not be inferred. It should clearly appear. This point of view was reiterated by the court in the Bachrach case* (State v. Industrial Acc. Comm. (1957), supra, 147 Cal.App.2d 818, 822–823, 306 P.2d 64) *and is one with which we are in accord.*

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"Further, we are of the view that as indicated by the Subcommittee report mentioned in the Strauss case, * * * and as is implicit in the legislative language, the statute contemplates that the previous condition must be *actually 'labor disabling,'* and that such disablement, rather than 'employer knowledge,' is the pertinent factor to be considered in determining whether the employe is entitled to subsequent injuries payments under the terms of section 4751. As commented in Larson's Workmen's Compensation Law (1952), section 59.33 (Vol. 2, p. 63), 'the prior injury under most statutes should be one which, if industrial, would be independently capable of supporting an award. It need not, of course, be reflected in actual disability in the form of loss of earnings [as this court has already held in Smith v. Industrial Acc. Com. (1955), 44 Cal.2d 364, 367[2, 3], [288 P.2d 64]], but if it is not, it should at least be of a kind which could ground an award of permanent partial disability. This must be so, because when the second-injury question later arises, the prior injury must be one capable of accounting separately for a portion of the ensuing disability, *as distinguished from condition rendered disabling only as the result of "lighting up" by the second injury.'"* (Emphasis added.)

[1] We have reached the conclusion that the evidence here falls short of meeting the requirements laid down by the Supreme Court in the Ferguson case as they are above stated.

The evidence establishes the following facts: Baldes, at the time of the industrial accident was 48 years of age. After completing the eighth grade he served in the United States Navy for 23 years where he worked primarily in the engine room and was discharged to the fleet reserve in 1949 with the rating of chief engine man. In 1951 he was recalled to active service and was assigned to teach a class in diesel engine mechanics. He felt himself unequal to the task of teaching and developed a nervous condition the symptoms of which were a lumpy sensation in the throat, occasional precordial pains and a burning sensation in the esophagus, (applicant described his condition as "stage fright"). He was confined to the Navy hospital and after observation for a period of 22 days was discharged to duty; he was not assigned to teaching but performed duty as a master at arms and had no recurrence of his nervous symptoms. He was released from active duty in the early part of January, 1953, and shortly thereafter was employed by Bethlehem.

Baldes testified that during his employment by Bethlehem he wasn't nervous at all and he had no trouble performing his work as a mechanic.

On November 6, 1953, the industrial accident occurred in which a splinter of steel entered his right eye with the result that he eventually lost the sight of it. About three weeks after returning to work, after a short period of hospitalization for his eye injury, he again exhibited his nervous symptoms. This was after he had come to the belief that he would lose the sight of his right eye. This nervous condition developed to the point where he was totally unable to care for himself and he was confined in the Veteran's hospital where his condition was diagnosed as "Psychotic depressive reaction manifested by depression, psychomotor retardation, anxiety, worry, transient hallucinations and delusions, feelings of helplessness, and inability to cope with difficulties, in partial remission. a. Precipitating Stress: Unknown."

Dr. Louise J. Gordy who examined Baldes at his request and whose report was received by the commission stated that in her opinion Baldes had suffered from a lifelong "personality difficulty" that he had, however, been able to make an adjustment until he was given an assignment while in the Navy "entailing more responsibility than he could handle"; that at the time of the industrial injury he was suffering from a "preexisting personality disorder with borderline adjustment" and that the industrial injury aggravated this preexisting disorder so that he became completely disabled.

Dr. George N. Thompson a specialist in neurology and psychiatry who was appointed by the commission as an independent medical examiner and whose examination was made in 1956, testified that at the time of his examination the applicant was in a remission from a schizophrenic psychosis; that prior to the psychotic break (that is the episode that caused his confinement in the Veteran's hospital after the industrial injury) the patient has suffered from a schizoid personality and that he had not and did not suffer from any mental deterioration and that his psychotic break was precipitated by his injury of November 6, 1953. He testified that while it was his opinion that Baldes had some impairment of personality prior to his industrial accident, *he had no way of knowing to what extent it existed.*

Both Baldes and his wife testified that from the time he entered the service at Bethlehem until after the industrial accident he was all right, had no complaints of a nervous or mental nature and that no symptoms developed until after the accident which resulted in the loss of his eye and that then he became frightened and gradually developed the symptoms that were diagnosed by the physicians as schizophrenic psychosis.

The record does not contain any evidence whatsoever that Baldes was immediately prior to his industrial injury permanently partially disabled or suffering from any condition that was "labor disabling." The most that can be said is, as expressed by Dr. Thompson, that he then was of an asymptomatic schizoid personality and that the psychotic break which resulted in disability beyond that due to the injury to his eye was precipitated i. e. "lighted up" by that injury. In so stating we have in mind the opinion expressed by the expert that at the time of his examination the applicant's disability due to his schizophrenic personality had been increased by 25 per cent beyond that existing before the accident.[1] The fact remains that

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[1] It may be noted that there is no basis for this opinion expressed by the witness for he also testified that he did not know and had no way of knowing to what extent Baldes' personality was impaired before the accident. It seems im-

that condition was not prior to the accident "labor disabling."

[2] In view of our conclusion that the evidence fails to sustain the award we do not reach the contention made by the Fund that under the doctrine of the "law of the case" the commission was without power to reopen the matter and vacate the award made pursuant to the remittitur of this court after the former proceedings. The award is annulled.

WHITE, P. J., and LILLIE, J., concur.

172 Cal.App.2d 7

APARTMENTS, INCORPORATED, a corporation, Plaintiff, Cross-Defendant and Respondent,

v.

J. E. TROTT, Colorado Land Company, a corporation, Defendants, Cross-Complainants and Appellants,

Central Surety & Insurance Company, a Missouri corporation, R. J. Horton, Douglas T. Kilbourn, Cross-Defendants and Respondents.

No. 18289.

District Court of Appeal, First District, Division 1, California.

July 14, 1959.

Rehearing Denied Aug. 10, 1959.

Hearing Granted Sept. 11, 1959.

Action by construction company against owner and his successor to recover balance allegedly due on construction of building in which owner and successor filed cross complaint against construction company and surety on bond. The Superior Court, County of Contra Costa, Norman A. Gregg, J., entered judgment denying owner's motion for transfer of action to Alameda county and owner and his successor appealed. The District Court of Appeal, Wagler, J. pro tem., held that where one of the nine counts in cross complaint sought damages for failure to discharge mechanics' liens filed in Alameda county in which building was constructed, but no real property was described in cross complaint and no lien claimant had been joined as a party, there was no error in refusing to transfer action as necessarily involving determination of questions not within jurisdiction of court in which action was pending.

Affirmed.

1. Courts 🔑40
Judgment 🔑16

Filing of any action for recovery of possession of, quieting title to, or enforcement of liens upon real estate in any county where real property affected thereby is not situated, does not give jurisdiction of subject matter to court and a judgment rendered thereon is void. West's Ann. Const. art. 6, § 5.

2. Courts 🔑7
Venue 🔑45

Once jurisdictional requirement of filing actions for recovery of possession of, quieting title to, or enforcement of liens upon real estate is met by the mere formality of filing in proper county, matter becomes purely one of venue and venue may be changed on any of grounds mentioned in statute respecting power of court to transfer real property actions. West's Ann.Code Civ.Proc. § 392; West's Ann. Const. art. 6, § 5.

3. Venue 🔑45

When a plaintiff joins a transitory action with a local action, defendant may

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possible to establish an unknown disability by subtracting 25 per cent of an unknown quantity from 100 per cent and this in effect is what the commission did in fixing the Fund's liability. In other words testimony that X (the unknown quantity) has been increased by 1/4 only leaves us with the insolvable algebraic zero equation that X equals X plus x/4 minus x/4.

elect to have a change of venue to county of his residence.

4. Courts ⇨7
Venue ⇨17

Superior court of any county has jurisdiction over all statutory local actions, that is, all actions referred to in statute on real property actions which are not also mentioned in constitutional provision regarding the three types of action which must be commenced in county where land is situated, regardless of where action is commenced or where property is situated, and can render a valid judgment affecting the same if no objection to venue is raised. West's Ann.Code Civ.Proc. § 392; West's Ann.Const. art. 6, § 5.

5. Courts ⇨486

Since statute regarding transfer of actions or proceedings reaches only question of jurisdiction and has nothing to do with venue, motion based thereon can effect the transfer of action involving real estate only when a constitutional local action is commenced in the wrong county. West's Ann.Const. art. 6, § 5; West's Ann.Code Civ.Proc. § 396.

6. Courts ⇨483

Motion for transfer of action or proceeding from court allegedly lacking jurisdiction of subject matter thereof, like a motion for change of venue, must be determined by state of pleadings at time motion is made and by character of judgment which might be rendered upon default. West's Ann.Code Civ.Proc. § 396.

7. Courts ⇨484

Where action was commenced to recover from original owner and his successor amount allegedly due on construction of building and owner and successor filed cross complaint seeking, among other things, to recover from contractor and surety for failure to discharge mechanics' liens filed in county in which building was constructed, but no real property was described and no lien claimant was joined as a party, motion to transfer case to county in which real property was situated was properly denied. West's Ann.Code Civ. Proc. §§ 392, 396; West's Ann.Const. art. 6, § 5.

8. Courts ⇨484

Statute providing for transfer of actions or proceedings allegedly commenced in court lacking jurisdiction of subject matter necessarily implies that when a motion for transfer is granted on ground of lack of jurisdiction such transfer should be made to court having jurisdiction on the pleadings as then framed. West's Ann. Code Civ.Proc. § 396.

9. Process ⇨4

Mere filing of complaint does not confer jurisdiction and service of summons is indispensable. West's Ann.Code Civ. Proc. § 416.

10. Appeal and Error ⇨911(3)

Where action was brought by builder to recover from landowner and his successor for balance due on construction of building and owner and successor filed cross complaint alleging among other things damages for failure to discharge liens on land located in county other than where action was commenced and to which owner and successor sought to have action transferred, but nowhere in record did it appear that summons in any of the mechanics' liens foreclosure actions had ever been served, appellate court must assume that county in which real estate was located had not acquired jurisdiction over action on builder's surety bond, and no question of priority was presented. West's Ann. Code Civ.Proc. § 416.

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Fernhoff & Wolfe, Oakland, for appellants.

Shapro & Rothschild, Alexander, Bacon & Mundhenk, San Francisco, Carlson, Collins, Gordon & Bold, Martinez, William F. Stone, San Francisco, for respondent Apartments, Inc.

Shapro & Rothschild, San Francisco, Carlson, Collins, Gordon & Bold, Martinez, for respondents Horton & Kilbourn.

WAGLER, Justice pro tem.

J. E. Trott and Colorado Land Company (hereinafter called "Land Co."), as defendants and cross-complainants, in an action filed against them in Contra Costa County by plaintiff herein, have appealed from an order of the superior court of said county denying their motion under Code of Civil Procedure, section 396, for a transfer of said action to Alameda County.

Section 396, so far as here applicable, provides that "If * * * the determination of the * * * cross-complaint, will necessarily involve the determination of questions not within the jurisdiction of the court, in which the action * * * is pending, the court, * * * must * * * transfer the action * * * to a court having jurisdiction * * *."

On May 1, 1956, plaintiff Apartments, Inc., and defendant Trott entered into a written contract whereby plaintiff agreed to construct an apartment building in the city of Berkeley, Alameda County, for the sum of $160,000. On June 4, 1956, plaintiff, as principal, and Central Surety and Insurance Corporation, as surety (hereinafter referred to as "Surety"), one of the respondents herein, executed to Trott, as obligee, a performance and labor and materials bond in the penal sum of $160,000. The instant appeal deals with litigation growing out of the foregoing transaction.

On November 27, 1957, plaintiff filed a complaint in the superior court of Contra Costa County against Trott and Land Co., his successor in interest for the recovery of the sum of $151,054.77, the balance allegedly due for the construction of the apartment building. The complaint contains two counts. The first which is in quantum meruit alleges that the reasonable value of said construction was the sum of $263,054.77 and that there remains due a balance of $151,054.77, the sum of $112,000 having been paid. The second count alleges that plaintiff and defendants entered into a written contract for the construction of said building according to signed prints and specifications for the sum of $160,000; that said specifications were subsequently amended at the request of defendants and that pursuant thereto extras of the reasonable value of $113,802.78 were furnished; that a balance of $37,251.99 remains due on the original contract making a total balance due of $151,054.77. This complaint was answered by defendants on January 28, 1959. The answer admits the execution of the written contract; admits the payment of $112,000; denies the request for modification and extras; alleges that the sum of $33,078.95 is due on the contract but denies all indebtedness because of plaintiff's failure to complete the building and discharge liens. As special defenses the answer alleges: (1) Assignment of plaintiff's rights under the contract to "Surety," (2) the action is not brought in name of real party in interest, (3) the execution on May 31, 1957, by plaintiff and defendants with approval of "Surety" of an agreement providing for recordation of notice of completion and events resulting therefrom, and (4) the pendency in Alameda County of 11 actions to foreclose mechanics' liens in the aggregate sum of $75,292.77.

Simultaneously with their answer defendants filed a cross-complaint joining as cross-defendants respondent "Surety" and respondents Kilbourn and Horton, officers of plaintiff corporation. The cross-complaint purports to set forth nine separate causes of action. The first eight consist of a copy in haec verba of an eight-count complaint filed in Alameda County on November 27, 1957, wherein Land Co., one of defendants herein, is plaintiff, and plaintiff and cross-defendants herein are defendants. This complaint is based upon the same contract which is referred to in plaintiff's second cause of action and upon the performance bond executed pursuant thereto. By it damages are sought for (1) failure to discharge liens, (2) failure to give proper credit for materials furnished by owner, (3) negligent construction, (4) breach of warranty of quality of workmanship, (5) loss of rentals due to delay and failure to complete, (6) added expense in financing due to delay, (7) slander of title by the filing of a sham and fraudulent claim * of lien in the sum of $144,000, (8) attorneys' fees and costs incurred.

As a ninth count defendants incorporate by reference, the special defenses contained in their answer, the eight counts above summarized and allege further that they are unable to determine whether the 11 foreclosure actions pending in Alameda County are valid or whether they are sham and false. They also allege that they have filed answers in each of said 11 actions together with cross-complaints against respondent "Surety" praying that in the event the court shall find an amount due that judgment shall run against said "Surety." They further allege "That an adjudication of the extent and validity of said claims of lien is necessary to a determination of defendants-and cross-complainants' rights and liabilities under the aforesaid building contract and bond." Appellants pray for such adjudication and judgment accordingly.

On February 24, 1958, appellants noticed their motion to transfer the instant action to Alameda County "on the ground that it appears from the verified pleadings that the determination of the action and cross-complaint will necessarily involve the determination of questions not within the jurisdiction of the above entitled court, and that the above entitled court is not the proper court for trial. * * *" The motion was submitted upon the pleadings and the affidavit of plaintiff's counsel. It is from a denial thereof that defendants have appealed.

The record before us discloses that defendant Trott and cross-defendants Horton and Kilbourn are all residents of Contra Costa County and that plaintiff corporation has its principal place of business in Contra Costa County. While the complaint in the instant action and the complaint in the Alameda County action (the first eight counts of the cross-complaint herein) were filed the same day, service was first made in the Contra Costa action.

Appellants concede that by first effecting service the Contra Costa Superior Court acquired jurisdiction of the parties and control of all subsequent proceedings. Their claim of right to transfer is based exclusively upon the ninth count of their cross-complaint which they contend sets forth a cause of action which the Contra Costa court has no jurisdiction to adjudicate. This results from the fact, they assert, that this count raises an issue respecting the validity of the 11 mechanics' liens upon which foreclosure actions are now pending in Alameda Court—hence it is a *local* action over which Contra Costa County has no jurisdiction.

Local actions involving real property are of two types: (1) Those referred to in article VI, section 5 of the Constitution, (2) those referred to in Code of Civil Procedure, section 392, which are *not* also mentioned in the Constitution. Witkin refers to the former as "constitutional" local actions and to the latter as "statutory" local actions. (1 Witkin, California Procedure, §§ 192, 195, pp. 707, 710.) By *constitutional local actions* is meant those actions only which are mentioned in the Constitution which must be *commenced* in the county where the real estate affected thereby is situated in order to confer jurisdiction. "[*A*]*ctions for the recovery of the possession of, quieting the title to, or for the enforcement of liens upon real estate* * *" fall in this category. (Emphasis added.) All local actions referred to in Code of Civil Procedure, section 392, which are not also mentioned in article VI, section 5 of the Constitution, are on the other hand statutory local actions.

[1-3] The filing of any of the three local actions mentioned in the Constitution in any county where the real property affected thereby is not situated does not

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* It is nowhere alleged that any steps were ever taken to cause said "claim" to ripen into a lien; nor do appellants seek to quiet title against same. The only relief prayed for in connection therewith is for compensatory and exemplary damages.

give the court jurisdiction of the subject matter and a judgment rendered therein is void. Fritts v. Camp, 94 Cal. 393, 29 P. 867; Rogers v. Cady, 104 Cal. 288, 38 P. 81; State v. Royal Consolidated Min. Co., 187 Cal. 343, 202 P. 133. Once the jurisdictional requirement is met, however, by the mere formality of filing in the proper county the matter becomes purely one of venue, i. e., the venue may be changed on any of the statutory grounds. In Chew v. Storrie, 108 Cal.App. 313, 291 P. 610, for example, plaintiff sued in Plumas County to foreclose a mechanics' lien on real estate situated therein (a constitutional local action). In his complaint, however, he joined another cause of action to enforce liability on a performance bond (a personal action). Under the familiar rule, that when a plaintiff joins a transitory action with a local action (of either type), the defendant may elect to have a change of venue to the county of his residence, a transfer of the action to the city and county of San Francisco was held proper. See: Duffy v. Duffy, 104 Cal. 602, 38 P. 443; Rice v. Schubert, 101 Cal.App.2d 638, 226 P.2d 50; Brock v. Superior Court, 29 Cal.2d 629, 177 P.2d 273, 170 A.L.R. 521.

[4] On the other hand, the superior court of any county has *jurisdiction* over all *statutory* local actions regardless of where the action is commenced or where the property is situated, and can render a valid judgment affecting same where no objection to venue is raised. (Miller & Lux v. Madera Canal etc. Co., 155 Cal. 59, 99 P. 502, 22 L.R.A.,N.S., 391 [action to recover damages to real property resulting from interference with riparian rights]; Grocers' Fruit Growing Union v. Kern etc. Co., 150 Cal. 466, 89 P. 120 [action for specific performance of contract to sell land]; Santa Barbara Lodge No. 605, Loyal Order of Moose v. Penzner, 104 Cal.App.2d 494, 231 P.2d 595 [action to set aside deed for fraud and mistake]; see also cases collected in 1 Witkin, California Procedure, § 196, pp. 711–712.)

[5] Since Code of Civil Procedure, section 396, reaches only the question of jurisdiction and has nothing to do with venue a motion based thereon can effect the transfer of an action involving real estate only when a constitutional local action is commenced in the wrong county.

[6–8] A motion based upon Code of Civil Procedure, section 396, like a motion for change of venue must be determined by the state of the pleadings at the time the motion is made and by the character of judgment which might be rendered upon a default. Keenan v. Dean, 134 Cal.App.2d 189, 285 P.2d 300; see also Buell v. Dodge, 57 Cal. 645; Kallen v. Serretto, 126 Cal.App. 548, 14 P.2d 917. An examination of the ninth count will readily disclose that, in the event of a default, appellants could secure none of the relief mentioned in article VI, section 5 of the Constitution. No real property is described in the cross-complaint and no lien claimant has been joined as a party. Under such circumstances Alameda County would have no more jurisdiction to determine the validity of the mechanics' liens than has Contra Costa County. Code of Civil Procedure, section 396, necessarily implies that when a motion for transfer is granted on the grounds of lack of jurisdiction, such transfer shall be made to a court which has jurisdiction on the pleadings as then framed to determine the question which is the basis of the transfer. Since the ninth count shows on its face that no constitutional local action is involved the motion for transfer was properly denied.

Appellants base their entire appeal upon three decisions: Case v. Kirkwood, 119 Cal.App. 207, 6 P.2d 110; Rice v. Schubert, 101 Cal.App.2d 638, 226 P.2d 50, and Armstrong v. Transcontinental Land & Water Co., 134 Cal.App.2d Supp. 889, 285 P.2d 1031. Case and Rice each involved an appeal from the denial of a motion for change of venue. They are therefore not in point. Each case having been commenced in the proper county no question of *jurisdiction* was involved. Each was affirmed on the basis of the "main relief" rule. Under this rule when a complaint states but a *single* cause of action but prays for two distinct types of relief, one local and one transitory, the rule selects one as determinative of venue. The rule is not applicable to the instant action because the cross-complaint contains not one but nine causes of action. However, if we were to consider the cross-complaint as a whole it is quite clear that by it appellants are seeking primarily to recover damages for the alleged breach of the building contract and to enforce liability upon the bond executed pursuant thereto. As such it is a transitory cause of action. If the court should undertake, as between the parties before it, to determine the validity of the liens, this would be only *incidental* to the main relief sought. As we have already pointed out this would in no manner involve the enforcement of mechanics' liens, or affect the title to real estate.

In Armstrong, numerous plaintiffs filed a 33-count complaint in the Los Angeles Municipal Court to recover, after rescission, purchase monies paid on real estate in Kern County. In one of the counts a cross-complaint was filed which the court construed as an action to quiet title to a portion of the real estate in question, i. e., a *constitutional* local action. The action was transferred to Kern County. Under article VI, section 5 of the Constitution, the superior court of Kern County was the only court in which such an action could have been commenced and was therefore the only court which could confer *jurisdiction,* hence the transfer was proper. The Armstrong case is entirely consistent with the views herein expressed.

In their closing brief appellants for the first time raise the question of priority of jurisdiction. Appellants argue that since it is alleged in their ninth count that on the 30th day of November, 1957, they filed an answer in each of the 11 foreclosure actions and at the same time *filed* a cross-complaint against "Surety" on its bond, the superior court of Alameda County was first to acquire jurisdiction over the action on the bond. (The cross-complaint to enforce liability on the bond in the instant case was not filed until January 28, 1958.)

[9, 10] This argument finds no factual support in the record. The mere *filing* of a complaint does not confer jurisdiction. Service of summons is indispensable. Code of Civil Procedure, section 416; DeBrincat v. Mogan, 1 Cal.App.2d 7, 36 P.2d 245. Nowhere in the record before us does it appear that summons on cross-complaint in any of the foreclosure actions has ever been served. We must assume therefore that Alameda County has not acquired jurisdiction over the action on the bond, and no question of priority is presented. In re Estate of Davis, 151 Cal. 318, 86 P. 183, 90 P. 711; Paulin v. Paulin, 39 Cal.App.2d 180, 102 P.2d 809.

The order is affirmed.

BRAY, P. J., and TOBRINER, J., concur.

Hearing denied; SCHAUER, J., dissenting.

172 Cal.App.2d 158

Gertrude G. EISCHEN, Plaintiff,

v.

George W. EISCHEN, Defendant and Respondent.

E. Gerlinger and Florabelle G. Patterson, Children and Heirs at Law of Gertrude G. Eischen, deceased, Real Parties in Interest and Appellants.

Civ. 23464.

District Court of Appeal, Second District, Division 3, California.

July 20, 1959.

Proceeding on motion of husband, who was administrator for wife's estate, to vacate final divorce decree obtained by wife upon ground that entry thereof was procured by wife's fraud upon husband and upon the court. From an order of the Superior Court, Los Angeles County, William E. Fox, J., vacating the divorce decree, children of wife by former marriage appealed. The District Court of Appeal, Shinn, P. J., held that where wife obtained a divorce by fraud, husband was not deprived of his homestead interest in property which was owned by wife and in which they had lived for many years.

Order affirmed.

1. Divorce 🔑165(5½)

In proceeding on motion by husband to vacate divorce decree upon ground that it was procured by means of fraud practiced upon husband and upon the court by his wife, evidence sustained finding that divorce decree had been obtained by fraud of wife.

2. Homestead 🔑158

Where a wife obtained a divorce by fraud, husband was not deprived of his homestead interest in property which was owned by wife and in which they had lived for many years.

3. Divorce 🔑184(10)

Order vacating final divorce decree implies that court found all material facts in issue in favor of party attacking decree, and reviewing court is bound by trial court's findings.

4. Divorce 🔑165(3)

The court may vacate a final decree of divorce upon a showing that it was procured through extrinsic fraud.

5. Divorce 🔑165(4)

Where husband did not learn until 1958 that a divorce decree obtained by wife in 1945 was subject to attack for fraud of wife in procuring decree, husband was not barred by laches from having decree set aside.

6. Equity 🔑71(1)

Mere delay in assertion of a right does not forfeit the right.

7. Equity 🔑84

In considering a claim of laches, court will view all aspects of case in light of equitable principles.

8. Equity 🔑72(1)

Ordinarily claim of laches will not be sustained unless it is shown that to reject it would result in prejudice to one who has relied on apparent acquiescence of another.

9. Equity 🔑69, 70

For laches to be invoked as a bar to assertion of a right, knowledge of existence of right and apparent willingness to waive it must be shown.

10. Executors and Administrators 🔑438(3)

Where husband was appointed administrator of his wife's estate, notice of motion to vacate a divorce decree obtained by wife on ground of fraud addressed to himself as administrator as well as to children of wife by a prior marriage was not in violation of rule that one cannot in an individual capacity sue himself in a representative capacity, and directing notice to himself as administrator did not deprive proceeding of its adverse character since whatever rights children had devolved upon them as heirs subject to administration upon death of wife.

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McIver & Green, Paul G. McIver, Robert Miller Green, Montebello, for appellants.

Von Herzen & Laidig, Samuel L. Laidig, Los Angeles, for respondent.

SHINN, Presiding Justice.

Gertrude G. Eischen and George W. Eischen were husband and wife, having intermarried August 14, 1929, in Mexico and in California in 1931. November 4, 1943, Gertrude sued for divorce; George defaulted; an interlocutory decree was entered December 7, 1943 and a final decree April 11, 1945. They remarried August 25, 1945. Gertrude died in April 1956. She left no will and George was appointed administrator of her estate. Gertrude had two children by a former marriage. These are the appellants, Edward Gerlinger and Florabelle Gerlinger Patterson.

The present controversy arose from the following facts: Gertrude owned as her separate property the premises in Montebello where the couple for many years lived and conducted a flower shop. In 1932 she declared a homestead on the property. The effect of the final decree of divorce, if valid and unimpeached, was to terminate

George's homestead interest in the property and to reduce his interest as a surviving husband to one-third. See Zanone v. Sprague, 16 Cal.App. 333, 116 P. 989; 16 Cal.Jur.2d 603.

[1, 2] January 28, 1958, George gave notice to appellants of a motion to vacate the final decree upon the ground that entry of the same was procured by means of Gertrude's fraud upon him and upon the court. The motion was heard upon supporting affidavits and an affidavit in opposition, and was granted. It is urged on the appeal from the order that there was no substantial evidence of Gertrude's fraud and that the attack upon the decree was barred by laches.

The contention of appellants that there was no substantial evidence of fraud is unavailing. It was shown by the affidavit of the attorney for appellants, who was also Gertrude's attorney in the divorce, that after the interlocutory decree was entered, and upon an occasion, the date of which was not stated, Gertrude informed him that she and George had become reconciled, George having promised to quit excessive drinking, and that she desired to have the action dismissed; she signed a request for a dismissal, it was signed by the attorney, was forwarded to the clerk for filing but was not filed for the reason that it was not signed by George; another one was prepared and given to Gertrude for George to sign but was never signed. In April 1945, Gertrude informed the attorney that George had continued his drinking and asked whether a final decree could be entered. An affidavit was prepared, was executed by Gertrude and upon presentation of the affidavit to the court the final decree was signed and entered. It was represented by Gertrude's affidavit that she and George had agreed upon a reconciliation on condition that he quit drinking to excess, that he had broken his promise, and that they had resumed living under the same roof but had not cohabited as husband and wife.

It was shown by the affidavit of George that he moved out of the home a few days after the interlocutory was entered but returned almost immediately at Gertrude's request and that marital relations were resumed and continued to the date of Gertrude's death. In April 1945, Gertrude informed him that she had previously requested her attorney to stop the divorce proceedings but that contrary to her wishes something had gone wrong and that a final decree had been entered; her attorney had advised her that red tape would be involved in setting aside the decree, that the easiest thing to do was for them to remarry and that the final decree would make no difference. Believing Gertrude, and having no legal advice and relying on the statement of the attorney, as related by Gertrude, he remarried her in August 1945. He did not learn of the manner in which Gertrude had caused entry of the final decree until after Gertrude's death. Supporting affidavits of several mutual friends of the parties corroborated George's averment that the parties lived together and cohabited until Gertrude's death.

It was a proper inference from the facts stated that if Gertrude had made no false representations and had concealed no facts from George he would have sought legal advice and would have learned that remarriage would not restore his rights under the homestead.

[3–5] The order vacating the final decree implies that the court found all material facts in issue in favor of George and concluded that they established extrinsic fraud upon him and upon the court. We are bound by the court's findings and we agree with the conclusion. A court may vacate a final decree of divorce upon a showing that it was procured through extrinsic fraud. McGuinness v. Superior Court, 196 Cal. 222, 237 P. 42, 40 A.L.R. 1110; Tomb v. Tomb, 120 Cal.App. 438, 7 P.2d 1104; Rivieccio v. Bothan, 27 Cal.2d 621, 165 P.2d 677.

[6–9] It is contended further that the attack upon the decree was barred by laches. Although in April 1945 George learned that the final decree had been entered, the motion was not made until September 1958. It is urged that by this long delay the right to challenge the decree was lost. The contention is untenable. Mere delay in the assertion of a legal right does not forfeit the right. In considering a claim of laches the court will view all aspects of the case in the light of equitable principles. Ordinarily the claim will not be sustained unless it is shown that to reject it would result in prejudice to one who has relied upon the apparent acquiescence of another. Hiett v. Inland Finance Corp., 210 Cal. 293, 291 P. 414; Weadon v. Shahen, 50 Cal.App.2d 254, 123 P.2d 88; Verdugo Cañon Water Co. v. Verdugo, 152 Cal. 655, 93 P. 1021. It is not contended that any prejudice was suffered by Gertrude through the lapse of time or that she would have derived any benefit had George made an investigation and assailed the final decree upon learning of her fraud.

[10] For laches to be invoked as a bar to the assertion of a right, knowledge of the existence of the right and an apparent willingness to waive it must be shown. Chamberlain v. Chamberlain, 7 Cal.App. 634, 95 P. 659; Hovey v. Bradbury, 112 Cal. 620, 44 P. 1077.

It was shown by the affidavit of Gertrude's attorney that he was a friend of both parties and had acted as attorney for each of them to the time of Gertrude's death. In his affidavit he denied that he had told Gertrude that there would be red tape connected with setting aside the final decree, that the easiest thing for the parties to do was to remarry, and that the final decree "would not make any difference," but the trial court no doubt believed that Gertrude had represented to George that she had received that advice from the attorney, and that George believed that a remarriage would restore all rights of the parties that existed prior to entry of the final decree. This was a mistake of law, but it was a mistake that was induced by the statements of Gertrude. It appears that she had not received from the attorney advice as she represented to George, but having made the representations she could not have put George at fault for relying upon them. Nor could George be held at fault for his belief that they had received good legal advice. And it must be remembered that George did not learn until after Gertrude's death that the manner in which the final decree was obtained rendered it subject to attack for fraud. Suppression of those facts with knowledge that they were unknown to George was a continuing deceit. To penalize George for relying upon the representations and concealment of Gertrude would be permitting her to profit by her own wrong.

George was appointed administrator of his wife's estate. He addressed his notice of motion to vacate the judgment to himself as administrator as well as to the appellants herein and to their attorney. It is contended that this was in violation of the rule that one cannot in an individual capacity sue himself in a representative capacity. There would have been merit in the point if the notice had not been given to appellants, who were the real parties in interest, or if they had not had an opportunity to appear and defend their rights. Or it may be that if no notice had been given except to himself as administrator the order vacating the decree would have been void as to creditors of Gertrude. But we do not see how directing the notice to himself as administrator could have deprived the proceeding of its adversary character. The appellants claimed as Gertrude's heirs. Whatever rights they had devolved upon them subject to administration upon the death of Gertrude. George, as administrator, was not purporting to represent them, as would have been the case if they had not been brought before the court. They had their day in court. In fact it does not appear that any party interested was not before the court. There was no one whose interests George had a duty to protect. Addressing the notice to himself as administrator was an unnecessary act and of no legal significance.

The order is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

172 Cal.App.2d 73

UNITED PARCEL SERVICE OF AMERICA, INC., a corporation, and Liberty Mutual Insurance Company, a corporation, Petitioners,

v.

INDUSTRIAL ACCIDENT COMMISSION of the State of California, and David Wilton Byington, Respondents.

Civ. 23819.

District Court of Appeal, Second District, Division 1, California.

July 16, 1959.

Proceeding on petition of employer and employer's insurer for writ of review and annulment of award of Industrial Accident Commission allowing workmen's compensation benefits to employee who sustained injury to his right foot while participating in foot race at annual company picnic. The District Court of Appeal, Nourse, J. pro tem., held that the evidence was insufficient to sustain commission's finding that injury arose out of and occurred in course of employment.

Award annulled.

1. Workmen's Compensation ⟹604

Liability of employer to employee for compensation only exists where at time of injury the employee is performing a service growing out of and incidental to his employment and is acting in the course of his employment, and the injury is proximately caused by the employment. West's Ann.Labor Code, § 3600.

2. Workmen's Compensation ⟹664

Injury sustained in athletic contest is compensable as incidental to employment and within course of employment only when it occurs on employer's premises during lunch or recreation period as regular incident of employment, or in cases where employer has expressly or impliedly required participation or attendance at the function, or where employer derives substantial direct benefit from employee's attendance at the function or his engagement in athletic activity, beyond intangible value of improvement in employee's health or morale that is common to all kinds of recreation and social life, or where the activity is one contemplated by contract of employment and opportunity to engage in it is part of consideration to employee for entering into contract.

3. Workmen's Compensation ⟹1559

In compensation proceeding, evidence was insufficient to sustain finding of commission that injury to foot sustained by employee while participating in foot race at annual company picnic arose out of and occurred in course of employment. West's Ann.Labor Code, § 3600.

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George R. Haswell and Robert R. Smith, Los Angeles, for petitioners.

Everett A. Corten, San Francisco, and Edward A. Sarkisian, Los Angeles, for respondent Industrial Accident Commission.

NOURSE, Justice pro tem.

Petitioners seek review and annulment of an award of the Industrial Accident Commission allowing workmen's compensation benefits to an employee who sustained an injury to his right foot while participating in a foot race at an annual company picnic.

The sole question presented is whether there was substantial evidence to justify the commission's finding that the injury so sustained by the employee arose out of and occurred in the course of his employment. Petitioner, United Parcel Service of America (hereinafter called "United"), was engaged in the business of making deliveries of merchandise to customers of stores; and respondent Byington on workdays was employed as one of its delivery truck drivers.

The annual company picnic of United at which respondent Byington was injured was held on a Sunday, which was not a workday. United's employees were not paid for attending said annual picnic and they were not penalized in any way for nonattendance. The picnic was held off the employer's premises at a rented park area. The employee testified that said park area was rented by the employer for the occasion. No transportation to the picnic park was furnished by United, and the employees travelled to the picnic park by their own selected means of transportation. The employees did not wear uniforms and the evidence does not show that there was anything in connection with the picnic which would advertise the service rendered by United. The employees were not required to attend the picnic and if they did not attend might employ their time as they saw fit.

The applicant as well as other employees and their families were invited to attend the picnic by an announcement of it published in the company's newspaper.[1] Their attention was also directed to the picnic by their supervisor.

[1, 2] Liability of an employer to an employee for compensation only exists where at the time of the injury the employee is performing a service growing out of and incidental to his employment and is acting in the course of his employment and the injury is proximately caused by the employment. Lab.Code, § 3600. An injury sustained in an athletic contest is compensable as incidental to employment and within the course of employment only when it occurs on the employer's premises during a lunch or recreation period as a regular incident of employment or in cases where the employer has expressly or impliedly required participation or attendance at the function or where the employer derives a substantial direct benefit from the employee's attendance at the function or his engagement in an athletic activity, beyond the intangible value of improvement in the employee's health or morale that is common to all kinds of recreation and social life, or where the activity is one contemplated by the contract of employment and the opportunity to engage in it is a part of the consideration to the employee for entering into the contract. Larson, "Workmen's Compensation Law," §§ 22:00–22:30; Hanna, "The Law of Employee Injuries and Workmen's Compensation," vol. 2, pp. 171–173; Campbell, "Workmen's Compensation," vol. 1, pp. 233–234; Reinert v. Industrial Acc. Comm., 46 Cal.2d 349, 294 P.2d 713; Winter v. Industrial Acc. Comm., 129 Cal.App.2d 174, 276 P.2d 689; Boynton v. McKales, 139 Cal.App.2d 777, 790–791, 294 P.2d 733.

[3] The evidence here does not establish any element which would make the injury suffered by the applicant compensable under our workmen's compensation statutes. There is no evidence that the employer received any benefit from the applicant's attending the picnic other than that which would be incidental to the employee's being psychologically or physically benefited from recreation and such benefit, of course, would be incidental to any recreation that he undertook whether at a company picnic or at some other recreation devised by the employee himself. The applicant's participation in the foot race or his attendance at the picnic did not advertise the company's service or further its business. The opportunity to attend the picnic was not a part of the contract of employment or of the consideration received by the employee for his employment. There was no compulsion either direct or indirect upon the employee to attend the picnic; it was merely an invitation to attend which he

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[1] Said announcement and invitation in the company newspaper stated in substantial part: "UPS Annual Picnic. On Sunday, July 13th, many of our UPS members and their families will journey to Mountain Oaks Park, La Crescenta * * for a day of picnic fun. The plans and preparations for our UPS Picnic are being completed by the Personnel Department, with the hope of assuring everyone a wonderful time—a day long to be remembered. Join your fellow members and their families at this exciting event. There will be the usual picnic events—games, contests, swimming, baseball, dancing, etc. * * * Prizes will be presented to the winners!"

could, without any penalty, refuse and if he accepted he accepted for his own pleasure and benefit and not for the benefit of the employer.

The cases of Reinert v. Industrial Acc. Comm., supra, 46 Cal.2d 349, 294 P.2d 713; Winter v. Industrial Acc. Comm., supra, 129 Cal.App.2d 174, 276 P.2d 689, and Boynton v. McKales, supra, 139 Cal.App.2d 777, 294 P.2d 733, under the facts are not controlling here. In Reinert the opportunity to engage in the recreation (horseback riding) which was the cause of Reinert's injury, was a part of the compensation given her by her contract of employment and engaging in the recreation was incidental to and a part of the employment. In Winter, the decision was based upon the holding of the court that the evidence there showed that it was a well-established custom for the employees to engage in the activity which resulted in the injury to the applicant and was therefore an activity contemplated by the contract of employment and that the hazard which resulted in the injury was the same hazard to which the employee was exposed while at work. In the present case the foot race did not occur at the place of employment and was not an established custom of the business and the risk to which the employee was exposed had no relation to his employment.

Boynton was an action for personal injuries and the question involved was whether the defendant was engaged in the scope and course of his employment at the time of the accident in which the plaintiff was injured. The evidence showed that the defendant-driver had attended a banquet which was closely related to the employer's sales program, the attendance at which was intended to benefit the company. The court there held that this evidence raised a question of fact to be determined by the jury, as to whether the defendant-driver was acting in the scope and course of his employment.

We hold that there was no evidence here to uphold the finding of the commission that Byington's injuries arose out of and in the course of his employment. The award is based upon that finding and must therefore be and is hereby annulled.

WHITE, P. J., and LILLIE, J., concur.

171 Cal.App.2d 786

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Jerilynn COE, Defendant and Appellant.

Cr. 6402.

District Court of Appeal, Second District, Division 1, California.

July 8, 1959.

Defendant was convicted in Superior Court of Los Angeles County, Richard C. Fildew, J., of grand theft, and she appealed from the judgment and from an order denying her motion for a new trial. The District Court of Appeal, Lillie, J., held, inter alia, that evidence that defendant, an agent of the county probation officer who served as court trustee for transmittal of child support funds, appropriated such funds to her own use, sustained conviction under information charging defendant with feloniously taking "the personal property" of such probation officer, as against contention that the money appropriated did not actually belong to such officer.

Judgment and order affirmed.

1. Criminal Law 🔑29

Cash payments for child support, ordered by Domestic Relations Department of Superior Court and made to county probation department from private persons for transmittal to the private persons for whose benefit the funds were ordered, were not "public funds," and hence an employee of the probation department who appropriated such funds to her own use was not required to be charged with embezzlement of public funds by a public employee, rather than with grand theft. West's Ann.Pen.Code, §§ 487, subd. 1, 504.

See publication Words and Phrases, for other judicial constructions and definitions of "Public Funds".

2. Embezzlement 🔑1

Prosecution under embezzlement statute is not to be limited exclusively to embezzlement of public moneys, in view of absence of any direct reference to public moneys in statute and inclusion therein of appropriation by private persons of any property belonging to any association, society or corporation of either a public or private nature. West's Ann.Pen.Code, § 504.

3. Embezzlement 🔑35

There is no such qualitative difference between grand theft and embezzlement of public funds by a public employee as to preclude a conviction under the grand theft statute where defendant is charged by way of information with grand theft and tried upon the theory of embezzlement. West's Ann.Pen.Code, §§ 487, subd. 1, 504.

4. Embezzlement 🔑35

In prosecution for grand theft, court did not err in admitting proof tending to show violation of embezzlement statute, defendant being at all times fully apprised of exact nature of offense with which he was charged. West's Ann.Pen.Code, §§ 487, subd. 1, 504.

5. Embezzlement 🔑35

Admission, under information charging grand theft, of proof tending to show commission of crime of embezzlement, in that it established that defendant was a county employee and agent of court trustee and that she appropriated trust funds she had received on behalf of her principal, did not constitute a material variance, where it was not shown that defendant was in any way misled in making defense or that any substantial rights were in any manner adversely affected by variance, if any, between proof and charge. West's Ann.Pen.Code, §§ 487, subd. 1, 504.

6. Indictment and Information 🔑35

Purpose of information is to notify accused of charge he is to meet at trial. West's Ann.Pen.Code, § 952.

7. Criminal Law 🔑200(1)

Prosecution for grand theft, in which the evidence established certain elements of crime of embezzlement, would bar any subsequent prosecution for embezzlement based on same transaction, and defendant would be entitled to show former jeopardy by evidence produced in the grand theft case. West's Ann.Pen.Code, §§ 487, subd. 1, 504.

8. Criminal Law 🔑295

On issue of former jeopardy, extrinsic evidence is admissible on trial to identify the offense under which defendant has already been convicted.

9. Embezzlement 🔑44(4)

Evidence that defendant, a county employee and agent of county probation officer who served as court trustee for transmittal of child support funds, appropriated such funds to her own use, sustained conviction for grand theft under information charging her with feloniously taking "the personal property" of such probation officer, as against the contention that the money appropriated by defendant did not actually belong to such officer. West's Ann.Pen.Code, § 487, subd. 1.

10. Embezzlement 🔑35

In prosecution for grand theft under information charging defendant with feloniously taking a specified amount of money, "the personal property of" a named individual, prosecution was not required to establish that the money in question actually belonged to such individual, in view of evidence establishing that money in question was part of trust fund of which named individual was trustee. West's Ann.Pen.Code, § 487, subd. 1.

Miller & Maddox, Loren Miller, Edward Carter Maddox, Los Angeles, for appellant.

Stanley Mosk, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

LILLIE, Justice.

Defendant was accused by way of information with grand theft, taking $1,610.26, the personal property of Karl Holton, Probation Officer, in violation of Section 487(1), Penal Code. She waived her right to a trial by jury and submitted the matter to the trial court on the transcript of the proceedings had at the preliminary hearing. Upon her conviction, she was granted probation on the condition she spend the first six months of her term in the County Jail. This appeal is from the judgment and order denying defendant's motion for a new trial.

An examination of the evidence in a light most favorable to the respodent discloses that defendant worked as a cashier at the payment window of the Los Angeles County Probation Department, receiving cash payments from private persons ordered by the Domestic Relations Department of the Superior Court for child support. These funds were accepted by her in the name of Karl Holton the Probation Officer who is designated as the Court Trustee. Her general duties consisted of taking the proffered payments, writing receipts, and turning the money over to the Central Cashier, which funds were transmitted to the County Auditor who issued warrants to the private parties entitled to them. For the money she received, defendant issued receipts in triplicate in the following form:

> "County of Los Angeles Office of
> the Court Trustee
> Received from * * *.
> For Account of * * *.
> Karl Holton, Trustee
> by * * *,"

giving one copy to the payor, retaining one for office records and transmitting one with the funds to the auditor. The money was kept in a cash drawer which could be locked with a key which defendant kept. At 2 p.m. each day she gave all of the even $100 amounts she had collected to the Central Cashier, and the excess (less than $100) she kept in her possession until 4 p.m. when she rendered a final account for the day and turned over the proceeds and receipts to the Balancing Cashier who gave her an I.O.U. Defendant had a metal box with a separate lock and key which, if she retained money overnight, she kept in a compartment in the safe. At the end of each business day defendant placed the cash box in the proper compartment in the safe where it remained until taken out by her. Four people had the safe's combination, including Mr. Ward and Mrs. Pickett, defendant's supervisor. Besides having a key to the cash box defendant had a key to the compartment in which the cash box was kept. No other person had both, although Mrs. Pickett had the only other key to the cash box and Mr. Ward the only other key to the compartment. When defendant put the cash box in the safe at night no one checked the contents.

The shortage was uncovered by a routine audit on October 29, 1957, by account auditors. On that day defendant was absent. When she failed to appear, they opened her cash box and counted the money. Among the currency and receipts were 50 receipts sealed in a separate envelope not covered by sufficient money to balance. A computation showed a shortage of $1,610.26 between the total money and receipts. The 50 receipts were dated October 22 and 23, running through the 25, 28, 29, and 30th. Defendant's last day of work was Monday, the 28th, yet she signed receipts dated the 29th, and 15 dated the 30th. Although receipts could be written after 4 p.m. for the next day, it was not customary to write them for two days later.

Appellant was unable to explain the shortage. She testified that when she last locked the cash box in the safe on October 28 all of the money was in it, some $1,700 or $1,800; and that the post-dated receipts covered checks. She said she delayed her accounting because she did not have time to make a balance on October 22; did not work on the 23rd or 24th, was ill at home after 2 p.m. on the 25th; and on Monday, the 28th, did not turn in the money and receipts accumulated on those days because the balancing clerk had gone home, so she locked them in the cash box in the safe. She did not work on the 29th because of illness in her family and on Tuesday, November 6, she was arrested. She denied any knowledge of the sealed envelope in which the receipts evidencing missing funds were found, or that she took or removed any funds.

Appellant contends that it was error to admit proof of a violation of Section 504, Penal Code, under an information charging grand theft in violation of Section 487(1); there is a fatal variance between the crime charged and the proof; and the evidence is insufficient to support a conviction of grand theft.

The information alleging a violation of Section 487(1), Penal Code, briefly charged that on October 28, 1957, defendant "did wilfully, unlawfully and feloniously take" $1,610.26, "the personal property of Karl Holton, Probation Officer."

Section 504 provides that "every officer * * * of any county * * * and every deputy, clerk, or servant of any such officer, and every officer, Director, Trustee, Clerk, servant, or agent of any association, society, or corporation (public or private), who fraudulently appropriates to any use or purpose not in the due and lawful execution of his trust, any property which he has in his possession, or under his control by virtue of his trust, or secretes it with a fraudulent intent to appropriate it to such use or purpose, is guilty of embezzlement."

[1] In advancing her position that in the case of a county employee accused of embezzling public funds, proof of a violation of Section 504, Penal Code, may not be made under an information charging a violation of Section 487(1), appellant argues she should have been charged under Section 504. This contention, of course, is predicated on the supposition that the monies appropriated by her were public funds, an assumption not justified on the record before us or under the law. The funds in question were deposited with Karl Houlton, Probation Officer, who was designated the Court Trustee. Pursuant to court order they were paid by private parties directed by the Domestic Relations Court in divorce and other proceedings to pay for the support of their minor children, for transmittal to the private persons for whose benefit the funds were ordered. Defendant, a county employee, and an agent of the Court Trustee, received the funds at the cashier's window. She gave receipts therefor, indicating for whose account the money was received by her, in the name of Karl Houlton, Court Trustee. Later each day she turned the monies over to the Central Cashier, which were transmitted by him to the County Auditor, who issued warrants to those entitled to them and on whose accounts the money was credited.

The evidence rules out any serious contention that the monies were of a "public fund" nature, to be used or held for a public purpose; but is entirely compatible with the private use or purpose for which their payment was ordered and received, to wit, child support. It is well known that this method of enforcing support orders is employed by our courts to avoid argument between private parties who are already estranged to such a point as to require litigation. The time during which this money is held by the Trustee, the facility through which the money is paid, is no longer than is necessary for the machinery of transmittal to operate. None of the money was paid by way of a fine or through a probation order to become county or state revenue. We fail to see how appellant could seriously argue that the money appropriated by her under the circumstances at bar constituted "public funds."

[2] Although it is obvious from a careful reading of Section 504, the cases construed thereunder, and various punitive provisions relative thereto, that the Legislature intended the embezzlement or defalcation of public funds by a public officer to be included in that section, the term "public" in connection with the property subject to appropriation is not used. That a prosecution under Section 504 could not be limited exclusively to embezzlement of "public" monies is borne out by the absence of any direct reference thereto, and the inclusion therein of the appropriation by private persons of *any property* belonging to any association, society or corporation of either a public or private nature.

It seems clear therefore not only from a factual consideration of the record before us but from a reasonable interpretation of Section 504 that public funds were in no way involved in the instant prosecution and the defendant was not charged either directly or indirectly with appropriation thereof. It was the theory of the pleader in the trial of the case, and the proof so showed, although the evidence admits certain elements of a crime under Section 504 in that defendant was a county employee and agent of the Court Trustee and that she embezzled trust funds she had taken on behalf of her principal, that there was clearly a violation of Section 487(1).

[3] However, even were the monies of a public nature, we find no merit to appellant's contention that there is such a "qualitative difference" between grand theft under Section 487(1) and one of the offenses defined in Section 504, (embezzlement of public funds by a public employee) as to preclude a conviction under Section 487(1), where appellant was charged by way of information with the one crime and tried upon the theory that she committed another. It is answered by the holding in People v. Murakami, 122 Cal.App. 221, 9 P.2d 583, 584. There, defendant was charged with grand theft under Section 484 in that he "unlawfully took the property of the Fresno Mutual Savings Association, a voluntary association, consisting of the sum of $300.-25 * * *." The offense consisted of taking money that he as Treasurer of the organization had collected from one of the members of the association to whom a loan had been previously made. It was argued that the information charged grand theft under Section 484 while the case was tried upon the theory that a crime had been committed under Section 504, and that the information should have been drawn with particular reference to the latter section. After tracing the legislative history of Section 484, defining theft, the court found that it included the offense which was more particularly described in Section 504; and citing People v. Fewkes, 214 Cal. 142, 4 P.2d 538, held that the information need not state the kind of grand theft with which the defendant is charged (People v. Manchell, 91 Cal.App. 788, 267 P. 718), on the theory that under the new procedure it is unnecessary and improper to compel the district attorney in advance of the proof to elect upon what theory the prosecution is to proceed, whether it be larceny, embezzlement, etc. The court relied upon People v. Myers, 206 Cal. 480, 275 P. 219, holding that distinctions in the charge and proof were purposely eliminated to simplify pleading procedure and to relieve the courts from the necessity of drawing fine distinctions to determine whether the particular crime charged had been proved.

Section 484, Penal Code, defining theft, includes larceny, embezzlement, false pretenses and kindred offenses. Theft is divided into degrees, grand and petit (Section 486, Penal Code) and Section 487 defines grand theft. The word "embezzlement" is to be read as if the word "theft" were substituted therefor (Section 490a) and Section 503 defines embezzlement as the fraudulent appropriation of property by a person to whom it is entrusted. Construing all of these sections together, it is clear that grand theft under Section 487(1) is included in theft as defined in Section 484, which in turn includes the crimes described in Section 504, which are species of theft (People v. Murakami, 122 Cal.App. 221, 9 P.2d 583).

The "qualitative difference" relied upon by appellant consists of greater punishment, disabilities relating to franchise and eligibility for public office and availability of probation. It appears to us that had the Legislature intended the wrongful appropriation of public funds under Section 504 to be dealt with separately and differently from monies of a public or private association or corporation also included therein, it would not have classed the two kinds of theft in the same section; and in accordance with the Murakami case, supra, which held that the offenses defined in Section 504 are included in the crime of theft, it follows that the embezzlement of public funds is also included. We note, too, that the so-called "qualitative distinction" pointed out by appellant does not relate to the substantive offense, the essentials common to both embezzlement and theft being the unlawful taking of funds or property belonging to another. The sections relating to punishment, disability and probation relate exclusively to matters material only *after* conviction of a person who by virtue of his official capacity and the nature of the funds taken is treated somewhat differently. We believe this in no way alters the liberal rule laid down in the Murakami case, supra, and we cannot permit the so-called "distinction" which does not relate to the substantive offense to rule out the existence of a crime when the guilt of the defendant is manifest.

[4] In addition, it appears from the record before us that appellant at all times was fully apprised of the exact nature of the offense with which she was charged, and no claim of prejudice has been or can be sustained in that connection. Knowing the content of the information filed against her, and of the testimony taken at the preliminary hearing, she voluntarily stipulated the latter could constitute the plaintiff's case at the trial, upon which she relied to present her defense. Appellant has failed to show how or in what way she has suffered prejudice and we find none to her resulting from the court's alleged error.

Closely related to the issue raised by appellant that she should have been charged with embezzlement of public funds, are the remaining claims that there was a fatal variance between the information and proof, and the evidence is insufficient to support the conviction of grand theft.

[5-8] As already pointed out herein, the evidence before us supports no charge of material variance, for the taking of personal property as alleged in the information was exactly what was proved at the trial in accordance with the theory of the pleader that the funds were not of a public nature. This is borne out factually and under well-established rules of entrustment. Of course, the question of variance arises only if we assume there was proof of the taking of public funds under Section 504. We hold that the evidence negates such a supposition, but assuming only for the purpose of appellant's contention that the monies were of a public nature and proof thereof constituted a variance, we fail to find it to be material, or such as to render the judgment subject to reversal. Appellant has not established that she was in any way misled in making her defense or that any substantial rights were in any manner adversely affected by the variance between the proof and the charge. She even now makes no claim that she did not know the offense with which she was charged or the testimony presented against her by the People. Nor does the record show that she objected at the time of trial to the alleged variance or requested any continuance for the purpose of otherwise preparing her defense (People v. Cook, 136 Cal.App.2d 442, 288 P.2d 602). We agree that the purpose of an information is to notify the accused of the charge he is to meet at the trial (Section 952, Penal Code; People v. Massey, 151 Cal.App.2d 623, 312 P.2d 365), however, the record shows that appellant knew in advance of the accusation she must meet. She argues that she may be placed in double jeopardy by being again charged with the same offense, and that a prosecution under this information

will not bar a future prosecution under Section 504. Even assuming that the monies she appropriated were of a public nature, it occurs to us that if, for any of the acts found in the record at bar, she is ever charged with embezzlement of public funds under Section 504 she will be entitled to a plea of double jeopardy (People v. Bechtel, 41 Cal.2d 441, 260 P.2d 31), and may show former jeopardy by the evidence produced in this case. Extrinsic evidence is admissible on the trial to identify the offense under which defendant has already been convicted. (People v. Braddock, 41 Cal.2d 794, 264 P.2d 521; People v. Williams, 27 Cal.2d 220, 163 P.2d 692).

[9, 10] Relative to appellant's remaining contention that the evidence is insufficient to support the conviction of grand theft, our attention has been drawn to the cases of People v. Borchers, 199 Cal. 52, 247 P. 1084, and People v. Hewlett, 108 Cal.App.2d 358, 239 P.2d 150, cited for the proposition that there must be an intent on the part of the accused to deprive the owner of his property. Appellant claims that the money appropriated by her did not actually belong to Karl Holton.

Any contention under the evidence that appellant was not acting as an agent of and for and on behalf of the Court Trustee, in receiving and holding the support monies, is not well made. As to her claim that the People must prove the money actually belonged to Karl Holton, we hold that under the facts in this case it is not necessary for the prosecution to establish money title in the trustee. Any argument concerning who actually owned the money is immaterial since it cannot be intelligently disputed on the evidence that during the time the shortage occurred the defendant had the monies in her possession, or under her control, by virtue of the trust agreement her principle had with the courts wherein he was designated as Court Trustee. People v. Hewlett, 108 Cal.App.2d 358, 239 P.2d 150, simply sets out the elements of embezzlement and did not discuss at any length the issue of the ownership in the property by the principle. In People v. Borchers, 199 Cal. 52, 247 P. 1084, there is language indicating that under a charge of embezzlement it must be shown that the property taken belonged to the alleged principal. The facts therein were quite different from those at bar. In addition the case was decided on other grounds. In People v. Applegate, 91 Cal.App.2d 163, 204 P.2d 689, in which defendant was charged with grand theft under Section 484 with having taken the personal property of the United Flower Growers' Association, a corporation, consisting of $9,800, the question of ownership of the money was raised. The court concluded that defendant held it as a trustee, and held that any legally recognizable interest is sufficient to sustain an averment of ownership in and prosecution for embezzlement of property held by a trustee. The Applegate case relied on People v. Torp, 40 Cal.App.2d 187, 104 P.2d 542, in which certain funds were delivered by Austin to defendant to pay to Gaines for the purchase of certain property. Defendant delivered the deed to Austin and appropriated the money. The information did not allege to whom the money belonged, and appellant contended it was necessary for the prosecution to establish legal title to the money. The court held that the evidence showed an entrustment, and that title to the money need not be absolute, for any legally recognizable interest is sufficient. It was held that to establish legal title thereto was not necessary and that it was sufficient if the money was given to defendant by Austin as a trust fund for a specific purpose. Said the court in 40 Cal.App.2d at page 193, 104 P.2d at page 544, "Whether the legal title to the money was in the Austins, the Gaines, or Mrs. Costa, is immaterial in this criminal proceeding. As far as the defendant is concerned he had no legal title to the money and his possession was for a limited purpose only. He cannot, in defense of his act, raise the question of titles as between others."

In the trial defendant did not attempt to show, nor does she claim before this court that ownership of the money was elsewhere than in the Court Trustee, or that she did not act as the agent of the Trustee in receiving the funds. We deem it not material since the fact of entrustment with the Probation Officer is clear.

For the foregoing reasons the judgment and the order denying motion for a new trial are, and each is, affirmed.

WHITE, P. J., and FOURT, J., concur.

172 Cal.App.2d 94

Larry Deane BROODING, Plaintiff, Cross-Defendant and Respondent,

v.

Gay BROODING, Defendant, Cross-Complainant and Appellant.

Civ. 18493.

District Court of Appeal, First District, Division 2, California.

July 17, 1959.

Hearing Denied Sept. 11, 1959.

Proceeding upon motion of wife to set aside default judgment of annulment in favor of husband on ground that judgment was taken against wife through her mistake, inadvertence, surprise, or excusable neglect. The Superior Court, County of Contra Costa, Thomas F. Fraga, J., entered order denying the motion, and wife appealed. The District Court of Appeal, O'Donnell, J. pro tem, held that where trial court had erroneously entered the default judgment, but there was unexplained delay of four and one half months between date that one of husband's attorneys notified one of wife's attorneys that the judgment had been taken and date defendant filed notice of the motion, trial court was required to deny the motion.

Affirmed.

1. Pleading 🔑120(1)

Where answer to first amended complaint contained denials which were responsive to allegations of second amended complaint, answer was sufficient to put in issue allegations of second amended complaint.

2. Judgment 🔑106(3)

Where answer to first amended complaint was sufficient to put in issue allegations of second amended complaint, default judgment made against defendant for failure to plead to second amended complaint was not void but only voidable.

3. Judgment 🔑143(3)

Error of trial court in granting default judgment against defendant, who had failed to plead to second amended complaint but whose denials and answer to first amended complaint were sufficient to put in issue allegations of second amended complaint, would be sufficient to warrant conclusion that judgment had been taken against defendant through mistake, inadvertence, surprise, or excusable neglect. West's Ann.Code Civ.Proc. § 473.

4. Judgment 🔑153(1)

Where trial court had erroneously entered default judgment against defendant, but there was unexplained delay of four and one half months between date that one of plaintiff's attorneys notified one of defendant's attorneys that the judgment had been taken and date defendant filed notice of motion to set aside the default on ground that judgment had been taken through mistake, inadvertence, surprise, or excusable neglect, trial court was required to deny defendant's motion. West's Ann. Code Civ.Proc. § 473.

5. Marriage 🔑65

In action by husband for annulment, pendency of wife's cross complaint for divorce and husband's answer did not deprive trial court of power to render default judgment for annulment.

6. Marriage 🔑67

Effect of decree of annulment is to declare that no valid marriage ever existed.

7. Marriage ⚷65, 66

In hearing on motion of wife on ground of mistake, inadvertence, surprise or excusable neglect to set aside default judgment of annulment in favor of husband, evidence of illicit relations between wife and third person during pendency of litigation was not relevant and should not have been admitted, but error was not prejudicial in view of fact that there was other evidence on which to base finding that wife was not entitled to the relief sought. West's Ann.Code Civ.Proc. § 473.

8. Appeal and Error ⚷931(6)

It is presumed on appeal that trial court, sitting without jury, did not base its finding on irrelevant evidence where there was competent evidence to support it.

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Robert H. Kroninger, Oakland, for appellant.

Edwards & Friborg, Oakland, for respondent.

O'DONNELL, Justice pro tem.

This is an appeal from an order denying defendant's motion under Section 473 of the Code of Civil Procedure to set aside the default and default judgment entered upon the second amended complaint for annulment of the marriage of plaintiff and defendant.

Plaintiff filed an original complaint for annulment. After a demurrer thereto was sustained he filed a first amended complaint which set forth two separate grounds for annulment: 1) That he was of the age of eighteen years at the time of his marriage and that the marriage was entered into without the written consent of plaintiff's parents; and 2) That plaintiff's consent to the marriage was obtained by force. Defendant filed an answer to the first amended complaint in which she denied all its material allegations. She also filed a cross-complaint for divorce. Plaintiff answered the cross-complaint.

Thereafter, plaintiff filed a second amended complaint. Defendant did not answer or otherwise plead to the second amended complaint. Her default in that regard was entered by the clerk and thereafter a default judgment annulling the marriage on the ground that plaintiff was under age and lacked parental consent was rendered by the trial court.

The default judgment was entered on September 27, 1957. The uncontradicted affidavit of Darrell B. Edwards, one of plaintiff's attorneys, avers that on or about October 15, 1957 he notified Philip L. Evans, one of defendant's attorneys, that plaintiff had obtained a default decree of annulment. It was not until March 4, 1958 that defendant filed a notice of motion to set aside the default.

Defendant contends that having filed an answer to the first amended complaint the denials of which were such that they were also responsive to the allegations of the second amended complaint, the case was thus at issue and that the default judgment was therefore void. (Defendant did not advance this contention at the hearing of her motion below. She there asserted that there had been no service of the second amended complaint—an assertion which was countered by plaintiff with substantial evidence to the contrary and which was impliedly found by the lower court to be untrue.)

[1, 2] Defendant is correct in her contention that her answer to the first amended complaint was sufficient to put in issue the allegations of the second amended complaint. Gray v. Hall, 203 Cal. 306, 265 P. 246. However, the case just cited also holds that a default judgment made under such circumstances is not void but only voidable. There it was sought, in a mandamus proceeding, to collaterally attack a default judgment which had been entered notwithstanding an answer had been filed to the original complaint the denials of which were sufficient to traverse the allegations of the amended complaint. In disposing of the contention that the judg-

ment under attack was void the court said: (203 Cal. at page 315, 265 P. at page 251)

> "Although the court in the original action committed error which would have called for reversal on appeal, it had acquired jurisdiction to act in the premises long before its commission, and, its judgment having become final without appeal or other direct attack, it is now conclusive against this collateral attack, whether the matter was rightly or wrongly decided as to the matters presented or which should have been presented on the hearing. (Citation) Where jurisdiction has attached, any irregularities thereafter occurring merely render the judgment erroneous or voidable."

And on pages 316–317, of 203 Cal. on page 252, of 265 P., the court further says:

> "It cannot be denied that, in those cases in which judgments have been rendered without any or insufficient service, or where the party not only has had no opportunity to answer, but is so ignorant of any proceeding against him as not to have been able to avail himself of the remedies which the law gives him until he has lost them all, the judgment is absolutely void. Such a judgment may be attacked at any time, directly or collaterally. (Citation) But it is a fundamental principle, everywhere prevailing, that where a court has jurisdiction of the person of the parties and the subject-matter of the controversy submitted to it by them, its judgment thereon cannot be impeached collaterally or otherwise than by some form of direct attack, although it may appear on the face of the record that error was committed by the court in determining the question."

[3,4] So in the instant case the trial court erred in granting a default judgment. Such judicial error on the part of the trial court was undoubtedly sufficient to warrant the conclusion that the judgment was taken against defendant through her "mistake, inadvertence, surprise or excusable neglect" (Code Civ.Proc. § 473). However, in order to qualify for relief from the default judgment, "application for such relief must be * * * made within a reasonable time, in no case exceeding six months, * * *" (Code Civ.Proc. § 473) In Benjamin v. Dalmo Mfg. Co., 31 Cal. 2d 523, 190 P.2d 593, the Supreme Court had occasion to construe the "reasonable time" provision of section 473. In that case it appeared that an office secretary of defendant, misunderstanding the instructions of one of her superiors, filed a summons and complaint in the office files instead of forwarding the documents to defendant's attorney for attention. In due course a default judgment was taken against defendant. Defendant's officers learned of the default judgment the day following its entry, located the misfiled documents, and immediately forwarded them to defendant's attorney. However, no action was taken to open the default for a period of more than three months. No explanation was given in the trial court for the three months' delay. The trial court granted defendant's motion to set aside the default, but the Supreme Court reversed, stating that while defendant's failure to file an answer within the time prescribed by law might be excusable because of the secretary's misunderstanding of her instructions, yet the defendant's failure to offer any explanation whatever for its delay in taking steps to set aside the default judgment was fatal to its motion. At page 532, of 31 Cal.2d at page 599, of 190 P.2d the court said: "To hold otherwise—that in the absence of any explanation a delay of more than three months in undertaking to open a default can be excused—would empower the trial court to dispense with the 'reasonable time' requirement of the statute." The same situation obtains in our case. Here we have an unexplained delay of four and one-half months between the time defendant's counsel was apprised of the default

judgment and the time proceedings were instituted to set it aside. Thus the trial court in the instant case was not merely justified in denying defendant's motion, it was its duty under legal compulsion to do so.

[5, 6] Defendant also contends that the trial court was powerless to render a default decree of annulment because of the pendency of defendant's cross-complaint for divorce and plaintiff's answer thereto. The contention is devoid of merit. The rule stated in Gray v. Hall, supra, relative to voidable judgments is again applicable. Moreover, the effect of a decree of annulment is to declare that no valid marriage ever existed. Millar v. Millar, 175 Cal. 797, 167 P. 394, L.R.A.1918B, 415. In Withers v. Superior Court, 91 Cal.App. 735, 267 P. 547 (cited with approval in Sefton v. Sefton, 45 Cal.2d 872, 291 P.2d 439) the court said (91 Cal.App. at pages 736–737, 267 P. at page 547): "The judgment of annulment terminated the court's authority to enforce payment of alimony accruing thereafter. Having decided that the marriage was a nullity, the status of the parties after the entry of that judgment was not such that they could be divorced any more than as though they had never been married." So in the case at bar, the fact that an action for divorce was pending, by virtue of defendant's cross-complaint, could not in any wise affect, nor be affected by, plaintiff's cause of action for annulment.

[7, 8] Finally, defendant contends that the trial court committed prejudicial error in admitting testimony at the hearing of her motion relating to illicit relations had between defendant and one Radloff during the pendency of this litigation. The evidence had no relevancy to the issues presented by defendant's motion to set aside the default and should not have been admitted. However, it is well settled that "* * * it is presumed on appeal that the court, sitting without a jury, did not base its finding on irrelevant evidence where there is competent evidence to support it." Southern California Jockey Club v. Cal. Horse Racing Bd., 36 Cal.2d 167, 176, 223 P.2d 1, 7.

The judgment is affirmed.

DOOLING, Acting P. J., and DRAPER, J., concur.

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172 Cal.App.2d 688

PEOPLE of the State of California, Plaintiff and Respondent,

v.

George MUNIZ, Defendant and Appellant.

Cr. 6667.

District Court of Appeal, Second District, Division 2, California.

Aug. 7, 1959.

Defendant was convicted of possession of heroin. The Superior Court of Los Angeles County, Richard C. Fildew, J., entered judgment, and the defendant appealed. The District Court of Appeal, Fox, P. J., held that where police officers were informed by informant that defendant was going to make a delivery of heroin on second floor of certain hotel, and officers went to hotel where they saw defendant, and one of the officers, who had had experience and training in the narcotic field, noticed discoloration and marks over vein areas on defendant's arms and was of opinion that discoloration and marks were caused by narcotic injections, officers could reasonably conclude that defendant was using narcotics and were justified in arresting him without a warrant, and heroin found in defendant's hand by officers was properly admitted in prosecution for possession of heroin.

Judgment affirmed.

1. Arrest ⚷63(4)
Criminal Law ⚷394.4(9)

Where police officers were informed by informant that defendant was going to make a delivery of heroin on second floor of certain hotel, and officers went to hotel where they saw defendant, and one of the officers, who had had experience and training in the narcotic field, noticed discoloration and marks over vein areas on defendant's arms and was of opinion that discoloration and marks were caused by narcotic injections, officers could reasonably conclude that defendant was using narcotics and were justified in arresting him without a warrant, and heroin found in defendant's hand by officers was properly admitted in prosecution for possession of heroin. West's Ann.Pen.Code, § 836; West's Ann.Health & Safety Code, §§ 11500, 11721.

2. Criminal Law ⚷742(1), 1158(1)

It is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which a determination depends.

3. Criminal Law ⚷1158(1)

A reviewing court cannot reject the testimony of a witness if the testimony has been believed by the trier of fact, unless there exists either a physical impossibility that it is true or its falsity is apparent without resorting to inferences or deductions.

4. Criminal Law ⚷627½

Where informer merely points the finger of suspicion at defendant, and arrest of defendant thereafter is based solely on officers' observations, which reasonably led officers to believe that a public offense was being committed in their presence, identity of informer is not required to be revealed.

◆

Manuel Valenzuela and Julius Weled, Los Angeles, for appellant.

Stanley Mosk, Atty. Gen., Jack E. Goertzen, Deputy Atty. Gen., for respondent.

FOX, Presiding Justice.

Defendant was convicted of violating section 11500, Health and Safety Code (possession of heroin). Defendant's application for probation was denied and he was sentenced to the state prison.

On August 28, 1958, Officers Barber and Stephensen, of the Los Angeles Police Department Narcotic Division, received a telephone call from an informant that the defendant was going to make a delivery of heroin on the second floor of a hotel at 221 West 3d Street, Los Angeles. A description of the defendant was also furnished. As a result of this information, the officers went to this hotel at approximately noon and stationed themselves in a hallway restroom. They waited about thirty minutes and then saw the defendant in the hallway. As he approached the door to the restroom, the officers stepped out, and Barber said, "Stand still, we're police officers." Defendant backed away rapidly and Stephensen took hold of defendant's wrists, as his hands were in his pockets. Defendant was wearing a short sleeved shirt. Barber testified that as the defendant was backing away, he noticed discoloration and marks lying over the vein areas on the defendant's arms. Barber stated that as a result of experience and training in the narcotic field, he was of the opinion that the marks he observed on the defendant's arms "were caused by injections of a substance into the main veins of the arms similar to what" he had seen "many times caused by narcotic heroin injection into the main veins." At this point, Officer Stephensen said, "You're under arrest." In defendant's left hand he had a piece of pink tissue paper containing 51 capsules of heroin. Officer Barber declined to reveal the name of the informant, at which time defense counsel moved to strike all of Barber's testimony relating to the possible cause for making the arrest. The motion was overruled. Defense counsel asked Barber the following question: "So then it is true, then, Officer, that the only reason you made the arrest of the defendant is you saw some marks on his arms as he was backing away from you, and then that caused you to suspect that he was on narcotics or had something to do with narcotics?" Barber answered, "Yes."

Defendant objected to the introduction into evidence of the heroin obtained from him at the time of his arrest on the ground that it was illegally obtained in that the officers had no search warrant and that the officers had no reasonable grounds upon which to believe a felony was being committed or that they saw a misdemeanor being committed. This objection was overruled. The defendant was found guilty.

As grounds for reversal, defendant argues "that the court erred by admitting into evidence narcotic drugs which were the subject matter of an illegal search and seizure, the fruits of an unlawful arrest made without probable cause."

Penal Code, section 836, provides in part:

> "A peace officer * * * may, without a warrant, arrest a person;
>
> "1. Whenever he has reasonable cause to believe that the person to be arrested has committed a public offense in his presence."

[1] Health and Safety Code, section 11721, makes it a misdemeanor for any person to use narcotics. From the appearance of the defendant's arms, the officers could reasonably conclude that he was then using narcotics in violation of section 11721, a misdemeanor; such would justify an arrest without a warrant.

In People v. Coleman, 134 Cal.App.2d 594, 599, 286 P.2d 582, 583, it is stated that "a search without a warrant is valid where it is incidental to a lawful arrest, if it is reasonable and made in good faith, and a seizure, during such a search, of evidence related to the crime is permissible." In re Dixon, 41 Cal.2d 756, 761–762, 264 P.2d 513; Harris v. United States, 331 U.S. 145, 151, 67 S.Ct. 1098, 91 L.Ed. 1399; United States v. Rabinowitz, 339 U.S. 56, 61, 70 S.Ct. 430, 94 L.Ed. 653.

The defendant's arrest was lawful and the search was made as an incident thereto. Nothing in the record suggests that the search was not made in good faith or that it was unreasonable either in scope or manner of execution. It follows, therefore, that the heroin was properly received in evidence.

[2, 3] Defendant questions the credibility of Barber's testimony. In particular, he contends that the officer could not, due to the lighting in the hallway and his distance from the defendant, reasonably believe defendant was a user prior to his arrest. The record, however, reveals no inherent improbability in Barber's testimony. As stated in People v. Cahan, 141 Cal.App.2d 891, 897, 297 P.2d 715, 718: "It is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which a determination depends. A reviewing court cannot reject the testimony of a witness that has been believed by the trier of fact unless there exists either a physical impossibility that it is true or its falsity is apparent without resorting to inferences or deductions." See also People v. Roberts, 47 Cal.2d 374, 378, 303 P.2d 721.

[4] Lastly, it should be noted that it is not necessary to reveal the identity of an informer who merely points the finger of suspicion at a defendant and an arrest thereafter follows which is based solely upon observations made by law enforcement officers which reasonably led them to believe a public offense was being committed in their presence. Scher v. United States, 305 U.S. 251, 254, 59 S.Ct. 174, 83 L.Ed. 151; People v. Williams, 51 Cal.2d 355, 359, 333 P.2d 19; People v. Amado, 167 Cal.App.2d 345, 334 P.2d 254; People v. Smith, 166 Cal.App.2d 302, 333 P.2d 208.

The judgment is affirmed.

ASHBURN and HERNDON, JJ., concur.

171 Cal.App.2d 816

Grace CORSO, Plaintiff and Appellant,

v.

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES, a National Banking Association, as Executor of the Estate of Walter P. Story, also known as W. P. Story, and also known as Walter Perry Story, Deceased, Defendant and Respondent.

Civ. 23677.

District Court of Appeal, Second District, Division 1, California.

July 9, 1959.

Hearing Denied Aug. 31, 1959.

Action for injuries sustained by plaintiff in an office wherein the owner died after the commencement of the action. From an adverse judgment of the Superior Court of Los Angeles County, William E. Fox, J., the plaintiff appealed. The District Court of Appeal, White, P. J., held that plaintiff's testimony as to the circumstances of her injury was inadmissible under the Dead Man's Statute which is not unconstitutional as applied to plaintiff.

Judgment affirmed.

1. Witnesses 🔑125

The object of the Dead Man's Statute is to prevent the plaintiff from having an unfair advantage against the dead man's estate. West's Ann.Code Civ.Proc. § 1880, subd. 3.

2. Witnesses 🔑167

The Dead Man's Statute prevents plaintiff from testifying to matters of fact which occurred before the death of the decedent, and the statute is applicable to things occurring without the decedent's presence as well as to those in which he may have participated. West's Ann.Code Civ.Proc. § 1880, subd. 3.

3. Statutes 🔑220

In view that no amendment has been made to the Dead Man's Statute, an indication is made that the Legislature has not intended to change the express meaning of that statute as interpreted by the courts. West's Ann.Code Civ.Proc. § 1880, subd. 3.

4. Witnesses 🔑167

In action for injuries sustained by tenant in an office building where subsequent to the commencement of the action the owner died, testimony of tenant as to how the injury occurred was inadmissible under the Dead Man's Statute. West's Ann.Code Civ.Proc. § 1880, subd. 3; West's Ann. Code Civ.Proc. § 2055.

5. Trial 🔑413

In action by tenant for injuries sustained in an office building owned by defendant who died subsequent to the commencement of the action, fact that plaintiff's deposition reciting the circumstances of the injury was read into the evidence did not bar her from complaining of the action of the trial judge in applying the Dead Man's Statute where the deposition was used as only the next best thing and not as the most desirable evidence. West's Ann.Code Civ.Proc. § 1880, subd. 3.

6. Constitutional Law 🔑311
Witnesses 🔑126

The California Dead Man's Statute which prohibited injured tenant from testifying as to circumstances of her injuries in action against deceased owner of office building is not unconstitutional as denying due process. West's Ann.Code Civ.Proc. § 1880, subd. 3; West's Ann.Const. art. 1, § 13; U.S.C.A.Const. Amend. 14.

7. Constitutional Law 🔑55

The Legislature has the right to control the general competency of witnesses and the subject of their testimony, but a court cannot be empowered to make a party a competent witness contrary to the general law.

◆

Robert B. Heggen, Los Angeles, for appellant.

Moss, Lyon & Dunn, Sydney A. Moss, Henry F. Walker, Los Angeles, for respondent.

WHITE, Presiding Justice.

This is an action for personal injuries, allegedly caused by the negligence of decedent and his employees. The cause was tried before a jury which returned a verdict in favor of defendant executor. Plaintiff's motion for a new trial was denied. From the adverse judgment entered upon the verdict, plaintiff prosecutes this appeal. Subsequent to the commencement of this action on November 17, 1955, and on June 18, 1957, the orginal defendant, Walter P. Story, died, and included in his estate was a large office building in downtown Los Angeles, within which the alleged injuries sustained by plaintiff were incurred. Defendant bank was appointed executor of the estate of Mr. Story, and by subsequent order of the court below, was substituted as defendant for Walter P. Story. Plaintiff filed her verified creditor's claim with defendant bank, as said executor.

Plaintiff's "First Amendment of First Supplemental Complaint For Personal Injuries" (plaintiff's only pleading appearing in the record on appeal) reveals that for her cause of action plaintiff alleged that at all times here pertinent, the decedent, Walter P. Story, prior to his death was the owner and operator of that certain building bearing his name, and located at 610 South Broadway, in the city of Los Angeles. That plaintiff, a licensed practitioner of physical therapy, was employed for herself and also as an independent contractor, by Dr. Fred J. Petrone, and that as an associate of the latter, plaintiff was a tenant in said building, occupying Room 809, on the eighth floor thereof. That on said eighth floor, the decedent provided washroom facilities for the tenants and their guests. That about 12:30 p. m. on January 27, 1955, plaintiff had occasion to enter the women's washroom. That in leaving said washroom, plaintiff walked therefrom, "in a reasonably careful and circumspect manner, and in the said hallway outside the door to the said women's washroom, the plaintiff slipped on water laying on the marble floor in the said hallway outside the said women's washroom, and fell to the said marble floor of the said hallway with great force and violence." That as a result thereof, plaintiff suffered very serious and permanent injuries.

It was further alleged that plaintiff's injuries were the direct result of the "carelessness and negligence of Walter P. Story, deceased and his servants and employees, * * * in that water was allowed to be and remain on the said marble floor upon which tenants and tenants' clients, associates, guests, and other persons having business therein, might walk and slip, causing great and extensive injury to themselves and their person;".

The trial of this action commenced June 24, 1958. As her first witness, plaintiff called Mary Gonzales, under Section 2055 of the Code of Civil Procedure. This witness was a matron and janitress employed at the Story Building, and among her duties were included the cleaning of the men's and women's restrooms. She testified that on the day of the alleged accident she was using a pump on a stopped toilet bowl in the women's restroom on the eighth floor. The witness recalled seeing plaintiff on that occasion. That when she saw plaintiff opening the door of the restroom slowly and looking in, the witness told plaintiff not to come in but the latter "walked in pretty fast right to the next (toilet) stall". Water had overflowed "right around the bowl" where the witness was working, "but there was no water no other place but right there". The water in the stall where the witness was working extended about two inches around the base of the bowl. Mrs. Gonzales further testified that after plaintiff entered the restroom she remained in the second stall about two minutes, during which time the witness continued working as aforesaid in the first stall. As to the conduct of plaintiff after she emerged from the second stall, Mrs. Gonzales testified:

"Q. Pardon me. What did she do after she left the second stall? A. She ran outside, out of the stall and stood by the basin and lifted her leg up and over her knee she rolled her stocking down and she said she got scratched and she pulled it up again in a hurry and walked out in a very—in a hurry, too.

"Q. Did you see her knee? A. No, I didn't.

"Q. Did you see her as she walked out? A. I did. I seen her walk out in a hurry. She got hurt in there. She fell and slipped.

"(The reporter read the answer.)

"The Witness: That is what she said, she slipped and fell.

"Q. Did you hear a noise, thud or any noise as though someone had fallen? A. No. I could have seen her right from the other stall if she had fell."

When plaintiff was called as a witness in her own behalf she testified as to her occupancy of Room 809 of the Story Building, the nature and methods of her work as a physical therapist, and the location of the ladies' restroom on the eighth floor. Then the following ensued:

"Q. (By Mr. Heggen, attorney for plaintiff): Now, on January 27, 1955 did you have an occasion to leave Room 809 and go to the ladies toilet?

"Mr. Moss (attorney for defendant): Now, if your Honor please, I shall object to any testimony as to matters or facts occurring before the death of the late Walter P. Story, the original defendant in this action upon the grounds that this plaintiff is not competent to testify to any such matter or fact by reason of Section 1880, subdivision 3 of the Code of Civil Procedure * * *.

"The Court: I will sustain the objection."

After some discussion in chambers outside the presence of the jury, concerning the foregoing ruling and the refusal of the trial judge to reverse it, plaintiff's counsel offered in evidence the deposition of plaintiff taken on March 7, 1956 with the request that he be permitted to read the same to the jury, to which defendant interposed an objection upon the grounds "* * * first, that the testimony of the plaintiff herself has been held to be barred by Section 1880, subdivision 3 of the Code of Civil Procedure, and if the testimony of the witness herself is not admissible then certainly a deposition of this same witness would not be admissible, and that, furthermore, I submit that it, too, is barred by Section 1880, subdivision 3 of the Code of Civil Procedure * * *". The objection was overruled and plaintiff's deposition was read to the jury. Plaintiff then resumed the witness stand and testified, over defendant's objection, to matters and facts occurring subsequent to the death of Mr. Story, concerning the nature of her injuries.

Plaintiff also produced Ann O'Brien who testified concerning her observations as to plaintiff's condition after the latter returned to the office. This witness was also a physical therapist and worked in the same office as did plaintiff. She testified she was in the office when plaintiff returned from the restroom on the day here in question. That plaintiff was limping and "Her ankle looked like it was red, looked like there might be blood under the surface of the skin, like a broken vein. It was a bruise, red and her knee, on the side of her knee as I looked at it was red and she had a bump on the side of her head by the temple." That plaintiff "* * * was sitting down holding her head. That is how I first noticed there was a lump on the head. Then I observed the rest of her ankle and her knee where she had fallen on the left side and she looked like she was in a daze, like she had been hurt." That plaintiff was in a dazed condition, and appeared to be in pain. The witness further testified that about 45 minutes after plaintiff's return to the office from the restroom, the witness went down the hall to obtain a drink of water; that in so doing she passed by the ladies' restroom, and "I noticed marks like there had been water and someone—the way I explain it, it was like mud, dried or—or like water, foot steps, several of them and then a streak like a skid. * * * "Well, to explain it, it was just like if you walked on some water and then stepped onto something and then made marks. That is the best way I could describe it because I didn't—Then there was skid marks. It could have been several foot prints. It might have been. It was blotchy like you could see —I noticed— * * * They were all together like in this area." That there was a "damp" spot on plaintiff's uniform; that plaintiff was wearing a "nurse's shoe" with a rubber sole. On cross-examination the witness was asked, "My question is, did you see anything wet on the floor when you went out there 45 minutes later?", to which she replied, "Well, I couldn't say one way or another".

We have set out in some detail the testimony of the last witness because plaintiff's counsel urges that she "was confused and vague in her testimony * * * was not sure whether she saw water in the hall or not, and exactly where", all of which added to the prejudice sustained by plaintiff when she was denied the right to testify as to the conditions prevailing in the restroom and on the hallway floor when plaintiff allegedly slipped and fell.

Because of the importance it will assume in the consideration of the legal problems presented on this appeal, we deem it advisable to briefly summarize plaintiff's deposition which was received in evidence and read to the jury. Plaintiff testified therein that on January 27, 1955, about 11:30 or 12:00 o'clock, she went to the women's restroom. She had used the restroom on previous days but this was the first time on this date. The hallway floors were marble. In approaching the restroom, she did not look down and did not notice any water or foreign substance on the floor. In entering the restroom itself, she first felt water when first she stepped her foot in. She did not lose her balance. She went on in and used the facilities. The matron came in; in fact she was standing at the doorway with mop in hand and she opened the door for plaintiff. Both of them walked right into the water. There was water on the restroom floor, mostly in front and in the first booth. It was clear water. Plaintiff went into the second stall. She was inside the restroom door when she first noticed water. As she left, she went to the door to the hall, opened it, and next found herself sailing through the air and down on the floor. When she was leaving the matron was in the first stall with the stall door open. The hall door was closed. It opened to the inside. She had put her first foot down on the outside of the door when she fell. The inside was damp from being mopped but it was not flooded. Her first step outside on the marble was when she fell. She does not recall again seeing water on outside as she started out. It was on her first step that she fell. She did not remember looking at the floor outside. She remembers that she did not look at the floor outside the restroom as she walked out. As she went out the door, she was not looking at anything—just to open the door and walk back to the office. She remembers skidding and that she lit on her left side. Her uniform was wet on the left side. She did not notice any water around her as she lay on the floor. She got up and went back into the restroom to tell the matron that she had fallen. She did not know whether the matron heard her or not as the matron made no reply. Plaintiff went back to her office. She saw no one until she went back into her office. After plaintiff got up, she did not observe the condition of the floor nor did she on her way back to her office. She was stunned but had no difficulty as far as the condition of the floor was concerned in walking over the floor outside the restroom this time. She told the manager of the building about it the next day. (Plaintiff then deposed about her injuries.) As she went into the restroom, she first noticed any water when she was standing in it with both feet. There was nothing on the outside that she could notice because the matron was standing there with the mop and she opened the door and plaintiff followed her in. Plaintiff went inside the door and there first noticed the water.

"Q. You did not at any time see any water outside the door, as far as you remember? A. As far as I remember, I didn't see because I didn't look down.

"Q. But you don't remember standing in any water outside the door, either? A. No, I don't."

She was inside the door when she first noticed she was standing in water. She did not look back around to the outside then. When she came out of the stall, she noticed the matron had mopped between the first stall and the door to the hall but the area was still damp. There was quite a bit of water toward the wall of the first booth. Plaintiff did not go in that area; only through or in the area that was still quite damp. Then she went out the restroom door and on her first step felt herself flying through the air. She did not at any time see any water or other foreign substance in the area where her body landed or where her foot was or where her foot was when it went out from under her. Her uniform was damp but not dripping—not enough water to wring out. She did not change her uniform that day when she went back to the office but kept on the same uniform (except during the period she received some ultrasonic treatment) to finish the day.

"Q. * * * (A)s I understand it, you did not at any time see any water outside the restroom door as such? A. I didn't look down. That's right.

"Q. You did not see any or notice any, or notice you were standing in any water? A. That's right."

[1] As her first ground for reversal of the judgment appellant earnestly urges that the trial court erred in denying her the right to testify as to how the injury occurred for the reasons set forth in Subdivision 3 of Section 1880 of the Code of Civil Procedure, which denies a party the right to testify upon a claim or demand against the estate of a deceased person, "as to any matter of fact occurring before the death of such deceased person". Appellant urges that the cases which construe this code section concern situations in which both the plaintiff and the decedent took an active personal part in the transaction involved, be it a contract or a tort. That the obvious object of the statute is to "prevent the plaintiff from having an unfair advantage against a dead man's estate".

Appellant further argues that the instant action does not parallel any case that can be found in that herein the deceased defendant Story knew nothing of the facts of this case except what was reported to him, and therefore, there is no testimony that could have been given by decedent Story were he living, that could have refuted that which would be given by appellant as to the immediate circumstances surrounding the happenings which occasioned appellant's alleged injuries.

In the recent case of Trabin v. Title Ins. & Trust Co., 52 Cal.2d 149, 339 P.2d 136, 137, our Supreme Court thus epitomizes the historical background surrounding the statute here in question:

"At early common law witnesses having a direct pecuniary or proprietary interest in the outcome of a case were disqualified on the theory that permitting them to testify would often lead to perjury which would go undetected and that more injustice would result from receiving their testimony than from excluding it. In the nineteenth century this general disqualification was recognized to be unsound and was abolished by legislative reform. However, in this country, unlike England, an exception was made, and the common law rule was to varying extents kept in force with respect to cases involving the estates of deceased persons by statutes like subdivision 3 of section 1880. The exception was apparently based on the view that, because the lips of a decedent were sealed, there was too great a danger that interested survivors would take advantage of his estate. (For historical discussion see 2 Wigmore on Evidence (3d ed. 1940), pp. 674, 695–701; Chadbourn, History and Interpretation of the California Dead Man Statute: A Proposal for Liberalization, 4 U.C.L.A.L.Rev. 175.)

Writers in the field of evidence have vigorously attacked such legislation, reasoning in substance that it represents an anomalous retention of a discredited common law doctrine and is productive of injustice at least as great as, and more concrete than, the evil sought to be prevented. (See 2 Wigmore on Evidence (3d ed. 1940), pp. 695–701; McCormick on Evidence, pp. 142–144; Chadbourn, History and Interpretation of the California Dead Man Statute: A Proposal for Liberalization, 4 U.C.L.A.L.Rev. 175, 206 et seq.; Hale, The California 'Dead Man's Statute,' 9 So.Cal.L.Rev. 35, 43 et seq.)"

The court then goes on to say: "This court has been reluctant to extend the effect of subdivision 3 of section 1880 beyond what is compelled by its language and in many cases has narrowly construed the statute against the disqualification of a witness and in favor of the admissibility of evidence. (Citing cases.)"

The question then arises whether a witness in the position of appellant, is disqualified as a witness, upon any sound basis when subdivision 3 of section 1880, Code of Civil Procedure, is considered in the light of its background and purpose.

As stated in Moul v. McVey, 49 Cal. App.2d 101, 105, 121 P.2d 83, 86: "The object of the statute is to so balance rights as between the survivor and the deceased that no advantage may be taken of a deceased person because of the fact that his lips are sealed by death, and that the personal representative may not take advantage of the survivor."

Appellant relies upon the case of Sweet v. Markwart, 158 Cal.App.2d 700, 323 P. 2d 192, which was an action wherein decedent died after the commencement thereof, but prior to trial. Pending suit and prior to his death, decedent's deposition had been taken. After death of defendant, an executor of his estate was appointed. The holding was that the decedent's deposition could be used by plaintiff against the estate. It was further held that, as to matters which decedent had made denial in his deposition, i. e., concerning which he had testified, the plaintiff would be competent to testify. In the case just cited, the court, 158 Cal. App.2d at page 711, 323 P.2d at page 200 quoting from Coble v. McClintock, 10 Ind.App. 562, 38 N.E. 74, stated, "'We think, when it is made to appear that the decedent has testified in a manner known to the law, and that his testimony is available to his estate, the reason for closing the mouth of the living party has ceased to exist, and when the reason ceases the rule should cease also.' See also annotation, 158 A.L.R. 306. Under such circumstances there is no advantage to the adverse party by permitting him to testify against the estate as to matters denied by the decedent because the denial of the decedent is available to the estate." Appellant also cites the case of Moul v. McVey, supra, 49 Cal.App.2d at page 106, 121 P.2d 83, holding that when the deposition of the survivor is *taken by the executor or administrator,* whether it is read in evidence upon the trial or not, opens the door for the survivor to testify. In the instant case appellant's deposition was not taken by the executor, but during the lifetime of decedent Story. Also cited is McKee v. Lynch, 40 Cal.App.2d 216, 227, 104 P.2d 675, relied upon by the trial court in admitting into evidence appellant's deposition.

Based upon the foregoing cases, appellant urges that they emphasize the provisions of Civil Code, Section 3510, "When the reason of a rule ceases, so should the rule itself".

Appellant correctly states that there is in the record the following testimony of Mary Gonzales, the matron and janitress at the Story Building:

"Q. Did you know Mr. Story? A. Yes, sir.

"Q. Did he ever give you any direct instructions himself? A. No.

"Q. Was he present on this occasion on January 27, 1955, as far as you know? A. No."

and the testimony of appellant as given in her deposition as follows:

"Q. Did you see anyone else from the time that you fell until you went back in your office? A. No.

"Q. Other than the matron? A. I did not see anyone."

It is appellant's contention that since it was established that decedent Story was not present at the time of the accident, knew nothing of it, that, if alive at the time of trial, he could give no testimony in refutation of appellant's version of how the accident occurred. Therefore, says appellant, "* * * the reason for closing the mouth of the living party has ceased to exist and when the reason ceases the rule should cease also." But to sustain appellant's argument and reasoning in support thereof we would be required to overrule the holding in Stuart v. Lord, 138 Cal. 672, 676, 677, 72 P. 142. This was an action to recover for services rendered to a decedent during his lifetime. Testifying as a witness for the administrator of decedent's estate, a Mrs. Baun related a conversation which she had with plaintiff outside the presence of decedent, wherein plaintiff stated to the witness that the former was "receiving * * * the sum of $15 per month, and the profits for the sale of butter and eggs which were produced on the ranch" which compensation was considerably lower than the amount plaintiff claimed per month for the services by her law suit. Plaintiff sought to take the stand and refute by her testimony the making of such a statement. The trial court ruled that she could not do so in face of objection predicated on the statute here in question.

In holding that the trial court did not err in sustaining the objection to this testimony, the Supreme Court stated (138 Cal. at pages 676, 677, 72 P. at page 143):

"* * * It cannot be said that the testimony here offered would not tend to establish the plaintiff's claim or demand. An admission of the plaintiff against her interest, and in contradiction of an important allegation of the complaint upon which issue was joined, namely, the value of her services, is clearly evidence tending to defeat a large part of the asserted claim, reducing it in this case from $840 to $360. This evidence having been given, it appears to be equally clear that the plaintiff's testimony to the effect that she did not make the admissions would tend directly to establish so much of her claim as the other testimony tends to defeat. Such testimony cannot be said to arise incidentally, any more than any other evidence directly upon the issues. It certainly comes within the very terms of the statutory provision. Neither can it be said that the spirit or object of the statute justified a departure from its letter. It is true that it may be a hardship upon the plaintiff to be prevented by the law from contradicting the testimony of third persons as to admissions *not made in the presence of the deceased,* but, on the other hand, it can be said with equal force, that it is a hardship on the estate that the deceased is prevented by death from denying any admissions against his interest which witnesses for the plaintiff may testify were made by him in his lifetime. The manifest object and purpose of the statute is to put them on an equal footing in respect to such evidence. And, besides, *there is nothing in the statute to indicate that its effect was intended to be limited to things which occurred in the presence of the deceased.* The language is, 'any matter or fact occurring before the death of the deceased,' and *this applies as well to things occurring without his presence as to those in which he may have participated.* * * *". (Emphasis added.)

[2] Manifestly, in the case now engaging our attention appellant sought to testify to matters of fact which occurred before the death of decedent Story and this is what the statute forbids, and it is applicable as well, as stated in Stuart v. Lord, supra, 138 Cal. at page 677, 72 P. at page 144 "* * * to things occurring without his (decedent's) presence as

to those in which he may have participated". See also Vonchina v. Estate of Turner, 154 Cal.App.2d 134, 136, 137, 315 P.2d 723.

[3, 4] While it is true as urged by appellant that if she "* * * had called Mr. Story on a deposition before he died, and had asked him if he was present on the eighth floor of his building on January 27, 1955, between 12:00 and 1:00 P. M., and he said, 'No,' then under the Sweet case, (Sweet v. Markwart, supra), plaintiff could testify in person. Because of the technicality of not having gone through this procedure, plaintiff now cannot testify.", but this modification in favor of the admissibility of evidence is predicated, as stated in the Sweet case, on the premise, as therein stated, that when, "the decedent has testified in a manner known to the law, and that his testimony is available to his estate, the reason for closing the mouth of the living party has ceased to exist, and when the reason ceases the rule should cease also". [158 Cal.App.2d 700, 323 P.2d 200.] No such situation exists here. While through the years various changes have been made by the legislature in the probate code with regard to an action against the executor upon a claim or demand against the estate, it is noteworthy that notwithstanding these changes, no amendment has been made to Section 1880, subdivision 3, and this would strongly indicate that the legislature has not intended to change the expressed meaning of that statute as interpreted by the courts.

The foregoing conclusion at which we have arrived, and since the judgment was in favor of respondent, renders it unnecessary to consider the latter's contention that the court erred in permitting appellant's deposition to be read into evidence over respondent's objection. Suffice it to say that upon the authority of and for the reasons stated in McKee v. Lynch, supra, 40 Cal.App.2d at pages 226, 227, 104 P.2d 675 (hearing denied by the Supreme Court), the ruling of the trial court was correct.

[5] We are not in accord with respondent's contention that since appellant's deposition was read into evidence, she cannot be heard to complain of the action of the trial judge in applying the provisions of the Code of Civil Procedure, section 1880, subdivision 3, because she was not prejudiced in that, "In her deposition, appellant described fully what occurred, just what she did observe, and what was not observed." As stated by appellant, "The deposition was used as only the next best thing and not as the most desirable evidence"; that she was entitled to "an opportunity to elaborate upon, and give in more detail, evidence concerning matters touched upon in her deposition, which was by way of answer to defendant's questions, on Code of Civil Procedure, Section 2055." We have herein set forth in some detail the contents of appellant's deposition, and from a reading thereof, we are satisfied that had the court erred in applying the restrictions of Code of Civil Procedure, section 1880, subdivision 3, to appellant's testimony it could not reasonably be urged that the judgment should be affirmed because no prejudice ensued to appellant from such ruling.

[6] Finally, appellant urges that if Code of Civil Procedure, section 1880, subdivision 3, prohibits her from testifying under the facts of this case, it is unconstitutional as applied thereto, and offends against the Constitution of California, Article I, section 13, and the due process clause of the United States Constitution as contained in the Fourteenth Amendment thereto. Appellant states that, "No cases have been found either in California, or other jurisdictions, giving specific application of this principle to the same or similar type of case as this." However, appellant argues that these constitutional provisions require a "fair hearing", and that the restriction placed upon appellant's testimony herein denied her equal protection under the law to present "vital evidence" to the jury.

We are satisfied that appellant's claim of unconstitutionality of the statute in question cannot be sustained.

[7] In 11 Cal.Jur.2d, Const.Law, Section 219, p. 633, it is stated: "Again, the right to testify in the courts of the state is not a privilege or immunity protected by the Fourteenth Amendment, and the state legislature has the power to declare who shall be competent to testify, and to regulate the production of evidence in the state courts." And in 16 C.J.S. Constitutional Law § 128, p. 532, we find the following: "The legislature has the right to control the general competency of witnesses and the subjects of their testimony; but a court cannot be empowered to make a party a competent witness contrary to the general law." In Vonshina v. Estate of Turner, supra, 154 Cal.App.2d at page 136, 315 P.2d at page 725 the court said that the "statute is supported by sound public policy and was wisely adopted in the interests of justice".

Pertinent to appellant's challenge to the constitutionality of subdivision 3 of section 1880 of the Code of Civil Procedure, is the language of the court in Fleming v. Superior Court, 196 Cal. 344, 351, 238 P. 88, 91, "As well might it be contended that section 13 of article I is violated by section 1881 of the Code of Civil Procedure, which provides that husband and wife may not testify against each other, that an attorney may not testify against his client, that a priest may not as a witness betray the secrets of the confessional, that a physician may not testify against his patient, and that a public officer may not be examined as to communications made to him in official confidence, for a prohibition against all such persons testifying *against* certain parties includes, necessarily, a prohibition against their testifying *in favor* of those opposed to such parties. The same might be said as to other enactments which make various kinds of 'natural' evidence incompetent. Practically all rules of evidence are exclusionary (Jones Ev., § 1), and it has never been doubted that the Legislature has power to declare certain 'natural' evidence inadmissible, or to declare certain persons incompetent as witnesses, either on grounds of public policy, or for the purpose of conducing to the despatch of business in the courts."

The judgment is affirmed.

FOURT and LILLIE, JJ., concur.

Hearing denied; WHITE, J., not participating.

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172 Cal.App.2d 126

Application of DOWNER CORPORATION, a California Corporation, for an Order Directing Arbitrators to Proceed and for the Appointment of a Third Arbitrator.

DOWNER CORPORATION, a California Corporation, Petitioner and Respondent,

v.

UNION PAVING COMPANY, a Nevada Corporation, Respondent and Appellant.

Civ. 9616.

District Court of Appeal, Third District, California.

July 17, 1959.

Hearing Denied Sept. 11, 1959.

Proceeding on petition for an order fixing attorneys' fees for services of petitioner's counsel on an appeal from an order confirming an arbitration award. From a judgment of the Superior Court, San Joaquin County, M. G. Woodward, J., awarding petitioner attorneys' fees, the defendant appealed. The District Court of Appeal, Warne, J. pro tem., held that where joint venture agreement provided for arbitration of dispute and that cost of arbitration should be borne equally by both parties but in event either party found it necessary to bring an action at law to enforce its rights, court should award successful party reasonable counsel fees, costs of arbitration, which were to be borne equally by the parties, were limited to actual costs of arbitration and not to court costs, and appeal from order confirming award was no part of arbitration and successful party was entitled to counsel fees for services rendered on appeal from order confirming arbitrators' award.

Judgment affirmed.

Van Dyke, P. J., dissented.

1. Joint Adventures 🔑4(1)

Where written joint venture agreements provided for arbitration of disputes and that costs of arbitration should be borne equally by both parties and that in event either party found it necessary to bring action at law to enforce its rights under agreement court should award successful party reasonable counsel fees, petitioner for appointment of a third arbitrator to settle a dispute could not be expected to know at time of filing its petition that defendant would appeal from an order thereafter made confirming award of arbitrators, and petitioner did not at that time have a cause of action for attorneys' fees for defending against appeal, and petitioner was not compelled to plead its costs and disbursements on appeal in its petition for appointment of a third arbitrator.

2. Joint Adventures 🔑4(1)

Where joint venture agreement provided for arbitration of dispute and that costs of arbitration should be borne equally by both parties, but in event either party found it necessary to bring an action at law to enforce its rights, court should award successful party reasonable counsel fees, costs of arbitration, which were to be borne equally by parties, were limited to actual costs of arbitration and not to court costs, and appeal from order confirming award was no part of arbitration, and successful party was entitled to counsel fees for services rendered on appeal from order confirming arbitrators' award.

3. Costs 🔑172

Costs do not include attorneys' fees.

* * *

Everett S. Layman, San Francisco, Kenneth S. Carey, Everett S. Layman, Jr., and Arthur J. Lempert, San Francisco, of counsel, for appellant.

Gordon J. Aulik, Stockton, for respondent.

WARNE, Justice pro tem.

This is an appeal from a judgment awarding respondent attorneys' fees for services of its counsel on an appeal from an order confirming an arbitration award.

In 1948 the parties entered into two written joint venture agreements, under the terms of which appellant was to furnish the capital and respondent the labor for performance of two construction contracts. The agreements, among other things, provided:

> "If any question should arise concerning the interpretation of this Agreement or any matter arising therefrom, said question or matter shall be left to the determination of a Board of Arbitrators. Each party shall appoint one arbitrator and these two shall appoint a third arbitrator. The decision of any two arbitrators shall be binding upon both parties hereto, and the cost of arbitration shall be borne equally between both parties."

After completion of the construction work in 1951, appellant refused to account for the profits. After unsuccessful negotiations for settlement, each party appointed an arbitrator, but the two were unable to agree upon the appointment of a third. Thereupon on March 13, 1952, respondent filed a petition herein seeking the appointment of a third arbitrator. Over appellant's objection the third arbitrator was appointed. On July 14, 1954, the arbitrators' award was signed and a notice of motion to confirm was filed. The award was confirmed on October 19, 1954. An appeal from the order of confirmation was taken on December 11, 1956. This court affirmed the order. Downer Corp. v. Union Paving Co., 146 Cal.App.2d 708, 304 P.2d 756. Thereafter appellant unsuccessfully sought a rehearing in this court, a hearing in the Supreme Court of the State of California, and a review by the Supreme Court of the United States. The remittitur from this court was filed on February 19, 1957, and on February 20 respondent filed its memorandum of costs and disbursements on appeal and included therein attorneys' fees in an amount to be fixed by the court pursuant to notice of a motion therefor filed therewith. Upon appellant's objections and motion, the motion for an order fixing the fees was dismissed but with leave to respondent to file a supplemental complaint or petition for fees. In accordance with said leave of court, respondent filed a petition for an order fixing attorneys' fees in accordance with the following provision of the joint venture agreements:

> "In the event either party finds it necessary to bring an action at law to enforce its rights hereunder, it is agreed that the Court shall award the successful party reasonable counsel fees."

After a hearing on the petition and the objections thereto, the trial court made an order fixing attorneys' fees but only for those services of respondent's counsel which were rendered after the taking of the appeal from the order confirming the arbitrators' award. On this appeal from said order appellant's main contentions are that the trial court had no jurisdiction to entertain a petition for attorneys' fees; that respondent waived its right to attorneys' fees by proceeding to arbitrate rather than bringing an action at law to enforce its rights; that respondent's claim is barred by the statutes of limitations; and that respondent's right to attorneys' fees is merged in the judgment affirming the award of the arbitrators, and respondent is barred by that judgment.

[1] Appellant maintains that respondent could not for the first time assert its right to attorneys' fees when it filed its memorandum of costs and disbursements on appeal but was compelled to plead the same in its petition for appointment of a third arbitrator which was filed on March 13, 1952, and that the statute of limitations commenced to run from that date. There is no merit in this contention. Obviously the respondent could not then know that an appeal would be taken from the order thereafter made confirming the award of the arbitrators. Neither at law nor under the provision for attorneys' fees contained in the joint venture agreements did respondent at that time have a cause of action for attorneys' fees for defending against the appeal from the order confirming the award of the arbitrators. It was not until after October 24, 1954, when appellant filed its notice of appeal from the order of confirmation, that counsel performed any services which were compensable under the agreements between the parties. The court in Genis v. Krasne, 47 Cal. 2d 241, 248, 302 P.2d 289, 293, in discussing Stockton Theatres, Inc. v. Palermo, 124 Cal.App.2d 353, 268 P.2d 799, stated: "[W]hen costs are awarded on appeal, the memorandum of costs on appeal is filed and taxed in the trial court (Code Civ. Proc., § 1034), and if a party is entitled to attorneys' fees on appeal, they can be determined by the trial court when it determines the costs on appeal. (See Cirimele v. Shinazy (1954) 124 Cal.App.2d 46, 53, 268 P.2d 210; Oakland Calif. Towel Co. v. Rowland (1949) 93 Cal.App.2d 713, 718–719, 209 P.2d 854.)"

In the Oakland Calif. Towel Co. case, supra, the court said, at page 719 of 93 Cal.App.2d, at page 858 of 209 P.2d: "It was further stated in the [Painter v. Estate of] Painter case, 78 Cal. [625] at page 627, 21 P. [433] at page 443: 'This authority given the court could only be exercised when the fee now in dispute was to be allowed by an order made after final judgment, and allowance is necessarily an incident to such judgment when given against the claimant as plaintiff in the action.' In accordance with the above, the trial court, if it be so inclined, may allow a *reasonable* fee for services on appeal. [Paragraph.] The judgment is affirmed. The motion for counsel fees on appeal may be filed within thirty days from the date of the filing of the remittitur." See also 14 Cal.Jur.2d, Damages, sec. 105, page 726.

Gerard v. Salter, 146 Cal.App.2d 840, 848, 304 P.2d 237, 242, upon which appellant relies, is not in point. There the attorneys' fees which were sought to be recovered at the time of the confirmation of the award were largely for services rendered in connection with the hearing before the board of arbitrators. No services on appeal were, or could be, then involved.

[2, 3] Appellant argues that respondent did not bring an action at law to enforce its rights but elected to proceed to arbitration and that, therefore, under the joint venture agreements, he was not entitled to counsel fees, as it was therein provided that "the cost of arbitration shall be borne equally between both parties. It is too well established to require citation of authority that "costs" do not include attorneys' fees. In the Gerard case, supra, wherein the contract authorized the arbitrators to "assess costs and charges of the arbitration upon either or both parties" but provided that if suit were brought "in court to 'enforce the terms thereof any judgment awarded shall include court costs and reasonable attorneys' fees to the successful party'" it was held that the provision for attorneys' fees related only to services in the court proceedings and not to those services rendered in connection with the hearing before the arbitrators. Similarly herein it must be held that the "costs of arbitration," which were to be borne equally by the parties, were limited to the actual costs of the arbitration and not to the court costs and fees of counsel thereafter incurred by reason of the court action to enforce the arbitration award. The arbitration ceased and ended with the award. The appeal from the order confirming it was no part of the arbitration. The issue of the right to attorneys' fees did not arise until after the arbitrators concluded their hearing and after the award granted by them had been affirmed. Since the parties to this action in their contract agreed that the court shall award the successful party reasonable counsel fees in the event that either party found it necessary to bring an action at law to enforce its rights under the arbitrators' award, the parties themselves invested the court with jurisdiction to allow reasonable attorneys' fees.

The judgment is affirmed.

SCHOTTKY, J., concurs.

VAN DYKE, Presiding Justice.

I dissent. Unless specially provided for by statute attorneys' fees are an element of damages ancillary to a cause of action to enforce some contractual right. Genis v. Krasne, 47 Cal.2d 241, 302 P.2d 289. Like any other element of damages they must be pleaded when the party claiming the same first institutes court action to enforce his claims. Genis v. Krasne, supra. The right to recover attorneys' fees depends upon the contract in the particular case and whether or not the contractual conditions antecedent to a valid claim for attorneys' fees are present is a proper issue to be submitted when the action is brought to enforce contractual rights. For instance, in the case before us the agreement as to attorneys' fees made it a condition precedent to recovery that the party claiming them had found it "necessary to bring an action at law to enforce its rights." It might well have been a disputed issue as to whether the application for a judgment confirming the arbitrators' award was necessary to the enforcement of the applicant's rights. Other affirmative defenses might exist. The right to attorneys' fees ought to have been pleaded and an award of attorneys' fees ought to have been requested as a part of the relief to be granted in the proceeding. That is the usual procedure and I see nothing in the situation here which justifies any exception to the general practice. As said in Genis v. Krasne, supra, 47 Cal.2d at page 246, 302 P.2d at page 292:

> "* * * Such fees cannot be allowed a successful litigant without pleading and proof (or admission) that there is a contract provision for them.

> This is so whether the successful party is plaintiff [citing cases] or defendant * * *" See also Brooks v. Forington, 117 Cal. 219, 48 P. 1073, and Prescott v. Grady, 91 Cal. 518, 522, 27 P. 755.

I think that in order to recover attorneys' fees it was necessary for respondent herein to tender the issue of its right to such fees as a part of the relief it claimed upon making its application to the court for a judgment confirming the arbitrators' award. Not having done so it relinquished its right.

The failure of respondent to plead its right to attorneys' fees and demand appropriate relief in the trial court brings into play another well-settled rule of law, that of estoppel by judgment. A judgment concludes the parties as to all issues that are settled thereby and also as to those issues which might have been settled by the judgment had they been pleaded and presented to the court. Sutphin v. Speik, 15 Cal.2d 195, 202, 99 P.2d 652, 101 P.2d 497; Dobbins v. Title Guarantee & Trust Company, 22 Cal.2d 64, 70, 136 P.2d 572; Brunswig Drug Company v. Springer, 55 Cal.App.2d 444, 449–450, 130 P.2d 758; De Hart v. Allen, 26 Cal.2d 829, 830–831, 161 P.2d 453. The doctrines of res judicata and estoppel by judgment apply to proceedings in court in respect of arbitrations. Section 1292 of the Code of Civil Procedure provides with respect to the judgment confirming the award:

> "The judgment so entered has the same force and effect, in all respects, as, and is subject to all the provisions of law relating to, a judgment in an action; and it may be enforced, as if it had been rendered in an action in the court in which it is entered."

The doctrine of res judicata was applied in respect of a judgment rendered in connection with arbitration in Goldkette v. Daniel, 70 Cal.App.2d 96, at pages 98–99, 160 P.2d 145, at page 146. In this case, since the right to attorneys' fees could have, and as I have said ought to have, been tendered as an issue in the main action when application was made for a confirmatory judgment, the right to attorneys' fees stands as adjudicated against respondent. In that proceeding respondent could not withhold any proper issue nor split its demands so as to retain the right to litigate in later proceedings. Akin to the foregoing are these further considerations. There was but one "action at law" begun and prosecuted by respondent. The fact that an appeal was taken did not and could not constitute a new action. Section 1049 of the Code of Civil Procedure provides that:

> "An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed * * *"

As said in Sharon v. Hill, 9 Cir., 26 F. 337, 346:

> "The effect of this provision appears to be that the judgment in the court below is only a step in the proceeding to a final judgment in the appellate court in case of an appeal, * * *." To the same effect see Pacific Gas & Electric Co. v. Nakano, 12 Cal.2d 711, 714, 87 P.2d 700, 121 A.L.R. 417.

Any suggestion that because a plaintiff does not know an appeal will be taken he need not make or cannot make claim thereto until an appeal is in fact taken was rejected by the Supreme Court in Genis v. Krasne, supra, 47 Cal.2d at page 248, 302 P.2d at page 293, as follows:

> "* * * It is lessor's position that when the litigation concluded in their favor in the trial court they could only present evidence of services which had been rendered up to that time; they could not anticipate whether there would be an appeal and what attorneys' services would be required if there were. There is no such practical difficulty, for when costs are awarded on appeal, the memorandum of costs on appeal is filed and taxed in the trial court * * *, and if a party is entitled to attorneys' fees on appeal, they can be determined by the trial court

when it determines the costs on appeal."

I would reverse the judgment for attorneys' fees with directions to the trial court to enter judgment that respondent is not entitled to recover such fees.

172 Cal.App.2d 213

PEOPLE of State of California,
Plaintiff and Respondent,
v.
Arthur John DELASANTOS, Defendant and Appellant.
Cr. 2952.

District Court of Appeal, Third District,
California.
July 21, 1959.

Defendant pleaded guilty to charges of issuing checks without sufficient funds with intent to defraud and admitted two prior convictions. The Superior Court, Sonoma County, Charles J. McGoldrick, J., rendered judgment, and defendant appealed. The District Court of Appeal, Warne, J. pro tem., held that where defendant was granted a continuance for one week to get additional facts in support of motion for change of plea of guilty to not guilty, motion was presented upon ground that persons to whom checks were issued did not file complaints and that at least in one instance person to whom check was passed knew that defendant did not have any money, but defendant did not contend the plea of guilty was result of mistake, fraud, duress or overreaching of his free and clear judgment, denial of motion for change of plea was not an abuse of discretion.

Affirmed.

1. Criminal Law 🔑641(1)

Where counsel for defendant had represented him for some time prior to plea of guilty, counsel made some investigation of charges prior to advising defendant to plead guilty, and consulted defendant who was familiar with all of facts, defendant's plea of guilty was not made without full knowledge of consequences and without advice of counsel, and defendant was not denied his constitutional right to counsel. West's Ann.Const. art. 1, § 13.

2. Criminal Law 🔑641(1)

When it is claimed on motion for new trial or appeal in criminal case that defendant was inadequately represented by counsel at trial, question is whether he was substantially denied his constitutional right to be represented by counsel. West's Ann. Const. art. 1, § 13.

3. Criminal Law 🔑641(1)

Right to representation by counsel is one which courts will maintain absolutely and to full extent, but where an accused is represented by counsel and basis of his claim is that he received poor advice, indicative of poor judgment on part of his attorney, and acted thereon to his detriment, those facts, even if substantiated, do not amount to denial of right of representation. West's Ann.Const. art. 1, § 13.

4. Criminal Law 🔑641

Court-appointed counsel representing defendant accused of crime becomes attorney for defendant for all purposes of case and to same extent as if regularly retained and employed by defendant, generally. West's Ann.Const. art. 1, § 13.

5. Criminal Law 🔑274

Where defendant was granted a continuance for one week to get additional facts in support of motion for change of plea of guilty to not guilty, of issuing checks without sufficient funds with intent to defraud, motion was presented upon ground that persons to whom checks were issued did not file any complaints and that at least in one instance person to whom check was passed knew that defendant did not have any money, but defendant did not contend the plea of guilty was result of mistake, fraud, duress or overreaching of his free and clear judgment, denial of motion for change of plea was not an abuse of discretion. West's Ann.Pen.Code, § 476a; West's Ann.Const. art. 1, § 13.

6. Criminal Law ⚷274

Where defendant has been induced to enter plea of guilty solely on representations of his own counsel, he cannot on that account be permitted to withdraw it. West's Ann.Const. art. 1, § 13.

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Vincent W. Reagor, Sacramento, for appellant.

Stanley Mosk, Atty. Gen., by Gail A. Strader, Deputy Atty. Gen., for respondent.

WARNE, Justice pro tem.

On March 21, 1958, a complaint was filed charging the appellant with seven counts of issuing checks without sufficient funds with intent to defraud. Section 476a of the Penal Code. The complaint also charged two prior convictions consisting of a forgery conviction in 1947 and a robbery conviction in 1949.

Appellant, on being arraigned in the municipal court for the Santa Rosa Judicial District of Sonoma County, pleaded guilty as to each of the seven counts and admitted the two prior convictions. At that time he was represented by counsel appointed by the court who was also appointed to represent him in the superior court.

Upon his appearance in the superior court on April 25, 1958, appellant and his attorney requested a continuance for the purpose of permitting investigation and report of the probation officer. On May 9, 1958, the trial court heard arguments on the motion and determined that because of appellant's two prior felony convictions he was not eligible for probation (section 1203 Penal Code), and at that time appellant was granted one week's continuance in order to make a motion for change of plea. On May 16, 1958, appellant's motion to withdraw his plea of guilty and enter a plea of not guilty was denied. Probation was then ordered denied, and judgment was entered committing appellant to imprisonment in the state prison for the term prescribed by law. The trial court ordered that the sentences on all counts run concurrently. Defendant appeals from the judgment.

The record of the oral proceedings shows that on May 9 counsel, in arguing for the continuance, stated that he, as appellant's counsel, learned after appellant had entered his plea of guilty that no complaint had been made by the persons to whom the checks had been issued, and on May 16, 1958, he stated to the trial court that following the continuance he had "talked to three other complaining witnesses * * * to whom he had not talked prior to the Defendant's plea of guilty." He stated that "it was determined that they were unaware of any criminal proceedings pending * *" One of the witnesses had stated that he knew at the time he accepted the check that the defendant had no money and that on many prior occasions this person had always been able to obtain his money through the sheriff's office. Upon this statement alone counsel for appellant requested that appellant be permitted to change his plea, the ground being that the information then available to counsel indicated that these checks were accepted with knowledge that there were no funds to cover them. However counsel indicated to the court that he was unable to talk with some of the remaining complaining witnesses.

Appellant first contends that he was denied the effective aid of counsel guaranteed by the Constitution, Const. art. 1, § 13; and secondly, that the trial court abused its discretion in denying his motion for a change of plea. We have concluded that there is no merit in either contention.

Appellant contends that it is the duty of counsel to investigate carefully all the defenses of fact and law which may be available and to confer with the defendant about them before permitting him to plead guilty. He asserts that his counsel in the trial court was ineffective in this respect. In support of this argument he relies upon the case of People v. Avilez, 86 Cal.App.2d 289, 194 P.2d 829. That case is factually different from the one before us and is clearly distinguishable. In that case the defendant was deprived of the effective aid of counsel by action of the trial court. The opinion in that case points out that private legal counsel had been retained for the defendant, and such fact was known both to the prosecution and the court. It was also known that such private legal counsel had been delayed in reaching the court. Nevertheless the proceedings there were accelerated by the court and the prosecution by the appointment of a deputy public defender to represent the defendant. This deputy public defender then merely acted *pro forma* and permitted the defendant to enter a plea of guilty immediately without any investigation of the facts or consultation with his client other than to advise him to plead guilty.

[1] In the instant case there is nothing to show that defense counsel had not had an opportunity to consult with and advise appellant. To the contrary, the record indicates that counsel for the appellant had represented him for some time prior to the plea of guilty. There is an indication that counsel did make some investigation of the charges prior to advising appellant. He also consulted appellant who was familiar with all the facts. It therefore may not be said that the plea of guilty was made without full knowledge of the consequences and without the advice of counsel.

In People v. Rainey, 125 Cal.App.2d 739, 271 P.2d 144, the court held that a defendant was not deprived of effective legal assistance when he was advised by his counsel to plead guilty to a robbery charge in a municipal court and stipulated in the superior court that the crime was one of first degree, in the absence of any showing that the advice and stipulation were not in accord with the facts as known to the defendant.

[2, 3] Similarly, in People v. Logan, 137 Cal.App.2d 331, 335, 290 P.2d 11, 13, the court said: "When it is claimed on motion for a new trial or appeal in a criminal case that the defendant was inadequately represented by counsel at the trial, the question is whether he was substantially denied his constitutional right to be represented by counsel. The right to representation is one which our courts will maintain 'absolutely and to the full extent'. People v. Avilez, 86 Cal.App.2d 289, 194 P.2d 829, 833; In re Major, 135 Cal.App.2d 405, 287 P.2d 359. But where an accused is represented by counsel and the basis of his claim is that he received poor advice, indicative of poor judgment on the part of his attorney, and acted thereon to his detriment, those facts, even if substantiated, do not amount to a denial of the right of representation. People v. Miller, 114 Cal. 10, 45 P. 986; People v. Lennox, 67 Cal. 113, 7 P. 260; People v. Kirk, 98 Cal.App.2d 687, 220 P.2d 976; People v. Gilbert, 25 Cal.2d 422, 154 P.2d 657; People v. Ynostroza, 105 Cal.App.2d 332, 232 P.2d 913; People v. Morton, 100 Cal.App.2d 269, 223 P.2d 259."

[4] Further, as stated in People v. Wein, 50 Cal.2d 383, 410, 326 P.2d 457, 473: "The handling of the defense by counsel of the accused's own choice will not be declared inadequate except in those rare cases where his counsel displays such a lack of diligence and competence as to reduce the trial to a 'farce or a sham.' [Citing cases.]" While the Wein case involved counsel of the accused's own choice, and the instant case involves court-appointed counsel, such court-appointed counsel to represent defendant accused of a crime "generally speaking * * * 'becomes the attorney for said defendant for all purposes of the case and to the same extent as if regularly retained and employed by the defendant.'" In re Atchley, 48 Cal.2d 408, 418, 310 P.2d 15, 22.

Applying the rules of law as hereinabove stated to the instant case, the record does not support appellant's contention that he was denied his constitutional right to counsel.

[5] Nor did the court abuse its discretion in denying appellant's motion for a change of plea. When the motion was first presented the trial court, at the request of

the appellant's counsel, granted a continuance for one week to enable appellant's counsel to get additional facts in support of the motion. The motion, when made, was presented upon two grounds—first, that the persons to whom the insufficient funds checks were issued had not filed any complaints against the appellant, and that some of them did not know that a criminal proceeding was pending against appellant; and secondly, that in at least one instance, the person to whom the check was passed knew that the appellant did not have any money and that on prior occasions he had always gotten his money through the sheriff's office. When the motion was again before the court following the continuance, appellant's counsel stated to the court that he had talked to three other complaining witnesses and that "it was determined that they were unaware of any criminal proceedings pending in this matter or of any knowledge that any criminal complaint was being made. One of the witnesses has stated that he knew at the time that the checks were issued that the Defendant had no money and that on many prior occasions he always gotten [sic] his money through the Sheriff's office * * * I did not talk to the shoe repairman, I tried to reach him but I was unable to do so."

[6] Upon this record the trial court did not abuse its discretion in denying appellant's motion for change of plea. An application to withdraw a plea of guilty is addressed to the sound discretion of the trial court. People v. Griggs, 17 Cal.2d 621, 624, 110 P.2d 1031; People v. Griffin, 100 Cal.App.2d 546, 224 P.2d 47; People v. Lamb, 64 Cal.App.2d 409, 148 P.2d 873. Appellant does not contend that his plea of guilty was the result of mistake, fraud, duress or the overreaching of his free and clear judgment, and it is conceded that where a defendant has been induced to enter a plea solely on the representations of his own counsel he cannot on that account be permitted to withdraw it. People v. Butler, 70 Cal.App.2d 553, 161 P.2d 401. Appellant relies entirely upon the case of People v. Avilez, supra, which we have hereinabove distinguished from the instant case.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

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172 Cal.App.2d 248

C. H. KERSHAW, Richard Kershaw, C. H. Kershaw, Jr., and Kershaw & Sons, Inc., a corporation, Plaintiffs and Respondents,

v.

MARYLAND CASUALTY COMPANY, a corporation, Defendant and Appellant.

Civ. 5874.

District Court of Appeal, Fourth District, California.

July 22, 1959.

Hearing Denied Sept. 16, 1959.

Action by insureds to recover damages alleged to have been sustained as result of breach of contract by insurer in refusing to defend action against insureds. From adverse judgment of the Superior Court, Imperial County, Elmer W. Heald, J., the insurer appealed. The District Court of Appeal, Mussell, Acting P. J., held that where insureds entered into contract for handling and processing of entire job of processing partially destroyed sugar beet pulp for cattle feed and insureds' supervision of processing ended when beet pulp had been sacked and left to be picked up by owner thereof, and insureds had nothing to do with it after it was sacked, and fire destroyed all of sugar beet pulp, some of which was still being dried and processed and some of which had already been sacked, beet pulp that had been processed and sacked and set aside for owner was not under custody and control of insureds at time it was destroyed and such beet pulp was not within scope of exclusion clause of comprehensive liability policy excluding coverage with his respect to property in the care, custody or control of insureds.

Judgment affirmed.

1. Insurance 🔑560(1)

Where policy required that when accident occurred written notice should be given by or on behalf of insureds to insurer or any of its authorized agents as soon as practicable and insureds immediately after fire notified authorized agent of insurer, insurer could not complain as to notice given when there was no evidence that authorized agent required any further or different notice or that the insurer objected promptly and specifically that notice of action against insureds was not timely given. West's Ann.Insurance Code, § 554.

2. Insurance 🔑434

Where insureds entered into contract for processing partially destroyed sugar beet pulp for cattle feed and insureds' supervision of processing ended when beet pulp had been sacked and left to be picked up by owner thereof and insureds had nothing to do with it after it was sacked, and fire destroyed all of sugar beet pulp, some of which was still being dried and processed and some of which had already been sacked, beet pulp that had been processed and sacked and set aside for owner was not under custody and control of insureds at time it was destroyed and such beet pulp was not within scope of exclusion clause of comprehensive liability policy excluding coverage with respect to property in the care, custody or control of insureds.

3. Insurance 🔑514

Where complaint filed against insureds seeking $120,510 charged that insureds negligently supervised, directed and managed processing of beet pulp, which was destroyed by fire, and insurer improperly refused to defend insureds in that action, insureds had right to make any reasonable and bona fide compromise of action against them and settlement entered thereon was presumptive evidence of liability of insureds and amount thereof and settlement of action for $12,000 plus attorneys' fees was not unreasonable.

4. Insurance 🔑514½

Where suit was instituted against insureds to recover damages for destruction of beet pulp allegedly caused by negligence of insureds in processing and handling of beet pulp and insurer denied liability under comprehensive policy and refused to defend action and an amended complaint was served on insureds but such complaint was never served on insurer, insurer could not escape liability on ground that its duty to defend was based on amended complaint.

5. Insurance 🔑514½

Attorneys' fees in sum of $1,417.15 for defending action brought against insureds for over $120,000 was reasonable.

6. Trial 🔑295(1)

Where instructions as a whole sufficiently state the issues, no prejudicial error results.

7. Appeal and Error 🔑1064(1)

In action by insureds against insurer to recover damages alleged to have been sustained by insureds as result of breach of contract to insure by refusal of insurer to defend action brought against insureds, no prejudicial error resulted from giving instruction that if insurer denied liability insureds were free to defend on their own account and had right to settle liability against them and that burden was on insurer to overcome presumptive evidence that settlement made by insureds was reasonable and made in good faith.

8. Insurance 🔑669(9)

In action by insureds to recover damages alleged to have been sustained as result of breach of contract to insure by insurer's refusal to defend action against insureds, evidence was sufficient to warrant instruction permitting jury to find that there may have been a waiver on part of insurer by its conduct in denying liability under the policy.

◆

Dickenson, Sattinger & McKee, El Centro, for appellant.

Horton, Knox & Carter, El Centro, for respondents.

MUSSELL, Acting Presiding Justice.

This is an action brought against the defendant Maryland Casualty Company, a corporation, for damages for breach of a contract to insure. A jury trial resulted in a verdict against the defendant casualty company and it appeals from the judgment.

In 1952 a large quantity of sugar beet pulp was partially destroyed in a fire occurring at the Holly Sugar Plant near Brawley, California. Imperial Feeds Inc., a corporation, purchased the damaged beet pulp at the plant for the purpose of processing it for cattle feed. On August 28, 1952, Imperial Feeds entered into a contract in writing with Kershaw & Sons, Inc., wherein Imperial Feeds agreed to pay Kershaw & Sons $2 per ton for the handling and processing of the entire job, this sum to be paid by Imperial Feeds on outturn weights when and as the pulp was processed and delivered. It was agreed that Kershaw & Sons were to supervise all operations; that all labor and materials and other costs connected with the job were to be paid by Imperial Feeds. It was agreed that the material would be moved to an airstrip in Holtville, which Imperial Feeds had leased from the county of Imperial on August 22, 1952, for the purpose of drying, spreading and processing the pulp. The beet pulp, which had been sacked, was transported from the Holly Sugar Plant to the airstrip by W. W. Topham & Sons, a trucking firm, and spread out on the runways to dry. Thereafter tractors equipped with scraper blades arranged the beet pulp into windrows. The specially constructed "shakers", which had been constructed by local welding firms, were pulled by tractors along the windrows and utilized to separate the desirable pulp from the paper, metal and large lumps of pulp contained in it. The useable pulp was then sacked and left on the airstrip to be picked up and transported therefrom by Imperial Feeds. The supervision of the processing by Kershaw & Sons ended when the beet pulp had been sacked and left to be picked up by Imperial Feeds and Kershaw & Sons had nothing to do with it after it was sacked.

On or about January 14, 1953, a fire occurred on the strip, destroying almost all of the beet pulp, sacked and unsacked. At that time there were approximately 2,000 tons of sacked material, valued at $40 per ton, and between 200 and 600 tons of material, valued at $20 per ton, yet to be processed and sacked. The bulk of the sacked material was to the east of the unsacked material. The wind was from the west to the east and the fire started in the beet pulp that had not been processed and was spread out on the airstrip. Apparently the fire was caused by a spark from welding equipment brought to the strip by one W. E. Maring and being used by him to repair one of the "shaker" machines which had broken down.

The workmen employed to do the work in processing the material were employed by Imperial Feeds and at the time they were employed were told that they were to be employees of Imperial Feeds. A Mr. Franco was one of the foremen employed by Imperial Feeds and, at his request, Maring, the welder, took his equipment to the strip to repair the "shaker" machine. The record shows that Kershaw & Sons made out checks to all of the workmen so that they could be paid every Saturday and Kershaw & Sons was reimbursed immediately by Imperial Feeds with the exact amount. The workmen were not carried on the payroll of Kershaw & Sons.

John R. Kershaw, who acted for Kershaw & Sons, testified that while he was at the airstrip on the morning of the fire, he was not there when the fire started and that, as far as he knew, neither he nor anyone else connected with Kershaw & Sons had anything to do with the fire; that when it occurred he notified Carey Bros., plaintiffs' insurance agent, of the occurrence of the fire and "placed them on notice".

On or about January 14, 1955, Imperial Feeds instituted an action against Kershaw

& Sons and others to recover damages for the destruction of 2,678 tons of damaged beet pulp, alleging that the negligence of the defendants caused the loss and destruction of the beet pulp, to their damage in the sum of $120,510.

It is admitted by Maryland Casualty Company that Kershaw & Sons "gave prompt notice to the defendant Maryland Casualty Company that the said civil action had been duly filed and served upon them; that plaintiffs tendered the summons and complaint to said defendant Maryland Casualty Company and notified the said defendant casualty company that plaintiffs looked to said defendant to defend said action and to pay all costs and expenses incident thereto, and any judgment rendered against plaintiffs in said action; * * * that the defendant Maryland Casualty Company failed and refused to defend said action on behalf of the plaintiffs and denied liability under said policy."

On January 12, 1956, there was filed in the action brought by Imperial Feeds an amended complaint in which Imperial Feeds sought damages against Kershaw & Sons, et al., as the result of their alleged negligence in processing the beet pulp involved. Apparently, this amended complaint was never served on Maryland Casualty Company. Thereafter plaintiffs Kershaw & Sons notified the casualty company that the action instituted by Imperial Feeds could in all probability be settled for a sum between $10,000 and $15,000 and that plaintiffs felt that, considering the liability and potential judgment in said action, it would be prudent to settle said action for an amount not to exceed $15,000. The casualty company refused to make any settlement on behalf of the plaintiffs and advised them that they were free to take any action they desired regarding settlement as there was no coverage under their policy. Plaintiffs then entered into an agreement and covenant with Imperial Feeds wherein Imperial Feeds agreed to dismiss their said action against plaintiffs and not to bring any further action against them arising out of said loss. In consideration of this agreement plaintiffs paid Imperial Feeds the sum of $12,000 and in addition thereto attorneys' fees and costs in the sum of $1,417.15. The present action was filed by plaintiffs to recover the damages alleged to have been sustained by them as a result of the breach of contract to insure.

At the time of the fire there was in full force and effect a comprehensive liability insurance policy issued by the Maryland Casualty Company to C. H. Kershaw, et al. * * * Partnerships and Individuals. The policy provides, inter alia, as follows:

> "*Coverage C—Property Damage Liability—Except Automobile.* To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of injury to or destruction of property, including the loss of use thereof, caused by accident. * * *
>
> "*Exclusions.* This policy does not apply: * * *
>
> "(f) Under coverage C, to injury to or destruction of (1) property owned, occupied or used by or rented to the insured, or (2) except with respect to liability assumed under sidetrack agreements and the use of elevators or escalators, property in the care, custody or control of the insured, or (3) any goods or products manufactured, sold, handled or distributed or premises alienated by the named insured, or work completed by or for the named insured, out of which the accident arises."

[1] The first contention of appellant is that the evidence shows as a matter of law that plaintiffs failed to comply with the conditions precedent in the insurance policy prior to bringing suit. The argument advanced in this connection is that no written notice was given to appellant as required by paragraph numbered 9 of the conditions of said policy, which reads as follows:

> "When an accident occurs, written notice shall be given by or on behalf of the insured to the company or any of its authorized agents as soon as

> practicable. Such notice shall contain particulars sufficient to identify the insured and also reasonably obtainable information respecting the time, place, and circumstances of the accident, the names and addresses of the injured, and of available witnesses."

The insurance policy involved was countersigned by Carey Bros., by R. H. Carey as authorized agent of the company and there is substantial evidence that John R. Kershaw, acting for Kershaw & Sons, notified Carey Bros. of the fire immediately after it occurred and there is no evidence in the record that Carey Bros. required any further or different notice.

Section 554 of the Insurance Code provides as follows:

> "Delay in the presentation to an insurer of notice or proof of loss is waived, if caused by an act of his, or if he omits to make objection promptly and specifically upon that ground."

There is no evidence in the record indicating that the casualty company objected promptly and specifically that notice of the action was not timely given. Moreover, when the summons and complaint were tendered in the Imperial Feeds suit, the company refused to defend said action on behalf of Kershaw & Sons and denied liability under the policy.

As is said in Estrada v. Indemnity Ins. Co., 158 Cal.App.2d 129, 138, 322 P.2d 294, 300;

> "An insurer may not thus repudiate a policy, deny all liability thereon, and at the same time be permitted to stand on the failure to comply with a provision inserted in the policy for its benefit. (Citing cases.)"

In Artukovich v. St. Paul-Mercury Indem. Co., 150 Cal.App.2d 312, 326, 310 P.2d 461, 469, relied upon by appellant, the court said:

> "The failure of Artukovich Bros. to comply with the 'Notice of Injury, Claim or Suit' provision of Industrial's policy is nonetheless a breach notwithstanding the fact the company had notice of the injury and appeared in the proceeding before the Industrial Accident Commission."

However, in that case there was no denial of coverage under the policy, as is the case here, and the question of waiver was not involved.

[2] Appellant's next contention is that the evidence shows as a matter of law that the loss to Kershaw & Sons in the fire is within the exclusion clause of their policy of insurance. This argument is not persuasive. The pretrial order in the instant case indicates that one of the principal issues of law involved was whether the beet pulp involved was in the actual control, care or custody of Kershaw & Sons at the time of the fire and the question of whether there was coverage for the loss under exclusion (f) (3) of the policy was not stated as an issue in the case. No instructions were offered by counsel for appellant covering any exclusion other than the care, custody or control exclusion found in exclusion (f) (2) and the case apparently was tried on the theory that exclusion (f) (2) was the exclusion involved.

In Ernst v. Searle, 218 Cal. 233, 240, 241, 22 P.2d 715, 718, the court said:

> "The rule is well settled that the theory upon which a case is tried must be adhered to on appeal. A party is not permitted to change his position and adopt a new and different theory on appeal. To permit him to do so would not only be unfair to the trial court, but manifestly unjust to the opposing litigant. 2 Cal.Jur., § 68, p. 237."

The evidence before us supports an inference and a finding that the beet pulp being processed by Kershaw & Sons was in its care, custody and control at the time of the fire. However, there is substantial evidence to support a finding that approximately 2,000 tons of the beet pulp had been processed, sacked and set aside for Imperial Feeds and that Kershaw & Sons' custody and control of this material ceased when it was sacked and so set aside.

This material was to be and was being picked up and transported for sale by Imperial Feeds and not by Kershaw & Sons. Under these circumstances the Maryland Casualty Company could not escape liability under the control, care or custody exclusion clause of the policy as to such material since it was destroyed by the fire.

In Wildman v. Government Employees' Ins. Co., 48 Cal.2d 31, 35–36, 307 P.2d 359, it was held that it is elementary in insurance law that any ambiguity or uncertainty in an insurance policy is to be resolved against the insurer; that if semantically permissible the contract will be given such construction as will fairly achieve its object of securing indemnity to the insured for the losses to which the insurance relates; that if the insurer uses language which is uncertain any reasonable doubt will be resolved against it; and if the doubt relates to extent or fact of coverage, whether as to peril insured against, the amount of liability or the person or persons protected, the language will be understood in its most inclusive sense, for the benefit of the insured.

[3] Appellant claims that as a matter of law the amount of settlement made by Kershaw & Sons was not reasonable and it is argued that the only liability of Kershaw & Sons to Imperial Feeds could arise under the policy under the circumstances specifically excluded under its terms and that the settlement, if any, should have been in a token amount. It was alleged in the amended complaint in Imperial Feeds, Inc. v. Kershaw & Sons, Inc., that the defendants negligently supervised, directed and managed the processing of the beet pulp involved. We cannot hold as a matter of law that the settlement should have been in a token amount, where, as here, the casualty company improperly refused to defend Kershaw & Sons in that action. Kershaw & Sons had the right to make any reasonable and bona fide compromise of the action against them and the settlement entered thereon is presumptive evidence of the liability of the insured and the amount thereof. Ritchie v. Anchor Casualty Co., 135 Cal.App.2d 245, 258, 286 P.2d 1000. The prayer in the complaint filed by Imperial Feeds was for $120,510 as damages. Some 2,000 tons of beet pulp, valued at $40 per ton, were destroyed by the fire and it does not appear that the amount of the settlement was unreasonable under the circumstances.

[4] It is further argued by appellant that any duty to defend would be based on the amended complaint filed by Imperial Feeds. This argument falls by reason of the denial by Maryland Casualty Company of liability under the policy and its refusal to defend the action brought by Imperial Feeds. As is said in Grant v. Sun Indemnity Co., 11 Cal.2d 438, 440, 80 P.2d 996, 997;

> "It is a well-recognized rule, which we conclude is applicable to the special circumstances here, that the insurer may not repudiate the policy, deny all liability, and at the same time be permitted to stand on a provision inserted in the policy for its benefit."

In Lamb v. Belt Casualty Co., 3 Cal.App.2d 624, 631, 40 P.2d 311, it was held that the law is well settled that, where one is bound either by law or agreement to protect another from liability, he is bound by the result of a litigation to which such other is a party, provided he had notice of the suit and an opportunity to control and manage it. Here, the casualty company had notice of the suit when the original complaint and summons were tendered to it and then had the right to control and manage the litigation. This it refused to do.

It is argued that the facts set forth in the original complaint in Imperial Feeds v. Kershaw, et al., show as a matter of law that there was no coverage under appellant's policy. This argument is based upon the premise that any liability of Kershaw & Sons under the facts therein alleged would be within the exclusionary provisions of the policy. However, the complaint relates to a cause of action founded on either contract or negligence of Kershaw

& Sons in processing and handling the beet pulp, the major portion of which was not under the care, custody or control of Kershaw & Sons.

[5] It is further contended that the amount of attorneys' fees and costs were not proved nor reasonable. The record shows in this connection that Kershaw & Sons paid to their attorneys the sum of $1,417.15 for fees and costs in defending the action brought by Imperial Feeds and there is no showing that these charges were unreasonable. As is said in Stevens v. Chisholm, 179 Cal. 557, 564, 178 P. 128, 131: "When it does not appear that the attorneys' fees and other expenses are obviously excessive, testimony of the amounts paid will constitute a *prima facie* case; and it will be assumed in such case that the attorneys' fees so paid were reasonable, unless the contrary appears."

[6] Finally, appellant contends that many of the instructions to the jury were prejudicially erroneous. Instruction number 3 is criticized as incomplete and not containing all the issues in the case. However, it is not necessary to set forth all of the issues in one instruction and where, as here, the instructions as a whole sufficiently state the issues, no prejudicial error results.

It is claimed that instruction number 4 limited defendant's contention to subdivision (f) (2) of the exclusionary clause of the policy. We find no words of limitation in said instruction and it merely states the contentions of defendant. As heretofore noted, the cause was tried upon the theory of custody, care and control of the pulp involved.

Instructions 9 and 19 are criticized for the same reason.

[7] Part of instruction 11 is as follows:

> "If you find that the Defendant denied liability on its contract of insurance, Plaintiffs were free to defend on their own account, and had the right to settle the liability against them. The burden is on the Defendant to overcome the presumptive evidence that the settlement made by the Plaintiffs was reasonable and made in good faith."

This instruction is criticized as placing the burden of proof on defendant to overcome the presumptive evidence. We find no prejudicial error in the quoted instruction. In Lamb v. Belt Casualty Co., supra, 3 Cal.App.2d 624, 631–632, 40 P.2d 311, 314, the court said:

> "On the other hand, where there is no trial and no judgment establishing the liability of the insured, but a settlement of the litigation has been made, the question whether the liability of the insured was one which the contract of insurance covered is still open, as is also the question as to the fact of liability and the extent thereof, and these questions may be litigated and determined in the action brought by the insured to recover the amount so paid in settlement. The settlement, or a judgment rendered upon a stipulation of such a settlement, becomes presumptive evidence only of the liability of the insured and the amount thereof, which presumption is subject to being overcome by proof on the part of the insurer."

[8] Instructions 14 and 15 are claimed to be erroneous in permitting the jury to find that there may have been a waiver on the part of Maryland Casualty Company by its conduct. However, there is evidence in the record to support a finding of a waiver by a denial of liability under the policy.

Lastly, appellant complains that instruction 16 is in error. It is appellant's contention that the mere fact of denial does not of itself excuse the insured from complying with the conditions precedent of the policy, but that the denial of coverage must be wrongful. However, in instruction 3 the court instructed as follows:

> "4. Did Defendant wrongfully deny liability under its contract and refuse to defend Plaintiffs against the claims of Imperial Feeds, Inc.

> "If you find it did not, then you will return a verdict for Defendant. But if you find that it did, you then will proceed to fix the amount of Plaintiffs' damages and return a verdict in their favor."

The instructions, when considered in their entirety, in our opinion adequately and fairly informed the jury as to the law applicable in the case and are not prejudicially erroneous in any particular.

Judgment affirmed.

SHEPARD, J., concurs.

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172 Cal.App.2d 99

John MASON, Plaintiff and Respondent,
v.
Joe ENNES, Individually and doing business as Joe Ennes Transportation Company, Defendants and Appellants.
Civ. 18506.

District Court of Appeal, First District, Division 2, California.
July 17, 1959.

Action to recover damages for breach of lease covenant by lessee to contract described building on leased premises. The Superior Court, Santa Clara County, N. J. Menard, J., entered judgment for plaintiff and defendants appealed. The District Court of Appeal, O'Donnell, J. pro tem., held that finding that lessee failed to erect a building such as was agreed upon did not negative affirmative defense that plaintiff had waived right to require that building be constructed in accordance with specifications of lease by permitting lessee to complete construction of building without objection and that failure to make any finding on issue of waiver or estoppel required reversal of judgment.

Judgment reversed.

1. Contracts 🔑9(1)

Less certainty in terms of contract is required in action for damages for breach thereof than in action for specific performance.

2. Landlord and Tenant 🔑24(1)

Where lease provision by which lessee covenanted to construct on leased premises a building to become the property of lessor upon termination of lease gave approximate dimensions of proposed building and provided that it was to be of sheet iron construction, built in accordance with requirements of county building code and of a type that would accommodate trucking business, description of proposed building contained in lease was sufficiently definite to afford basis for recovery of damages for breach of covenant to build.

3. Landlord and Tenant 🔑44(1)

Under lease provision by which lessee agreed to construct described building on leased premises, lessee was contractually obligated to construct such building, though lease also authorized lessee to construct on leased premises described building and such improvements as might be necessary or convenient in conducting his business.

4. Landlord and Tenant 🔑49(2)

Where cost of proposed building was not an element of covenant by lessee to construct described building on leased premises and was not put in issue in action to recover damages for breach of covenant except to the extent that cost involved issue of damages, and as to such issue a finding was made, no finding as to cost of building contemplated by parties to lease was necessary.

5. Landlord and Tenant 🔑49(2)

Where no issue of special damages was raised in action to recover damages for breach of lease covenant by lessee to construct described building on leased premises, finding that lessor was damaged in stated sum by breach of lease agreement was proper and adequate without setting forth the manner in which court arrived at the amount of damages.

6. Trial ⚷395(5)

Only ultimate facts should be found.

7. Trial ⚷404(1)

A proper finding on one issue constitutes implied negation of all contrary propositions.

8. Appeal and Error ⚷1071(6)
Landlord and Tenant ⚷49(2)

In action against lessee to recover damages for breach of lease covenant to construct described building on leased premises, finding that lessee failed to erect a building such as was agreed upon did not negative affirmative defense that lessor had waived right to require that building be constructed in accordance with specifications of lease by permitting lessee to complete construction of building without objection, and failure to make any finding on such issue of waiver or estoppel required reversal of judgment for lessor.

9. Appeal and Error ⚷1071(6)
Trial ⚷391

Findings must be made on every material issue raised by the pleadings, including issues raised by affirmative defenses in answer, and failure to make such findings constitutes reversible error.

◆

Watson & Tedesco, Vincent N. Tedesco, San Jose, for appellant.

Winton, Edlefsen, Murphy, F. Leon Edlefsen, Merced, for respondent.

O'DONNELL, Justice.

Plaintiff, as lessor, and defendant, as lessee, executed a written lease which contained the following provisions: "Lessee is hereby authorized to build approximately 30 ft. X 70 ft. upon the demised premises for the use of his business and to also construct such other improvements thereon as may be necessary or convenient for him in conducting said business. With reference to the 30 ft. X 70 ft. building to be so erected Lessee does hereby covenant and agree to so construct the same, work thereon to commence within a reasonable time after the execution of this lease. All material and labor necessary therefor shall be at the expense of Lessee except and provided, however, Lessor does hereby agree to furnish all concrete material necessary for the flooring and foundation of said building. The building shall be of sheet iron construction and all work shall be performed in a good workmanlike manner and the construction shall be in accordance with and comply with the requirements of the Building Code of Santa Clara County.

"Upon the termination of this lease the building so erected shall be and become the property of Lessor."

Defendant was engaged in the trucking business.

Following execution of the lease a cement foundation for the building, having dimensions of 32 feet by 60 feet, was laid. Plaintiff paid the cost of the foundation. Following the laying of the foundation, defendant constructed a building thereon. Rather than being of sheet iron, as called for by the lease, the building had a roof of sheet aluminum, three of the walls were made of plyboard and the fourth side of the building consisted of an old trailer coach which supported one end of the roof. The building failed to comply with the building code of Santa Clara County in a number of particulars.

Plaintiff instituted this action for damages for defendant's failure to construct a building of the type described in the lease. The cause was tried by the court, sitting without a jury, and plaintiff was awarded damages in the sum of $3,500. Defendant appeals from that judgment.

[1, 2] Defendant's first contention is that the covenant of the lease for the construction of a building is unenforceable because the description of the kind of building to be constructed is indefinite and uncertain. The contention is without merit. In an action for damages, less certainty in the terms of the contract is required than in an action for specific performance. Bettancourt v. Gilroy Theatre Co., 120 Cal.App.2d 364, 261 P.2d 351. Here the dimensions of the building were approximated by the parties

at 30 feet by 70 feet; the materials of which the walls and roof were to be constructed were clearly specified; the building was to be built to conform to the requirements of the building code of Santa Clara County; and finally, the building was to be of a type that would accommodate a trucking business. We are satisfied that the description contained in the lease of the proposed building was sufficiently definite to form the predicate for an action for damages for breach of the covenant to build. (For an excellent discussion of this subject see the Bettancourt case, supra.)

[3] Defendant next contends that he was not obligated to construct a building but was simply given the privilege to do so. He bases this contention on the fact that the above quoted provision of the lease states that he is "authorized" to construct a building. However, when the word "authorized" is considered in proper context, and in relation to the other provisions of the above quoted paragraph, it becomes apparent that defendant contractually obligated himself to construct the building. By the provision in question defendant is "authorized" not only to construct a building, but also such other improvements as may suit his convenience. But when the lease speaks of the building alone, and not any other improvements, it provides that "Lessee does hereby covenant and agree to so construct the same * *." Defendant's obligation in that regard could hardly be more clearly expressed.

[4] Defendant next contends that because he introduced evidence showing that the building he constructed cost $2,500 and was suitable for his purposes, and plaintiff produced testimony that a building of the type called for by the lease would cost $6,000, the trial court should have made a finding declaring whether a building to cost $2,500, or one to cost $6,000, was contemplated by the parties. In answer to this contention it may be observed that the matter of cost was not an element of the covenant to build and was not put in issue by any of the pleadings; except, of course, to the extent that cost involves the issue of damages, and as to that issue a finding was in fact made.

[5, 6] Defendant next contends that the trial court erred in failing to make specific findings on the issue of damages. His argument on this point seems to be that in its findings the trial court should have set forth the manner in which it arrived at the amount of $3,500 damages. No error appears. The complaint alleged the ultimate fact that plaintiff was damaged in the sum of $7,500 by reason of defendant's breach of the covenant to build. The answer simply denied that plaintiff had sustained damages in any amount. Neither in the complaint nor in the answer were any items of special damages referred to. The trial court found that "plaintiff was damaged by reason of the breach of said lease agreement by defendants in the sum of $3,500." This finding is proper and adequate. Only ultimate facts should be found. 48 Cal.Jur.2d 309.

A more serious objection to the findings is that the trial court failed to find on the issue of waiver which was pleaded as an affirmative defense. The allegations of defendant's answer in that regard read: "As and for a further, separate and distinct answer and defense, and by way of alleging waiver by plaintiff, this answering defendant alleges that on or about September 8, 1953, a building approximately 32 ft. by 60 ft. was erected on the premises of plaintiff as described in that certain lease which is attached to plaintiff's First Amended Complaint as Exhibit A, and that plaintiff had full knowledge of the erection of said building on the aforementioned premises and that plaintiff allowed defendant to complete the construction of said building without notice to defendant of any disapproval of defendant as to the construction and size of said building."[1] The only findings of the trial court dealing with the covenant to build and its breach are these: "That it is true that, according to the terms of said agreement of lease, defendants did covenant and agree to construct a 30 foot x 70 foot building of sheet iron construction on said premises; that said lease agreement further provided that the construction of said building was to be in accordance with and comply with the requirements of the Building Code of Santa Clara County.

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[1] Although defendant refers to his affirmative defense as a defense of "waiver", it would appear to be more appropriately classified as a defense of estoppel. However, the distinction in terminology is unimportant here.

"That it is true that the defendants did not keep and perform their part of the covenants and agreements set forth in said lease agreement, in that defendants failed to erect a building such as was agreed upon in said lease agreement."

[7–9] Plaintiff, in defense of the court's failure to make findings on the issue of waiver, invokes the rule which is thus stated in Witkin, California Procedure, vol. 2, p. 1850: "* * * where a proper finding is made on an issue, it is not necessary to negative issues contradictory thereto. The finding on the first issue is an implied negation of all contrary propositions." And in 48 Cal.Jur.2d 296 it is said: "For example, if the findings made necessarily negative allegations of the answer concerning which no specific findings are made, they are sufficient." We think it clear that this rule cannot be made to apply to the situation in the instant case. The trial court's finding, as we have seen, is simply that defendant "failed to erect a building such as was agreed upon in said lease agreement." But such a finding certainly does not negative, nor is it in any way inconsistent with, the allegations in defendant's answer to the effect that plaintiff saw the size and character of the building under construction yet allowed defendant to complete its construction without objection. In other words, conceding that the building constructed by defendant did not comply with the requirements of his lease, still there remains the further issue: Did plaintiff waive his right to require that the building be constructed in accordance with the specification of the lease? By failing to make any finding on this issue the trial court has, of course, left it unresolved. It is firmly established that it is essential that findings be made on every material issue raised by the pleadings, including issues raised upon affirmative defenses in the answer, and that a failure so to do constitutes reversible error. De Burgh v. De Burgh, 39 Cal.2d 858, 250 P.2d 598; Bertone v. City and County of San Francisco, 111 Cal.App.2d 579, 245 P.2d 29.

The judgment is reversed.

DOOLING, Acting P. J., and DRAPER, J., concur.

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172 Cal.App.2d 674

Frank LILLARD, Plaintiff and Appellant,

v.

Joseph WALSH and Belle C. Walsh, his wife, Defendants and Respondents.

Civ. 23740.

District Court of Appeal, Second District, Division 1, California.

Aug. 7, 1959.

Hearing Denied Sept. 30, 1959.

Action for decree that two parcels of improved real estate were held by defendant husband and wife under a constructive trust for plaintiff and for an accounting. The Superior Court of Los Angeles County, H. D. McClain, J., entered judgment denying plaintiff's relief and he appealed. The District Court of Appeal, under testimony that husband and wife holding title to defendants' land as his nominee and agreeing to receive both parcels from plaintiff on condition that they would cancel out the obligations owed by plaintiff to them and pay all outstanding bills and assume trust deed on another property, a prima facie to impress a trust was made out, but evidence sustained finding that trust was surrended by plaintiff to defendant.

Affirmed.

1. Trusts ⟹110

In action by plaintiff for decree that parcels of improved realty were held by defendants under constructive trust for plaintiff, under evidence disclosing that properties owned by plaintiff were transferred to defendant without consideration and that defendant executed documents reconveying premises, even though such documents were not acknowledged, a prima facie case was made out to impress a constructive trust on properties concerned in favor of plaintiff.

2. Acknowledgment ⟹1

Purpose of acknowledgment of deed is evidentiary in character and is required to entitle instrument to be recorded or to render it competent evidence without further proof.

3. Trusts ⟹110

In action by plaintiff for decree holding that two parcels of improved income real estate were in fact held by defendants upon a constructive trust for plaintiff who had originally conveyed such properties without consideration to defendants because of pending legal actions against him, under testimony disclosing that plaintiff offered to exchange properties with defendants for an assumption by defendants of all obligations owed by plaintiff to defendants plus all outstanding bills and trust deeds on another piece of real estate, after which defendants took possession of premises and expended large sums in improving same, evidence sustained finding that oral agreement to surrender trust was acted upon by defendants in such manner as to make it inequitable for plaintiff to assert interest. West's Ann.Code Civ.Proc. § 1971.

4. Trusts ⟹61(3)

Trust may be extinguished by the cestui in any case in which trustee so acts in reliance upon surrender as to make it inequitable for cestui to assert his interest, in other words performance of oral contract within statute of frauds takes case out of statute. West's Ann.Civ.Code, §§ 2229, 2230, subd. 1.

5. Trusts ⟹283(2)

While law is very jealous of dealings between trustee and beneficiary of trust scrutinizing them very searchingly and suspiciously when they are had in a way that leaves any doubt of their integrity, integrity of such transactions is not determined by pecuniary adequacy of consideration as long as it is fair and reasonable under all circumstances, even though not necessarily property's full value at time of sale. West's Ann.Civ.Code, § 2235.

6. Trusts ⟹110

In plaintiff's action for decree declaring defendants held improved income real estate in constructive trust for plaintiff, record did not warrant interference with trial court's finding that there was no confidential relationship between plaintiff and defendants who were not related but who had been friendly over the years. West's Ann.Civ. Code, § 2235.

7. Trusts ⟹365(5)

Where plaintiff consummated deal by which he surrendered his improved real estate to defendants who assumed certain obligations of plaintiff and entered upon and improved such real estate, and plaintiff was in defendants' company on several occasions following transaction in question but failed to institute action to have a constructive trust placed upon real estate for almost four years, plaintiff was barred by laches.

◆

Wallace & Wallace, Los Angeles, for appellant.

Bernard Lippman, Los Angeles, for respondents.

LILLIE, Justice.

This action sought a decree that two parcels of improved real property in the city of Los Angeles were held by defendants under a constructive trust for plaintiff. An accounting was also demanded, plaintiff offering to reimburse defendants for any monies expended by or owing to them in the event a reconveyance was ordered.

From the judgment denying him relief, plaintiff has appealed.

The properties in question adjoin each other on South Hartford Avenue, being numbered 490 and 498 respectively. In 1948 plaintiff purchased the 490 parcel on which there was located a three-story apartment building. He paid $9,500 in cash and assumed a $20,000 encumbrance requiring equal monthly payments of $200. Thereafter, and until the end of January, 1952, plaintiff resided in and managed the apartment building. In November of 1951 he purchased the 498 parcel for $6,050. The building there situated, due to its age, was untenantable and belonged to an estate then in the process of administration. At the probate sale, defendant Joseph Walsh, as one of the two participating brokers, received a $165 commission. He also advanced plaintiff the required 10% cash deposit in return for plaintiff's promissory note in that amount. The remainder of the purchase price was borrowed by plaintiff from his nephew, Gordon Arthur, who mortgaged his home for the necessary $5,500, repayable in $55 monthly installments. Unlike the matters which follow, the foregoing facts are not in dispute.

In December of 1951, criminal proceedings were instituted against plaintiff and his nephew for an alleged assault and battery upon a tenant residing at the 490 address. According to defendant Walsh, plaintiff expressed concern that a civil suit for damages might also be commenced by the asserted victim against both his nephew and himself; and on or about January 30, 1952, to place their assets beyond reach of execution, conveyances were prepared and handed by them to defendant who agreed to hold the various parcels as the designated grantee thereof. We are not concerned with the Arthur properties because defendant later executed all of the necessary instruments to reestablish title in plaintiff's nephew, Gordon Arthur. As to plaintiff's parcels, it appears that plaintiff executed deeds to both properties under date of January 30, 1952, no consideration passing therefor; each document being acknowledged. At the same time defendant delivered back to plaintiff two deeds, neither acknowledged, to the identical parcels.

Several days after this transaction, plaintiff came to defendant's office and in the course of the conversation that followed, defendant told plaintiff that he had received calls from the holders of the trust deed against the 490 parcel regarding three past due installments of $200 each, and that there were unpaid utility bills totalling almost $500 as well as accrued property taxes for 1951. For these reasons, as well as the inadequacy of income from the building (due to its run-down condition) to meet operating expenses, defendant advised plaintiff that he could no longer continue as his nominee. Defendant thereupon asked plaintiff for the return of the two unacknowledged deeds in exchange for the conveyances naming him as grantee: "I told him I didn't want the property. Give me back my deed. I told him there was nothing in it for me. I'd have to advance too much money. It wasn't worth it." In that regard, he advised plaintiff that the building on the 490 parcel would practically have to be rebuilt "to make it profitable." On that occasion, or a few days later, plaintiff refused defendant's offer and tender, explaining that he was without funds to cure the defaults and pay past due obligations and that he did not have sufficient credit to borrow money for necessary improvements. He also indicated that he could not keep up the monthly payments to protect his nephew's home from foreclosure. Accordingly, plaintiff offered to convey to defendant both parcels on condition that defendant would cancel out the obligations owed by him to defendant, pay all outstanding bills and assume the trust deed against the Arthur residence. Defendant agreed to this proposal, took possession of both properties as owner and recorded the deeds given him by plaintiff. The following year, the 498 parcel was sold for $10,500 after the defendant had removed the dwellings thereon and had the lot levelled. He made substantial improvements, assertedly aggregating $50,000, on the apartment house at number 490, which now yields an annual net income of $4,000. Plaintiff made no demand for restitution or an accounting until January of 1956, some four years later. Upon the trial he produced the unacknowledged deeds which, he told defendant four years earlier, had been lost.

Much of the foregoing constituted the gist of various affirmative defenses which the trial court found as a whole to be true. Rejected, therefore, was plaintiff's version of the entire transaction, namely, that defendant knowing of plaintiff's plight represented himself to be an expert in the management of income properties, that he could secure better financing than plaintiff and that plaintiff should give him title to the properties until they were put on a paying basis. In that connection, plaintiff endeavored to establish that a confidential relationship existed between the parties, that plaintiff was imposed upon and that, although an inactive member of the California Bar, he was then lacking in sufficient mental vigor to protect himself in the circumstances.

As the "principal contention" on this appeal, it is now claimed that the evidence "indisputably" shows that title to both properties at all times remained in appellant and that defendant, holding only the record title, was a constructive trustee thereof for plaintiff's benefit. Somewhat subsidiary thereto, but argued at equal length, is the contention that the evidence established a fiduciary relationship as a matter of law, thus assertedly fortifying appellant's claim by virtue of the presumptions which arise in such instances. On their part, respondents rely on the several affirmative defenses which the trial court by its findings declared to have been sustained, particularly the finding that appellant's oral agreement to convey the premises became enforceable upon a showing that personal debts were forgiven, past obligations assumed and substantial improvements made.

[1, 2] There should be no hesitancy in declaring that under appellant's pleadings and the theory thereby adopted, a prima facie case was made out to impress a trust in the properties conveyed. The decisional law was extensively canvassed in Steinberger v. Steinberger, 60 Cal.App.2d 116, at pages 119–120, 140 P.2d 31, and as there pointed out California has aligned itself with the English rule that a constructive trust arises and will be enforced to compel restitution upon the violation of an oral promise to reconvey. Here, of course, there was more than an oral promise by defendant. He admittedly executed documents reconveying the premises and as between the parties it is of no legal consequence that the deeds were not acknowledged (Williston v. City of Yuba City, 1 Cal.App.2d 166, 36 P.2d 445; Bumb v. Bennett, 51 Cal.2d 294, 333 P.2d 23). "The deed of conveyance was not invalid between the parties thereto merely because it was not acknowledged by the grantors. The purpose of an acknowledgment to a deed is evidentiary in character and is required so as to entitle the instrument to be recorded or to render it competent evidence without further proof" (Williston v. City of Yuba City, supra, 1 Cal.App.2d 166, 170–171, 36 P.2d 445, 447). Respondents, as heretofore stated, maintained that the factual situation was otherwise than depicted by appellant. They argue that any trust arising by the exchange of conveyances was terminated and repudiated by appellant's action in orally consenting to their entry upon and improvements of the properties. To this argument, appellant places reliance on Section 1971, Code of Civil Procedure, which provides that a trust may be terminated only by a writing: "No estate or interest in real property * * * *nor any trust or power over or concerning it, or in any manner relating thereto,* can be created * * * *surrendered,* or declared, otherwise than by operation of law, *or a conveyance or other instrument in writing, subscribed by the party creating* * * * *surrendering* or declaring the same * * *." (Italics added.)

[3, 4] The trial court having found that the oral agreement to surrender was acted upon, such finding brings appellant within the rule that a trust may be extinguished

by the *cestui* in any case in which the trustee so acts in reliance upon the surrender as to make it inequitable for the *cestui* to assert his interest; in other words, performance of an oral contract within the statute of frauds takes the case out of the statute (Nicolds v. Storch, 67 Cal.App.2d 8, 53 P.2d 561; Johnson v. Altman, 96 Cal. App.2d 467, 215 P.2d 768). In Nicolds v. Storch, supra, 67 Cal.App.2d 17, 153 P.2d 561, the court refers to a note in 106 A.L. R., page 1318, that whatever may be the nature of the trust relation, all courts agree that where there has been some performance by the trustee in accordance with the oral contract, or where his position has been changed as a result of it, the surrender is effective irrespective of the requirement of the statute. Similar pronouncements are found in Robison v. Hanley, 136 Cal.App.2d 820, 823–824, 289 P.2d 560; Lowenthal v. Kunz, 104 Cal.App.2d 181, 184, 231 P.2d 62; Scott on Trusts, Sec. 481.3, p. 2357, and are determinative here. Furthermore, it is idle for appellant at this stage to assert that we should disbelieve defendant's testimony because it lacked documentary corroboration, although we have given it particular scrutiny in view of the fiduciary relationship alleged to have prevailed.

[5] Also related to the claim of an asserted confidential relationship appellant next contends that the transfer to respondents should be voided because the consideration therefor was "grossly inadequate." He argues that Walsh secured title to properties assertedly worth $20,000, in exchange for approximately $3,000 worth of actual benefits to appellant. Although Section 2229, Civil Code, declares that a trustee may not deal with trust property for his own profit, an exception to the foregoing enactment is found in Section 2230 which permits a trustee to participate in a transaction involving trust property "1. When the beneficiary, having capacity to contract, with a full knowledge of the motives of the trustee, and of all other facts concerning the transaction which might affect his own decision, and without the use of any influence on the part of the trustee, permits him to do so." Likewise pertinent is Section 2235, Civil Code, "All transactions between a trustee and his beneficiary during the existence of the trust, or while the influence acquired by the trustee remains, by which he obtains any advantage from his beneficiary, are presumed to be entered into by the latter without sufficient consideration, and under undue influence." Assuming that a fiduciary relationship existed here between the parties, "the law is very jealous of this kind of dealings, scrutinizing them very searchingly and suspiciously when they are had in a way that leaves any doubt of their integrity" (Schurman v. Look, 63 Cal.App. 347, 355, 218 P. 624, 627); however, the integrity of such transactions is not determined by pecuniary adequacy of consideration (Schurman v. Look, supra, 63 Cal.App. 347, 356, 218 P. 624) as long as it was fair and reasonable under all the circumstances, even though not necessarily the property's full value at the time of the sale (Golson v. Dunlap, 73 Cal. 157, 163, 14 P. 576). Additionally, appellant's argument overlooks the assumption by Walsh of existing encumbrances against the premises; thus, the instrument involving parcel 490 specifically provides that it was given subject to "(T)he unpaid balance of a note for $20,000 secured by a deed of trust * * *", and it is further a fact that Walsh took over the trust deed on Mr. Arthur's property and made payments thereunder. Too, the presumption created by Section 2235, supra, is a disputable one (Luiz v. Queen of Angels Hospital, 53 Cal.App.2d 310, 313, 127 P.2d 966) and the trial court impliedly found that it had been overcome. Finally, and still indulging the assumption that defendant had appellant's complete confidence, it is inherent in the findings that he consented to and acquiesced in defendant's course of conduct and that he did so with full knowledge of all the facts which might affect his decision (Section 2230, Civil Code). Having thus consented, a rule permitting him to attack the transaction would "convert a rule intended to prevent fraud into one creat-

ing an incentive to, and a cover of, fraud" (Colton v. Stanford, 82 Cal. 351, 378, 23 P. 16, 21).

[6] As to the actual existence of a confidential relationship, a close question was presented to the trial judge who, contrary to appellant's claims, permitted the required latitude of examination under the circumstances. As already mentioned, appellant is an inactive member of the California Bar. A casualty of World War I, he has intermittently suffered a diminution of his mental faculties which necessitated periods of hospitalization in various facilities. He was befriended from time to time by defendant who helped him to secure employment and otherwise evidenced an interest in his welfare. Appellant has cited several decisions which support the principle that a confidential relationship in fact should be the test (Sparks v. Sparks, 101 Cal.App.2d 129, 135, 225 P.2d 238; Steinberger v. Steinberger, supra, 60 Cal.App.2d 116, 122, 140 P.2d 31) as distinguished from situations in which the law will infer special confidence, namely husband and wife, parent and child, counsel and client, etc. He also refers to Stewart v. Marvin, 139 Cal.App.2d 769, 294 P.2d 114, in which equity assisted a grantor who, while not totally incapacitated mentally, was lacking in ordinary mental vigor. These and other cases, however, were affirmances of the trial court's conclusion that the relationship existed and are predicated on the familiar substantial evidence rule also here applicable: "The amount of evidence necessary to establish such relationship ordinarily rests with the trier of the facts (Citation)" (Adams v. Talbott, 61 Cal.App.2d 315, 320, 142 P.2d 775, 778). Upon the record, which we have painstakingly examined, we do not find sufficient facts to warrant interference with the trial court's finding in this respect.

[7] Finally, there appears to be but little escape from the additional affirmative defense, likewise found to be good, that appellant's claim was barred by his laches. He admittedly was in defendant's company on several occasions following the transaction involving the properties; on one occasion he accompanied defendant on a trip to the east coast. True, appellant was again hospitalized for a period in 1955, but he apparently never relinquished his membership in the State Bar. No good reason otherwise appears, nor is any excuse offered for his failure to institute action for almost four years. Such a delay under the circumstances is a distinct badge of laches (O'Melia v. Adkins, 73 Cal.App.2d 143, 152, 166 P.2d 298).

For the foregoing reasons, the judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.

Hearing denied; WHITE, J., not participating.

172 Cal.App.2d 133

Harry PRUYN, as Special Administrator of the Estate of Clara Pruyn, Deceased, Plaintiff and Respondent,

v.

Truman S. WATERMAN, as Executor of the Estate of John L. Pruyn, Deceased, Defendant and Appellant.

Civ. 18444.

District Court of Appeal, First District,
Division 2, California.

July 20, 1959.

Rehearing Denied Aug. 19, 1959.

Hearing Denied Sept. 16, 1959.

Action to quiet title to an interest in certain personalty. The Superior Court, City and County of San Francisco, Albert Axelrod, J., entered judgment for plaintiff and defendant appealed. The District Court of Appeal, Kaufman, P. J., held that evidence sustained finding that note secured by deeds of trust and shares or certificates in savings and loan companies purchased with community funds, but to which title was held in joint tenancy form by the husband and wife, was held by the parties as community property.

Judgment affirmed.

1. Evidence ⚿461(1)

Notes secured by deeds of trust and shares of certificates in savings and loan companies, even though executed in joint tenancy form, were not conclusive of the intention of the parties, and therefore, in an action to quiet title to such property, trial court properly considered other evidence as to the intention of the parties. West's Ann.Financial Code, § 7604; West's Ann. Code Civ.Proc. § 1837.

2. Trial ⚿165

On a defendant's motion for a nonsuit, the evidence must be interpreted most strongly against the defendant and in favor of the plaintiff.

3. Appeal and Error ⚿1010(1)

In determining whether evidence sustained a finding, function of the District Court of Appeal is only to determine whether there is substantial evidence to support the conclusion reached by the trial court.

4. Evidence ⚿236(3)

In an action to quiet title to certain property held in joint tenancy form, declarations in will of one of the joint tenants that all of his property was community property of himself and his wife as well as oral statements made by testator that certain property was community property, were admissible.

5. Evidence ⚿273(5)

In action to quiet title to certain personalty which had been held by husband and wife in joint tenancy form, an inheritance tax affidavit and community property affidavit filed by husband substantiating that the disputed property was acquired from the earnings of the husband during the marriage were properly admitted as declarations against interest. West's Ann.Prob. Code, § 1170; West's Ann.Code Civ.Proc. § 1853.

6. Husband and Wife ⚿266

A husband and wife may change the status of their property from separate to community by an executed oral agreement; all that is required to show such an agreement is proof of the parties' acts and conduct in dealing with their property, and the status of the property may be shown by the very nature of the transaction or appear from the surrounding circumstances.

7. Husband and Wife ⚿264

In action to quiet title to an interest in certain personalty, evidence sustained finding that notes secured by deeds of trust and shares or certificates in savings and loan companies purchased with community funds, but to which title was held in joint tenancy form by the husband and wife, were held by the parties as community property.

8. Husband and Wife ⚿264

Acknowledgment by the spouses in the presence of each other that each had the power of testamentary disposition over joint tenancy property constituted evidence of intent of the parties to regard the property as community.

9. Appeal and Error ⚿201(1), 288

Where defendant in action to quiet title to certain personalty made no objections to alleged irregularities at the trial or in motions for a new trial in regard to alleged deprivation of his right to defend or file a closing brief, such matters could not be raised for the first time on appeal.

10. Trial ⚿393(1)

Fact that findings of fact and conclusions of law were filed and signed without allowing statutory five-day period to elapse did not constitute an error which could vitiate the judgment. West's Ann.Code Civ.Proc. § 634.

11. Motions ⚿56(2)

Where defendant in action to quiet title to personalty understood that the cause was submitted for judgment as of March 27, and he filed two briefs thereafter, one on March 27, and one on April 4, court would not be deemed to have erred in entering a nunc pro tunc order on June 12 confirming the time granted for filing briefs and submitting the cause for judgment as of March 27.

◆

Raymond H. Levy, San Francisco, for appellant.

John K. Hagopian, San Francisco, for respondent.

KAUFMAN, Presiding Justice.

This is an appeal in an action to quiet title to a one-half interest in certain personal property, brought by the plaintiff, Harry Pruyn as special administrator of the estate of his mother, Clara Pruyn. The defendant, T. S. Waterman, as executor, listed the disputed property as an asset of the estate of John L. Pruyn, the deceased husband of Clara. The trial court found that the disputed property was community property, over one-half of which Clara Pruyn had a right of testamentary disposition, and entered judgment for the plaintiff. Defendant argues that on the death of Clara, the property vested in its entirety in John L. Pruyn, as the surviving joint tenant, and that there is no estate to be probated as the estate of Clara Pruyn.

Does the evidence support the findings that personal property purchased with community funds but to which title is held in joint tenancy form by a husband and wife, was held by the parties as community property? That is the basic question presented by this appeal. There are also the contentions that the trial court erred in considering any evidence besides the instruments of title and its conclusions of law; and that the defendant (appellant herein) was deprived of due process of law during the trial.

The facts are as follows: Clara and John Pruyn were married on July 31, 1926. All of the property owned by Clara and John Pruyn consisted of notes secured by deeds of trust and shares or certificates in savings and loan companies, all of which were in joint tenancy form. At the trial, it was stipulated that all the disputed property was community property in source, title to which stands in joint tenancy form, and that the parties had not acquired any property by gift or inheritance.

On March 30, 1955, Clara Pruyn executed a will, bequeathing her share of the properties to the plaintiff Harry Pruyn (her son by a prior marriage) and several other legatees. On May 23, 1955, John L. Pruyn executed a will which declared "all my property is the community property of myself and my beloved wife, Clara Pruyn", and which acknowledged that his wife had made a will and had the right to make a will, and which also acknowledged Harry Pruyn as his son.

Clara Pruyn died on June 12, 1955. Her will was duly filed with the county clerk. On June 20, 1955, John L. Pruyn commenced proceedings under Probate Code, section 1170, to declare the death of his wife and to terminate the joint tenancies in their properties. On August 15, 1955, John L. Pruyn executed a codicil to his will. By this codicil he purported to dispose of his half of the property, as well as the property subject to administration under Clara's will. John L. Pruyn died on January 3, 1956.

[1] We will first dispose of defendant's argument that the joint tenancy form of the instruments of title is conclusive of the intention of the parties, and that therefore the trial court erred in considering any other evidence and denying his motion for a nonsuit. Defendant's argument is based on section 7604 of the Financial Code and section 1837 of the Code of Civil Procedure. Section 7604 of the Financial Code reads as follows:

> "The purchase or acceptance of shares or investment certificates in the name of two or more persons as joint tenants or in form to be paid to any of them or the survivors of them, in the absence of fraud or undue influence, *is conclusive evidence in any action or proceeding to which either the association or the surviving share or certificate holders may be a party,* of the intention of such share or certificate holders to vest title to such shares or certificates and dues paid on account thereof and dividends and interest thereon in the survivors." (Emphasis added.)

Section 1837 of the Code of Civil Procedure, defines "Conclusive Evidence" as "That which the law does not permit to be contradicted."

[2] As the above quoted provision of the Financial Code has not heretofore been construed, defendant relies on In re Estate of Fritz, 130 Cal.App. 725, 20 P.2d 361, and other authorities construing similar language in former section 15a of the Banking Act[1], to argue that no evidence outside the written instruments is admissible. Even assuming for the sake of argument that the instant action is one within the provisions of section 7604,[2] we cannot agree. In the most recent interpretation of former section 15a of the Bank Act, our Supreme Court said:

> "There is no doubt that under the statute the making of the deposit is conclusive evidence of the intention of the depositors at that time to vest title in the survivor. It does not follow, however, that the statute compels depositors thereafter to remain frozen to that intention. It in no way deprives the depositors of their freedom of contract to make subsequent agreements changing their interests in the account. Such freedom is expressly recognized in Civil Code section 1698, which provides that a 'contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise.' Section 15a cannot reasonably be interpreted to impair this freedom to alter one contract by another. There is nothing in its language that would justify such interpretation. The intention to which it refers is the intention manifested by the making of the deposit in the specified form and thus necessarily the intention existing at the time that form is used. Its constrained language cannot be enlarged to nullify any subsequent contracts between the depositors and thereby to repeal by implication Civil Code section 1698".

Hotle v. Miller, 51 Cal.2d 541, 334 P.2d 849, 851. We think a similar construction must be applied to the language of section 7604 of the Financial Code, and that the trial court did not err in admitting evidence other than the instruments of title. Although section 7604 was not specifically involved, it has recently been held that shares of telephone stock in joint tenancy form could be changed to a different form by a subsequent executed oral agreement. Abbey v. Lord, 168 Cal.App.2d 499, 336 P.2d 226. As to defendant's motion for a nonsuit, the evidence must be interpreted most strongly against the defendant and in favor of the plaintiff. Goldstone v. Merchants' Ice & Cold Storage Co., 123 Cal. 625, 56 P. 776. The record indicates that the defendant's motion was properly denied.

[3] We come now to defendant's major contention that the evidence is insufficient to support the trial court's finding that the parties intended the property to be community property and that such evidence was erroneously admitted. Before briefly reviewing the evidence before the trial court, it must be pointed out that our function is only to determine whether there is substantial evidence to support the conclusion reached by the court below. Wynn v. Wynn, 170 Cal.App.2d 484, 338 P.2d 930.

[4] As indicated by the trial court in its excellent memorandum opinion, apart from

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[1] Superseded in 1942 by section 852 of the Banking Code, which in turn has been succeeded by section 852 of the Financial Code. (Stat.1951, c. 364, p. 860)

[2] By its terms, section 7604 applies only to any proceeding to "which * * * the surviving share or certificate holders may be a party." The initial construction of the language in former section 15a, indicated that the language referred only to an action where one of the joint owners is dead. Hill v. Badeljy, 107 Cal.App. 598, 604, 290 P. 637.

Furthermore, section 7604 did not become operative until 1953 (Stat.1951, c. 364, p. 1022) and the record here does not disclose when the disputed properties were acquired.

the stipulation of counsel for the respective parties that the original character of the property was community, the evidence as to the intention of the parties consisted of three items: First, the will of John L. Pruyn, executed at a time when Clara Pruyn was still alive. This will declared in paragraph "Fourth" that "* * * all of my property is the community property of myself and my beloved wife, Clara Pruyn". Such declarations in a will as well as oral statements made by the decedent that certain property was community property are admissible. Bias v. Reed, 169 Cal. 33, 145 P. 516; See also In re Estate of Watkins, 16 Cal.2d 793, 108 P.2d 417, 109 P.2d 1. The codicil which revoked this paragraph of the will was dated after the death of the wife, at which time the community has terminated. The evidence is uncontroverted that the only property owned by the husband on May 23, 1955, the date of the original will, was the disputed property, the source of which was community.

Second, defendant Waterman, an attorney testified as follows in regard to the will of John L. Pruyn:

> "The Court: Who prepared the will?
>
> "The Witness: I interviewed Mr. Pruyn, he told me exactly what he wanted. Mr. Levy was present. We made notes at the time. The will was subsequenty dictated to the machine, Dictagraph Machine, and transcribed by the secretary, and was subsequently executed.
>
> "The Court: There is no question about the will, but we are concerned about the fourth paragraph which says, 'All my property, the community property of myself and my beloved wife Clara Pruyn.' You prepared this will, didn't you?
>
> "The Witness: A. Uh-huh.
>
> "The Court: Where did you get that statement?
>
> "The Witness: A. This will was dictated, as I said, into the machine, and, as I recall, that was dictated from notes that were made in a previous conference with Mr. Pruyn as to what he wanted, and then he came into the office and he read it.
>
> "The Court: He read the will?
>
> "The Witness: A. That's right, and I discussed the various provisions with him, and he said that is what he wanted."

[5] Third, there were admitted into evidence an inheritance tax affidavit and community property affidavit filed by John L. Pruyn in the above-mentioned action filed under Probate Code, section 1170. Both of these affidavits substantiate the stipulation of counsel that the disputed property was acquired from the earnings of the husband during the marriage. These affidavits were properly admitted as declarations against interest. Code of Civil Procedure, section 1853; In re Estate of Hill, 167 Cal. 59, 138 P. 690; In re Estate of Raphael, 91 Cal. App.2d 931, 206 P.2d 391.

[6, 7] In addition, plaintiff's testimony established a conversation between the Pruyns (shortly before the wills were executed) evidencing an agreement. While, as defendant points out, such evidence is weak, it cannot here be said to be unconvincing or unsubstantial when viewed in the light of the evidence reviewed above. It is elementary that a husband and wife may change the status of their property from separate to community by an executed oral agreement. Kenney v. Kenney, 220 Cal. 134, 30 P.2d 398. All that is required to show an executed oral agreement of transmutation is proof of the parties' acts and conduct in dealing with their property. In re Estate of Raphael, supra. The status of the property may be shown by the very nature of the transaction or appear from the surrounding circumstances. Borgerding v. Mumolo, 153 Cal.App.2d 821, 315 P.2d 347; Lawatch v. Lawatch, 161 Cal.App.2d 780, 327 P.2d 603. Here, the conclusion is inescapable that the record justifies the findings of the trial court.

[8] As to the defendant's contention that the trial court also erred in its conclusions of law, we must point out that in San-

drini v. Ambrosetti, 111 Cal.App.2d 439, 244 P.2d 742, it was held that acknowledgment by the spouses in the presence of each other that each had power of testamentary disposition over joint tenancy property, was evidence of the intent of the parties to regard their property as community. In re Estate of Jameson, 93 Cal.App.2d 35, at pages 41–42, 208 P.2d 54, at page 58, the court stated:

> "A declaration in a deed or other instrument that spouses are to take as joint tenants raises the presumption that the legal title is in the parties in accordance with such language, Chamberlain v. Chamberlain, 2 Cal.App.2d 684, 687, 38 P.2d 790; and destroys the statutory presumption that the property is community; such conveyance creates a joint tenancy in which the interests of the spouses are separate property. Launer v. Griffen, 60 Cal.App.2d 659, 644, 141 P.2d 236. Nevertheless, the case of Tomaier v. Tomaier, 23 Cal.2d 754, 757, 146 P.2d 905, 906, holds 'It is the general rule that evidence may be admitted to establish that real property is community property, even though title has been acquired under a deed executed in a form that ordinarily creates in the grantee a common law estate with incidents unlike those under the law of community property. * * * It has in fact been held unequivocally that evidence is admissible to show that husband and wife who took property as joint tenants actually intended it to be community property. Hulse v. Lawson, 212 Cal. 614, 299 P. 525; Jansen v. Jansen, 127 Cal.App. 294, 15 P.2d 777; see Minnich v. Minnich, 127 Cal.App. 1, 8, 15 P.2d 804; Horsman v. Maden, 48 Cal.App.2d 635, 640, 120 P.2d 92.'"

[9] We turn finally to defendant's contentions that he was denied due process of law during the trial because the trial court prematurely decided the case and signed the findings, and deprived defendant of the right to defend or file a closing brief. At the outset, it should be noted that the defendant made no objections to the alleged irregularities at the trial or motions for a new trial, and is attempting to raise these matters for the first time on appeal, which, of course, he cannot do. See In re Estate of Raphael, 115 Cal.App.2d 525, 252 P.2d 979, and cases cited in 3 Cal.Jur.2d 628, § 152. The record indicates that the alleged continuance was conditional, and was to be granted only if the court found that the properties were not community property, in which case the court would consider in detail the matter of the assignments and Clara Pruyn's competency. The matter was then continued for two weeks with everyone's understanding that if the defendant's motion for a non-suit was denied, the matter would be ended. The court then asked counsel if he had any further evidence on the character of the property and defendant offered none. The court granted time to file briefs and the record indicates that the defendant's counsel filed a trial brief and a supplemental brief.

[10, 11] Defendant also argues that the findings of fact and conclusions of law were filed and signed without allowing the statutory five day period to elapse. Code of Civil Procedure, § 634. Apart from the fact that even had such an error occurred, it would not vitiate the judgment (Treat v. Superior Court, 7 Cal.2d 636, 62 P.2d 147; Baker v. Eilers Music Co., 175 Cal. 652, 166 P. 1006; Sadicoff v. Jackson, 46 Cal.App. 256, 189 P. 111.) the record does not support the defendant. The record shows that on May 8, 1958, plaintiff served defendant's counsel and filed with the court, Proposed Findings of Fact and Conclusions of Law. On May 16, the court itself amended the findings and signed and filed them. At this point, defendant attempted to submit counter-findings of fact and conclusions of law. The record shows a letter from the court to the defendant's counsel stating that the counter-findings (mailed on May 17) were being returned as the court had already pointed out that the matters could be taken up by a motion for a new trial. Nor is there any merit in defendant's contention

that the court erred in its nunc pro tunc order of June 12, 1958, which order confirmed the time granted for filing briefs and submitting the cause for judgment as of March 27, 1958. The record indicates that defendant understood that the matter was submitted as of March 27, as he filed two briefs, one on March 27 and one on April 4. There is therefore no merit to defendant's final contentions nor any basis for granting his motion to augment the record on appeal.

We conclude that the judgment finds ample support in the record before us.

Motion to augment denied.

Judgment affirmed.

DOOLING and DRAPER, JJ., concur.

52 Cal.2d 601

UNION INTERCHANGE, INC. (a Corporation), et al., Respondents,

v.

Wynne A. SAVAGE, as Real Estate Commissioner, etc., et al., Appellants.

L. A. 24992.

Supreme Court of California,
In Bank.
Aug. 10, 1959.

Action for declaraton that plaintiffs' business operations were outside the scope of amendments to real estate licensing provisions of Business and Professions Code embracing "advance fee law" and for injunction to prevent enforcement of amendments, wherein trial court granted preliminary injunction staying enforcement pending determination on merits. The Superior Court, Los Angeles County, Bayard Rhone, J., rendered order refusing to dissolve preliminary injunction and defendants appealed. The Supreme Court, Traynor, J., held that in view of substantial doubt as to constitutionality of provisions, question raised by affidavits as to whether plaintiffs' operations were within scope of amendments and in view of lack of any change of circumstances since granting of injunction, trial court's refusal to dissolve preliminary injunction could not be deemed an abuse of discretion.

Affirmed.

Opinion, 335 P.2d 225, vacated.

1. Injunction 🔑164

Trial court had inherent power to vacate preliminary preventive injunction irrespective of whether it specifically reserved jurisdiction to do so. West's Ann. Code Civ.Proc. § 532.

2. Injunction 🔑210

When it can be shown that circumstances have so changed that injunction is no longer necessary or desirable, trial court has power to amend it in interest of providing justice for all parties in interest. West's Ann.Code Civ.Proc. § 532.

3. Injunction 🔑164, 210

Fact that preventive injunction purports to be either permanent or preliminary has no bearing upon court's inherent power to modify it. West's Ann.Code Civ.Proc. § 532.

4. Injunction 🔑164

Court's inherent power to modify or revoke preliminary injunction is in no way dependent upon statute authorizing motion to dissolve preliminary injunction granted without notice and such statute does not prevent dissolution of preliminary injunction granted on notice. West's Ann.Code Civ.Proc. § 532.

5. Injunction 🔑164

Trial court's inherent power to modify injunction is not dependent upon specific reservation of jurisdiction in order granting injunction; United Railroads v. Superior Court, 170 Cal. 755, 151 P. 129, overruled. West's Ann.Code Civ.Proc. § 532.

6. Appeal and Error 🔑954(1, 2)
Injunction 🔑161

Order granting, denying, dissolving or refusing to dissolve either a permanent or preliminary injunction rests in sound discretion of trial court upon consideration of all particular circumstances, and such an order will not be modified or dissolved on appeal except for abuse of discretion

7. Injunction 🔑163(1)

In action for declaration that plaintiffs' business operations were outside the scope of amendments to real estate licensing provisions of Business and Professions Code embracing "advance fee law" and for injunction to prevent enforcement of amendments, wherein court granted preliminary injunction staying enforcement pending determination on merits, in view of substantial doubt as to constitutionality of provisions, question raised by affidavits as to whether plaintiffs' operations were within scope of amendments and in view of lack of any change of circumstances since granting of injunction, trial court's refusal to dissolve preliminary injunction could not be deemed an abuse of discretion. West's Ann.Bus. & Prof.Code, §§ 10026, 10131, 10132, 10134, 10252, 10252.5, 10253, 10253.5, 10255, 10305, 10501, 10502, 10506; U.S.C.A.Const. art. 1, § 8, cl. 3; Amend. 14.

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Edmund G. Brown and Stanley Mosk, Attys. Gen., Lee B. Stanton and Neal J. Gobar, Deputy Attys. Gen., for appellant.

Alvin G. Greenwald, Los Angeles, for respondents.

TRAYNOR, Justice.

On September 2, 1955, plaintiffs filed a complaint for declaratory relief and injunction, seeking a declaration that their business operations were outside the scope of certain amendments to the Business and Professions Code relating to the regulation of real estate and business opportunities transactions. Bus. & Prof.Code, §§ 10026, 10131, 10132, 10134, 10252, 10252.5, 10253, 10253.5, 10255, 10305, 10501, 10502, 10506. In the alternative, they sought a declaration that those sections were unconstitutional. They claimed that the application of those sections to their business activities would violate constitutional guarantees of freedom of speech and press, due process of law, and equal protection of the law, and would contravene the commerce clause of the United States Constitution. Amend. 14; Art. 1, § 8, cl. 3. They sought a preliminary injunction to stay enforcement of the amendments pending the action for declaratory relief and a permanent injunction restraining such enforcement after hearing and decision on the merits. After service of notice on defendants and a hearing on the order to show cause, the court on October 24, 1955, granted the preliminary injunction. That order restrains defendants "pending the determination of this cause, from interfering with the plaintiffs, their agents, servants, and employees, by instituting any criminal complaint, action or proceeding against them for violation of * * * the Advance Fee Amendments." No appeal was taken from the order.

On October 1, 1957, defendants presented a motion to vacate the preliminary injunction with supporting affidavits and points and authorities. The motion was based on the grounds that plaintiffs' activities were unlawful under legislation enacted before the effective date of the advance fee amendments, and that "a recent decision of the trial court in Connecticut held that the operations of the plaintiffs and cross-defendants were subject to the Connecticut Advance Fee Law which is substantially the same as that of California, and said court upheld the constitutionality of said law."[1] Defendants appeal from an order of the trial court denying the motion to vacate the preliminary injunction.

[1, 2] Plaintiffs contend that the order must be affirmed on the ground that the trial court lacked jurisdiction to vacate the temporary injunction pending the trial on the merits. This contention lacks merit. In Sontag Chain Stores Co. v. Superior Court, 18 Cal.2d 92, 113 P.2d 689, we held that a trial court has inherent power to modify or vacate a permanent preventive injunction upon a showing that "there has been a change in the controlling facts upon which the injunction rested, or the law has been changed, modified or extended, or where there the ends of justice would be served by modification." 18 Cal.2d at page 95, 113 P.2d at page 690. We recognized in that case that although "it is the long established policy of the law to * * * accord finality to judgments," the trial courts must be given power to modify or dissolve preventive injunctions issued by them. This power is necessary because a preventive injunction is fundamentally different from any other judgment or decree: it "is in essence of an executory or continuing nature, creating no right but merely assuming to protect a right from unlawful and injurious interference." 18 Cal.2d at page 94, 113 P.2d at page 690. When it can be shown that circumstances have so changed that an injunction is no longer

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[1] The decision has since been reversed by the Supreme Court of Errors of Connecticut which held the legislation unconstitutional. United Interchange, Inc. v. Spellacy, 144 Conn. 647, 136 A.2d 801.

necessary or desirable, the trial court has power to amend it in the interest of providing justice for all parties in interest. "The court's power in this respect is an inherent one." 18 Cal.2d at page 94, 113 P.2d at page 690.

[3] The fact that a preventive injunction purports to be "permanent" or "preliminary" in form is not significant. Unforeseeable circumstances necessitating modification or dissolution of the injunction may occur in either case. When the decree is continuing in nature, directed at future events, it must be subject to adaptation as events may shape the need. In the case of a preliminary injunction, there may be need for adaptability to maintain the status quo pending final determination of the matter in controversy. It would be incongruous to hold that the trial court has inherent power to modify a permanent preventive injunction, but lacks the power to modify a preliminary or temporary preventive injunction that may remain in force for years.[2]

[4] This power has been recognized in such cases as Wheeler v. Superior Court, 82 Cal.App. 202, 255 P. 275, which held that the trial court had jurisdiction to modify or suspend a preliminary injunction when that right was reserved in the order. See also State Compensation Ins. Fund v. Maloney, 121 Cal.App.2d 33, 43, 262 P.2d 662; Tulare Irr. Dist. v. Superior Court, 197 Cal. 649, 666–667, 242 P. 725. These cases support the view that the power to modify or revoke a preliminary injunction is an inherent power not dependent upon statute, and that it was not the purpose of section 532 of the Code of Civil Procedure to limit the trial court's discretion to modify its orders when fairness and equity so require.[3] That section authorizes a motion to dissolve when a preliminary injunction was granted without notice. Plaintiffs' contention that the section prevents the dissolution of a preliminary injunction granted on notice is inconsistent with the theory and holding of the cited cases. If a trial court does not have power to dissolve a preliminary injunction except in the manner provided by that statute, it is immaterial that it purports to retain such jurisdiction. The court could not by decree restore such jurisdiction in the face of valid statutory exclusion.

[5] Moreover, to require a specific reservation in the order to retain jurisdiction in the trial court would seem to place undue emphasis on formalism. Such a requirement is not justified simply because the injunction is "temporary" in form. The rationale of United Railroads of San Francisco v. Superior Court, 170 Cal. 755, 151 P. 129, that the status of a case pending decision on the merits must be "definitely and finally determined once for all," (170 Cal. at page 759, 151 P. at page 131) has been rejected and the case itself distinguished and modified in numerous later cases. Sontag Chain Stores Co. v. Superior Court, 18 Cal.2d 92, 95–96, 113 P.2d 689 [citing Tulare Irr. Dist. v. Superior Court, 197 Cal. 649, 242 P. 725; Wheeler v. Superior Court, 82 Cal.App. 202, 255 P. 275]; see also American Trading Co. v. Superior Court, 192 Cal. 770, 222 P. 142; Branker v. Superior Court, 165 Cal.App.2d 816, 332 P.2d 711. We have concluded, therefore, that the United Railroads of San Francisco case

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2. The injunction in the present case, for example, was issued on October 24, 1955.

3. Section 532 provides, in part, that: "If an injunction is granted without notice to the person enjoined, he may apply, upon reasonable notice to the judge who granted the injunction, or to the court in which the action was brought, to dissolve or modify the same." It would seem that the section was meant to serve as a guarantee that a party would have at least one hearing on the matter, rather than as a general restriction on the equity power of the courts. The quoted part of the section was rendered meaningless by a 1911 amendment to the statute prohibiting the granting of a preliminary injunction without notice to the opposite party. Code Civ.Proc. § 527.

should be overruled, and that the rule of the Sontag case applies to preliminary as well as permanent preventive injunctions. See Branker v. Superior Court, 165 Cal. App.2d 816, 332 P.2d 711. Thus, in the instant case the trial court had jurisdiction to consider and pass upon defendants' motion and to determine whether there has been a change in the controlling factors upon which the injunction rested or whether the ends of justice would be served by modification of the order.

[6] Although the trial court had jurisdiction to entertain the motion, we have concluded that it did not abuse its discretion in refusing to vacate the preliminary injunction pending a hearing on the merits. "It is a rule so universally followed and so often stated as to need only to be referred to that the granting, denying, dissolving, or refusing to dissolve a permanent or preliminary injunction rests in the sound discretion of the trial court upon a consideration of all the particular circumstances of each individual case." Kendall v. Foulks, 180 Cal. 171, 174, 179 P. 886, 887. Such an order will not be modified or dissolved on appeal except for an abuse of discretion. People v. Black's Food Store, 16 Cal.2d 59, 61, 105 P.2d 361; McCoy v. Matich, 128 Cal.App.2d 50, 52, 274 P.2d 714; Wilms v. Hand, 101 Cal.App.2d 811, 815, 226 P.2d 728.

[7] Defendants contend that it was an abuse of discretion for the trial court to refuse to dissolve the injunction on the grounds that: (1) the Advance Fee Amendments to the Business and Professions Code (Stats.1955, chap. 1678) are constitutional on their face; (2) as a matter of law plaintiffs' activities fall within the proscription of that legislation; and that (3) as a matter of law the injury to the public from plaintiffs' activities far outweighs any possible injury to plaintiffs from a refusal to enjoin the enforcement of the statute pending a final determination on the merits. These contentions lack merit. No change of circumstances since the injunction was originally issued is urged for now amending or dissolving it. Since there is substantial doubt as to the constitutionality of the statute (see United Interchange, Inc. of Mass. v. Harding, 154 Me. 128, 145 A.2d 94; United Interchange, Inc., v. Spellacy, 144 Conn. 647, 136 A.2d 801, holding similar legislation unconstitutional), the trial court could well have found that irreparable injury would result from a refusal to continue to enjoin its enforcement until a final determination is made on the merits. Moreover, in light of the conflicting affidavits before the trial court, it cannot be said as a matter of law that plaintiffs' activities fall within the scope of the challenged legislation or that it is constitutional as it is sought to be applied to them. These questions can be determined more appropriately after a trial on the merits.

The order is affirmed.

GIBSON, C. J., and SCHAUER, SPENCE, McCOMB, and PETERS, JJ., concur.

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52 Cal.2d 591

PEOPLE of the State of California, Respondent,

v.

Frank J. MATULA, Jr., Appellant.

Cr. 6478.

Supreme Court of California,
In Bank.

Aug. 5, 1959.

Defendant was convicted of perjury. The Superior Court, Los Angeles County, H. Burton Noble, J., entered judgment of conviction and order denying defendant's motion for new trial, and defendant appealed. The Supreme Court, Spence, J., held that union officer's testimony as to relationship with rubbish collectors' association was just as germane to legislative interim committee's inquiry as to whether union had aided the association in enforcing association rules which restrained competition among association members as was contradictory testimony of other witnesses before the committee, and union officer's testimony was material on its face, and, therefore, giving of instruction that such materiality had been established was not prejudicial error, despite lack of proof of the contradictory testimony.

Judgment and order affirmed.

Opinion, 336 P.2d 1000, vacated.

1. Perjury 🔑11(2)

Under Penal Code provision which, in defining perjury, expressly requires that the false statement be of a "material matter", satisfactory test for materiality of testimony at legislative hearing is whether the false statements concern a subject properly within scope of committee's authority and could reasonably influence outcome of the proceeding. West's Ann.Pen.Code, § 118.

2. Perjury 🔑31

In prosecution for committing perjury in testimony before legislative interim committee, prosecution was not required to prove testimony of other witnesses for purpose of establishing the materiality of defendant's testimony before the committee. West's Ann.Pen.Code, § 118.

3. Perjury 🔑37(3)

In prosecution for commission of perjury in testimony before legislative interim committee, evidence warranted giving of instruction to jury that materiality of defendant's testimony before committee had been established, even though there had been no declaration concerning judicial notice of the committee hearings. West's Ann.Pen.Code, § 118; West's Ann.Code Civ.Proc. § 2102.

4. Perjury 🔑25(1)

Accusatory pleading of perjury may either simply state that the false testimony was material to issues in proceeding in which it was given, or it may aver the facts which establish materiality.

5. Indictment and Information 🔑119

An accusatory pleading need provide only reasonable notice of the offense charged, and, therefore, nonessential averments may be disregarded as surplusage. West's Ann.Pen.Code, § 952.

6. Perjury 🔑29(2)

In a prosecution of union officer for commission of perjury in testimony before legislative interim committee, indictment, which averred that defendant's testimony was material to the issues in view of contradictory testimony of other witnesses and that such testimony was material because of its tendency to show falsely that officer and union had not enforced and attempted to enforce rules of rubbish and garbage collectors' association, did not require prosecution to prove testimony of other witnesses if materiality could be proven otherwise. West's Ann.Pen.Code, § 118.

7. Criminal Law 🔑1172(6)
Perjury 🔑11(2)

Union officer's testimony as to union's relationship with rubbish collectors' association was just as germane to legislative interim committee's inquiry whether union had aided the association in enforcing association rules which restrained competition among association members as was contradictory testimony of other witnesses before the committee, and union officer's testimony was material on its face, and, therefore, in subsequent perjury prosecution of union official, giving of instruction that such materiality had been established was not prejudicial error, despite lack of proof of the contradictory testimony. West's Ann.Pen.Code, § 118; West's Ann.Code Civ.Proc. § 273; West's Ann.Const. art. 6, § 4½.

8. Perjury 🔑33(2)

In perjury prosecution, criminal intent is sufficiently established if it is shown that defendant wilfully gave false testimony. West's Ann.Pen.Code, § 118.

9. Perjury 🔑11(2)

Where witness before legislative committee doubts committee's power to compel an anwer to a question, proper course is to object to materiality of question and demand an explanation, but, if witness chooses to give false answer, he must risk, in perjury prosecution, subsequent judicial determination of materiality of the question. West's Ann.Pen.Code, § 118.

10. Criminal Law ⚿446

Certified transcript of prior judicial proceeding is prima facie evidence of testimony and proceeding it recites. West's Ann.Code Civ.Proc. § 273.

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Cooper & Nelsen, Grant B. Cooper, Phyllis N. Cooper and Herman F. Selvin, Los Angeles, for appellant.

Stanley Mosk, Atty. Gen., Clarence A. Linn, Chief Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., William B. McKesson, Dist. Atty., Fred Henderson and William E. McGinley, Deputy Dist. Attys., Los Angeles, for respondent.

SPENCE, Justice.

Defendant Matula appeals from the judgment of conviction of perjury (Pen.Code, § 118) and from the order denying his motion for new trial.

In October 1955, Matula was called as a witness at hearings held by the Assembly Interim Committee on Governmental Efficiency and Economy. Matula was secretary-treasurer of Local 396 of the Teamsters' Union, which included many drivers of rubbish trucks and also checkers at rubbish dumps in the Los Angeles area. The committee's questioning of Matula concerned his activities as a union officer and the activities of his union. In particular, many questions dealt with whether Matula had been using the power of his union to aid various rubbish collectors' associations in enforcing association rules that restrained competition among association members. He testified to the effect that no such collusion between his union and the associations existed to his knowledge.

Matula was indicted and convicted for committing perjury in his testimony before the committee. On this appeal, Matula does not challenge the sufficiency of the evidence to show that he wilfully gave false answers but confines his attack to points relating to the materiality of his testimony before the committee.

Penal Code, section 118, defining perjury, expressly requires that the false statement be of a "material matter." Matula contends that the prosecution failed to prove that his testimony was material to the committee's proper field of inquiry, and that the trial court committed prejudicial error in instructing the jury that his testimony was material.

[1] This appears to be the first case in which this court has been called upon to consider the materiality requirement of the perjury statute in relation to hearings before a legislative investigating committee. See, however, Ex parte McCarthy, 29 Cal. 395, 401–402. The rules concerning perjury are ordinarily phrased in terms more meaningful in the usual situation involving a prior judicial proceeding. For instance, it is said that the false testimony must have been material to "the issue" in the prior proceeding. People v. Bradbury, 155 Cal. 808, 814–815, 103 P. 215; People v. Jones, 123 Cal. 299, 302, 55 P. 992; People v. Macken, 32 Cal.App.2d 31, 38–40, 89 P.2d 173; 38 Cal.Jur.2d, Perjury, §§ 13–15, pp. 379–384. However, a satisfactory test for materiality of testimony at a legislative hearing is whether the false statements concern a subject properly within the scope of the committee's authority and could reasonably influence the outcome of the proceedings. See People v. Dunstan, 59 Cal. App. 574, 584, 211 P. 813; 38 Cal.Jur.2d, Perjury, § 14, pp. 380–382.

The parties differ as to what proof of materiality was required under the indictment in the instant case. The indictment is a lengthy document of 18 pages. It recites the Assembly resolution which created the interim committee and authorized it to ascertain, study, and analyze facts relating to state and local government structure and operations, for the purpose of recommending legislative changes increasing the efficiency and effectiveness of the state and local governments.

The indictment further avers that the duly appointed committee, in pursuance of its authority and power, conducted the hearing "to determine if it should recommend to the Assembly of the State of California the enactment of new laws, the repeal of existing laws, or the amendment of the existing laws governing the collection and disposal of rubbish and garbage." There is then an extensive recitation of the questions asked of Matula and of the false answers given by him.

Following the recitation of defendant's testimony, the indictment alleges that the quoted false testimony given by defendant under oath "was material to the issues and hearing then and there pending before said committee in the following particulars: * * *." The particulars that follow are that the committee had heard from other witnesses that collectors' associations had rules penalizing members who took customers from other members, and that Matula had used his union office to enforce and attempt to enforce those rules by threatening to run violators out of business, to close the union to them, to deny them the use of union dumps, and to picket them.

The indictment then alleges further: "That the above quoted false testimony of the defendant, Frank J. Matula, Jr., was then and there material to the issues pending at the hearing then and there being conducted by said committee, in that it tended to show that the defendant, Frank J. Matula, Jr., said Union and its officers, agents, and employees had not enforced and attempted to enforce the rules, regulations, and by-laws of said rubbish collectors' associations mentioned above."

Defendant demurred to the indictment and moved to set it aside, on the ground that the face of the indictment showed that his testimony was not material to the issues before the committee and was beyond the scope of the committee's authorized field of inquiry. The demurrer was overruled and the motion was denied. Defendant then sought a writ of prohibition and the writ was denied (Matula v. Superior Court, 146 Cal.App.2d 93, 303 P.2d 871). The court there pointed out that numerous constitutional and statutory provisions relate to the many ways in which cities, counties and special districts are directly or indirectly concerned with rubbish and garbage collection and disposal. The court concluded that an inquiry into the operations of an industry of such vital public concern, and susceptible to so many varied forms of governmental control, was an authorized and proper investigation for a committee on governmental efficiency.

Following the denial of the writ, Matula entered a plea of not guilty and the case proceeded to trial. On the issue of materiality, the prosecution introduced at the trial the committee's authorizing resolution and read from the hearing transcript the chairman's opening statement. That statement recited that the Mayor of Los Angeles had requested the Speaker of the Assembly to assign to a committee the investigation of "all problems surrounding the collection and/or disposal" of refuse, because the mayor's own investigation had led him to believe there were "areas of conflict" reflecting weaknesses in the law. After relating that the Speaker had assigned the investigation to his committee, the chairman described the general purpose of the hearings: "Is there a situation existing in the collection and disposal of refuse and garbage that contains anything which, in the public interests should be enacted by the State Legislature, by legislation. And if so, should there be legislation enacted into State Laws on that level?"

The prosecution also read into the record, from the hearing transcript, the parts of Matula's testimony relevant to, and including, the parts quoted in the indictment. However, the entire hearing transcript was never introduced into evidence.

The trial court refused defendant's requested instruction that Matula's testimony was not material to the committee's inquiry but, on the contrary, instructed that the testimony was material as a matter of law. After the verdict of guilty, the court denied his motion in arrest of judgment and for a new trial.

On the argument of the motion for a new trial, the trial court remarked that there was no error in the materiality instruction because the court "has" judicial notice of the committee hearings. However, no request for taking judicial notice had been made, and no declaration concerning judicial notice had been given to the jury, as provided in section 2102 of the Code of Civil Procedure. It is not clear whether the trial court meant by its remark that it was purporting to take judicial notice at that time or had already done so before the case had been submitted to the jury.

Defendant contends that materiality was never established because the indictment's averments of the contradictory testimony of other witnesses were never proved. He further contends that even if materiality could have been established without proof of the contradictory testimony, it was prejudicial error to instruct the jury to the effect that such materiality had been established.

Respondent contends, however, that materiality was established in any of three ways: (1) Matula's testimony was pleaded and proven to be material to the committee's inquiry whether contradicted or not, and that the averments concerning the contradictory testimony of other witnesses can therefore be treated as surplusage; (2) materiality was established as a matter of law in the prohibition proceeding (Matula v. Superior Court, supra, 146 Cal.App.2d 93, 303 P.2d 871) under the doctrine of the law of the case; and (3) the transcript of the hearings, including the contradictory testimony of other witnesses, was properly made a subject of judicial notice.

[2, 3] We are of the opinion that the prosecution did not need to prove the testimony of the other witnesses, and that the proof of materiality was such that no prejudicial error resulted from the giving of the challenged instruction.

[4] An accusatory pleading of perjury either may simply state that the false testimony was material to the issues in the proceeding in which it was given, or it may aver the facts that establish materiality. People v. Ah Bean, 77 Cal. 12, 18 P. 815; People v. Low Ying, 20 Cal.App.2d 39, 66 P.2d 211. As quoted above, the indictment in the present case avers in two places that Matula's testimony "was material to the issues." In the first instance it adds the "particulars" of contradictory testimony of other witnesses, admittedly not proven. However, the second averment grounds materiality on the tendency of the false testimony to show that Matula and the union "had not enforced and attempted to enforce the rules" of the collectors' associations.

[5, 6] Since an accusatory pleading need provide only reasonable notice of the offense charged. (Pen.Code § 952; People v. Beesly, 119 Cal.App. 82, 6 P.2d 114, 970), nonessential averments may be disregarded as surplusage (People v. Randazzo, 48 Cal. 2d 484, 489–490, 310 P.2d 413; see also United States v. Allen, D.C., 131 F.Supp. 323, 326). The pleading in the instant case did not require the prosecution to prove the testimony of other witnesses if materiality could be proven otherwise, and we believe materiality was proven otherwise.

[7–9] While there have been perjury cases in which the false testimony was said to have been material only because it tended to impeach a witness who did testify to material matters ("circumstantial" materiality) (People v. Lem You, 97 Cal. 224, 225, 32 P. 11; People v. Low Ying, supra, 20 Cal.App.2d 39, 66 P.2d 211), this was not the situation with respect to Matula's testimony. His testimony was "directly" material. His version of the union's relationship with the associations was as germane to the committee's inquiry as the contradictory versions of the other witnesses.

As was correctly pointed out in the prohibition proceeding (Matula v. Superior Court, supra, 146 Cal.App.2d 93, 98–101, 303 P.2d 871), there is considerable legislation providing many ways in which the rubbish industry may be affected by the activities of various governmental entities. Furthermore, we cannot ignore the increased public concern with the efficient collection and disposal of rubbish in these days when air pollution problems have led to bans on the burning of rubbish in populous areas. Inquiry into the present workings of the rubbish industry in the most populous area of the state was well within the authority of the committee interested in the effectiveness of existing legislation. Moreover, the subject matter of Matula's false testimony—collusion between the union and the collectors' associations—was material on its face. It could easily influence the outcome of the committee's investigation because of the probable effect of any such collusion upon the price which the public may have to pay, upon the service which the public may receive, and upon the ability of local governmental units to control these matters under existing statutes.

Defendant argues that recent federal cases (e. g., Scull v. Commonwealth of Virginia, 359 U.S. 344, 79 S.Ct. 838, 3 L.Ed.2d 865; Watkins v. United States, 354 U.S. 178, 77 S.Ct. 1173, 1 L.Ed.2d 1273) establish the proposition that the connection between a committee's authority and the particular question asked must be proven more explicitly than was done in the instant case. These cases involved legislative inquiries into the beliefs and associations of witnesses. They concerned witnesses who refused to answer questions because of an expressed belief that the questions exceeded the committee's power to compel an answer. They hold that under such circumstances, the witness cannot be convicted of contempt unless the question was not only "pertinent," but that the pertinency was explained or otherwise made clear to the witness.

In our opinion, those cases are not controlling in prosecutions for perjury which are based upon the actual giving of false testimony. In contempt cases, the importance of the detailed explanation is to establish the criminal intent of the witness who refuses to answer. See Barenblatt v. United States, 360 U.S. 109, 79 S.Ct. 1081, 1091–1092, 3 L.Ed.2d 1115; Scull v. Commonwealth of Virginia, supra, 359 U.S. 344, 79 S.Ct. 838, 843, 3 L.Ed.2d 865. But in prosecutions for perjury, criminal intent is sufficiently established if it is shown that the defendant wilfully gave false testimony. Pen.Code, § 118. The proper course for a witness to pursue when he doubts a committee's power to compel an answer to a question is to object to its materiality and demand an explanation. But the witness who chooses instead to give a false answer must risk the subsequent judicial determination of the materiality of the question.

We conclude that in the circumstances of this case the giving of the challenged instruction was not prejudicial error. It is frequently said that materiality for perjury purposes is a question of law. People v. Lem You, supra, 97 Cal. 227, 228, 32 P. 11; People v. Sagehorn, 140 Cal.App.2d 138, 153, 294 P.2d 1062; People v. Curtis, 36 Cal.App.2d 306, 319–321, 98 P.2d 228; Annotation, 62 A.L.R.2d 1027. But it has also been indicated that it may be a mixed question of fact and law: that the jury's function is to find what happened at the prior proceeding and the court's function is to instruct the jury as to what findings would establish materiality. People v. Lem You, supra, 97 Cal. 224, 228–230, 32 P. 11; Luse v. United States, 9 Cir., 49 F.2d 241, 244–245. But even assuming that the jury should have been permitted to determine what happened at the legislative hearings, the most that can be said is that the jury was deprived of the opportunity of determining whether the portions of the hearing transcript that were made part of the record in this case were accurate.

[10] However, the jury was given no reason to doubt the accuracy of the transcript. On the contrary, when the prosecuting attorney was reading portions of the transcript into the record, defense counsel, who had a copy of his own, corrected some of the prosecuting attorney's reading errors. But the defense at no time challenged the accuracy of the transcript. The certified transcript of a prior judicial proceeding is prima facie evidence of the testimony and proceedings it recites. Code Civ.Proc. § 273. No such express statutory presumption applies to transcripts of legislative committee hearings; but in any event, there is no reasonable probability that the jury would have reached a different verdict had the materiality instruc-

tion required them to find first that the transcript accurately reflected the committee proceedings. We therefore conclude that the giving of the challenged instruction was not prejudicial. Cal.Const., art. VI, § 4½; People v. Watson, 46 Cal.2d 818, 299 P.2d 243.

In view of the above conclusions, it is unnecessary to decide whether materiality was established through judicial notice of the contradictory testimony or under the doctrine of the law of the case.

The judgment and order denying a new trial are affirmed.

GIBSON, C. J., and TRAYNOR, SCHAUER, McCOMB and PETERS, JJ., concur.

172 Cal.App.2d 493

Eula Charlotte ROGERS, Administratrix of the Estate of Jack E. Rogers, also known as Jack Ervin Rogers, deceased, Plaintiff and Appellant,

v.

SOUTHERN PACIFIC COMPANY, a corporation, Defendant and Respondent.

Civ. 18357.

District Court of Appeal, First District, Division 2, California.

July 30, 1959.

Rehearing Denied Aug. 28, 1959.

Hearing Denied Sept. 22, 1959.

Wrongful death action brought against railroad, under Federal Employers' Liability Act, by administratrix of railroad employee who, while riding on stirrup of moving flatcar, was crushed to death between such car and another flatcar after fellow employee had signaled that there was sufficient clearance between the two cars. The Superior Court, City and County of San Francisco, Clarence W. Morris, J., entered judgment on verdict for railroad, and administratrix appealed. The District Court of Appeal, Dooling, J., held that evidence sustained implied finding of no negligence on part of railroad.

Judgment affirmed.

1. Master and Servant 🔑279(6)

In wrongful death action, under Federal Employers' Liability Act, by administratrix of railroad employee who, while riding on stirrup of moving flatcar in switching operation, was crushed to death between such car and another flatcar after fellow employee had signaled that there was sufficient clearance, evidence sustained implied finding that determination of clearance as requested by deceased employee pertained only to the cars. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

2. Master and Servant 🔑278(18)

In wrongful death action, under Federal Employers' Liability Act, by administratrix of railroad employee who, while riding on stirrup of moving flatcar, was crushed to death between such car and another flatcar after fellow employee had signaled that there was sufficient clearance for the two cars to pass, evidence sustained implied finding of no negligence on part of railroad. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

3. Master and Servant 🔑228(1)

Under Federal Employers' Liability Act, employee's contributory negligence is not a complete defense but is merely ground for diminishing amount of the recovery. Federal Employers' Liability Act, § 3, 45 U.S.C.A. § 53.

4. Appeal and Error 🔑1050(1), 1064(1)

Where, in wrongful death action brought by railroad employee's administratrix against railroad under Federal Employers' Liability Act, jury was instructed that, under the act, employee's contributory negligence was not a complete defense but merely ground for diminishing amount of the recovery, jury, to find its verdict for railroad, had to find that railroad was not guilty of any negligence which contributed as a proximate cause to employee's death, and, therefore, any error in the instructions or admission of evidence relating solely to employee's contributory negligence could not have been prejudicial to administratrix. Federal Employers' Liability Act, § 3, 45 U.S.C.A. § 53.

5. Appeal and Error ⚷1064(1)

In wrongful death action brought against railroad, under Federal Employers' Liability Act, by administratrix of railroad employee who, while riding on stirrup of moving flatcar, was crushed to death between such car and other flatcar after fellow employee had signaled that there was sufficient clearance between the two cars, instruction that, if employee voluntarily chose unsafe rather than safe means of performing switching operation and choice was sole proximate cause of his injuries, railroad would not be liable could not have been prejudicial to administratrix in view of requirement that jury first find that employee's choice of dangerous way was sole proximate cause of his injuries. Federal Employers' Liability Act, § 3, 45 U.S.C.A. § 53.

6. Appeal and Error ⚷930(2)

In determining effect of instructions given jury, District Court of Appeal would have to ascribe to jury a reasonable knowledge of meaning of the English language.

7. Appeal and Error ⚷201(2)

In wrongful death action, plaintiff's claim that certain of the trial judge's actions prevented her from having fair trial was not open to her on appeal in view of her failure to make objection at time of the questioned conduct.

8. Appeal and Error ⚷1068(4)

In wrongful death action, errors, if any, going only to question of damages, could not have been prejudicial in view of jury's verdict for defendant.

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Ryan & Ryan, Thomas C. Ryan, Thomas Michael Ryan, San Francisco, for appellant.

Bledsoe, Smith, Cathcart, Johnson & Phelps, Robert A. Seligson, San Francisco, for respondent.

DOOLING, Justice.

This is an appeal by plaintiff, Eula Rogers, administratrix of the estate of Jack E. Rogers, from the judgment entered following a verdict for defendant in an action for wrongful death brought under the Federal Employers' Liability Act. 45 U.S.C.A. § 51 et seq.

Rogers was an employee of defendant, foreman of a switching crew. On April 13, 1956, while riding on the stirrup of a moving flat car loaded with lumber, he was crushed to death between this car and another flat car located on an adjacent track.

Norman, a switchman on Rogers' crew, witnessed the accident and testified as to the following facts concerning the switching operation which resulted in the accident. One of respondent's engines at its Bayshore yards was connected with three flat cars, two containing precut lumber and one containing plasterboard. One of the lumber cars was coupled to the engine and the plasterboard car was the third or last in line. The task for the switching crew was to reverse the order of the cars and to position the plasterboard car next to the engine. To accomplish this the plasterboard car was to be "kicked" into track 89 and the two lumber cars into track 87 (a car is "kicked" when it is pushed by the switch engine until it reaches a desired speed and then uncoupled and permitted to roll). The plasterboard car was kicked and it stopped short of track 89 almost "fouling" or partially blocking passage on track 87.

Rogers was standing by the track 87 switch approximately 120 feet from Norman. He called to Norman, "Will it clear?" and Norman, after checking in the customary manner, replied, "Yes, but it will be close." Rogers then gave the "kick" sign which Norman relayed to the engineer, the engine proceeded to back up and the pin was pulled uncoupling the two lumber cars. After the cars passed Rogers at the 87 switch, he threw that switch and then ran about 70 feet after the cars and jumped on the rear end of the first car. At this time the front of the first car had already successfully cleared the "fouling" point. Rogers then stepped on the stirrup of the second car and rode about 25 to 30 feet before the accident occurred.

The two cars were traveling at a speed comparable to that of a fast walk and Norman, whose duty it was to jump on the cars and brake them if they were moving too rapidly, testified that he did not feel that they were moving too fast and that there was no necessity for riding the cars. As Rogers neared the plasterboard car he "hugged" the side of the car and continued the ride. At this point Norman could no longer see Rogers and he never realized that Rogers would not clear the "fouling" point, although he "knew it would be close." There was nothing blocking Rogers' line of sight to the plasterboard car and approximately seven seconds elapsed from the time he boarded the car and the time the accident occurred.

Rogers was in charge of the switching operation. His signal started the engine, he threw the switch sending the cars onto the 87 track, he chose to use the "kicking" method rather than a "shoving" procedure which would insure exact placement of the cars; and it was not his duty to jump on the moving cars.

Norman measured the clearance in the conventional railroad manner by standing next to the nearest rail of the track adjacent to the plasterboard car. He extended his arms, and his hands did not touch the plasterboard car, indicating sufficient clearance for the lumber cars to pass.

The engineer and the pin puller on Rogers' crew testified that Rogers directed the operation and made the signals and that the manner of conducting such an operation was entirely up to the foreman. The assistant general yardmaster testified that the determination of clearance as made by Norman was only for the purpose of ascertaining whether the cars would collide. It is commonly known throughout the railroad industry that such a measurement would not indicate that there would be sufficient additional clearance for a man hanging on the side of a car.

Appellant contends that the verdict was against the uncontradicted evidence and was contrary to law. To support this contention she asserts that Norman had the duty to warn Rogers of the danger. She also asserts that Norman was guilty of negligence as a matter of law in failing to warn Rogers of the insufficient clearance.

[1] There was ample evidence to support an implied finding that the determination of clearance requested by Rogers pertained only to the cars. The procedure Norman used was standard and it was commonly understood by railroad men that such measurement was only for the purpose of ascertaining whether there was clearance for equipment. At the time when Rogers jumped on the moving cars Norman had not yet had the opportunity to make a decision as to whether the cars were traveling too fast. Approximately seven seconds later the accident occurred.

[2] Cases are cited by appellant for the proposition that under the Federal Employers' Liability Act an employer is liable if its negligence played any part in causing the accident. Grand Trunk Western R. Co. v. Boylen, 7 Cir., 81 F.2d 91; McAllister v. Suncook Valley R. R., 93 N.H. 400, 42 A.2d 733. As respondent points out, the courts in those cases merely affirmed judgments for plaintiffs. Here the jury was properly instructed concerning the Federal Employers' Liability Act and the evidence supports the implied finding of no negligence on the part of respondents.

[3, 4] Several of the claims of error apply only to the defense of contributory negligence. The jury was properly in-

structed that under the Federal Employers' Liability Act the contributory negligence of an employee is not a complete defense but is merely a ground for diminishing the amount of recovery. Springer v. Southern Pac. Co., 145 Cal.App.2d 640, 302 P.2d 872; 45 U.S.C.A. § 53. In order to find its verdict for defendant under these instructions the jury must have found that defendant was guilty of no negligence which contributed as a proximate cause to decedent's death. Under such circumstances any error in the instructions or the admission of evidence relating solely to the decedent's contributory negligence cannot have been prejudicial to appellant. Tracy v. Terminal R. Ass'n of St. Louis, 8 Cir., 170 F.2d 635, 639–640. This conclusion makes it unnecessary for us to determine whether, as claimed by appellant, there was error in allowing one of defendant's employees to interpret a rule of the company relating to decedent's duty in performing the switching operation, in instructing that a violation of this rule by decedent would be negligence per se, or in allowing testimony concerning the amount of alcohol in decedent's blood and the effect thereof upon decedent. All of these matters, conceding they involved error, went only to the question of contributory negligence and could only have reduced the plaintiff's verdict if the jury had found that defendant was guilty of any actionable negligence.

The jury was instructed that if there were two ways of performing the switching operation one of which was safe and the other fraught with risk of injury to decedent and the decedent voluntarily, without the choice being in any way dictated by the negligence of defendant, chose the unsafe and more dangerous way, "and that such a choice was the sole proximate cause of his injuries," defendant would not be liable.

[5, 6] The instruction cannot have been prejudicial to appellant. In order to make it applicable the jury must find that the choice of the dangerous way was the "sole proximate cause of his injuries." If they found that the defendant's negligence was one of the proximate causes of the injury the instruction by its express terms would not apply since decedent's conduct would not then be the sole proximate cause. We must ascribe to the jury a reasonable knowledge of the meaning of the English language.

[7, 8] Appellant's claim that certain actions of the trial judge prevented her from having a fair trial are not open to her since no objection was made at the time to the questioned conduct of the trial judge. 48 Cal.Jur.2d, Trial, § 392, p. 402. Alleged errors going only to the question of the amount of damages cannot have been prejudicial since the jury's verdict was for respondent. Cucuk v. Payne, 140 Cal.App.2d 881, 887–888, 296 P.2d 7.

Judgment affirmed.

KAUFMAN, P. J., and DRAPER, J., concur.

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172 Cal.App.2d 319

In re ESTATE of Theolinda M. DEACON, Deceased.

Agnes CLARK, Petitioner and Appellant,
v.
The DESCENDANTS of Betty SWANSON, Respondents.

Civ. 6110.

District Court of Appeal, Fourth District, California.

July 24, 1959.

Probate proceeding. The Superior Court of San Diego County, Bonsall Noon, J., rendered order denying petition to determine heirship on behalf of certain legatees, and petitioner appealed. The District Court of Appeal, Shepard, J., held that in will containing several dispositive clauses but no general residuary clause, properly construed, there was no connection between clause providing for sale of certain properties and application of proceeds to pay debts of testatrix' husband then stating that any balance should be distributed "as hereinafter set forth", without setting forth intended disposition, and another clause directing executrix to sell other properties and to distribute proceeds to persons therein named, and balance remaining from sales of properties mentioned in paragraph failing to mention distributees was required to be distributed according to law of intestate succession.

Affirmed.

1. Wills ⟹440

In interpreting wills, courts are not to look for undeclared purposes which may be imagined to have been in testators' minds, but rather to intentions disclosed by the words they have used. West's Ann.Prob. Code, §§ 101, 102, 103, 106.

2. Wills ⟹587(1), 865(1)

In will containing several dispositive clauses but no general residuary clause, properly construed, there was no connection between clause providing for sale of certain properties and application of proceeds to pay debts of testatrix' husband then stating that any balance should be distributed "as hereinafter set forth", without setting forth intended disposition, and another clause directing executrix to sell other properties and to distribute proceeds to persons therein named, and balance remaining from sales of properties mentioned in paragraph failing to mention distributees was required to be distributed according to law of intestate succession. West's Ann.Prob.Code, §§ 101, 102, 103, 106.

3. Wills ⟹706

Interpretation given to will by trial court was required to be adhered to on appeal where it was reasonable, even if another interpretation was possible.

Linley & Doerr, El Cajon, for appellant.

Stevens & Andreasen, Oceanside, for respondents.

SHEPARD, Justice.

This is an appeal from an order of the probate court denying a petition to determine heirship on behalf of certain legatees named in the will of deceased.

By her will made 17 April 1937 deceased provided in Paragraph Second thereof for the sale of certain property located on Nineteenth Street in the City of San Diego, and the application of the proceeds thereof to pay encumbrances and certain debts of her husband Daniel A. Deacon. The last sentence of said paragraph reads as follows:

> "If there should be a balance after the payment of the notes as set forth herein, then such balance is to be distributed as hereinafter set forth."

Paragraph Third directs the sale of certain other property, the payment of another debt of her husband, and the distribution of the balance, if any, to a friend Mrs. Kathryn Brunne. Paragraph Fourth directs the leasing by the executrix of certain warehouse property and the payment of certain debts and encumbrances. Paragraph Fifth reads as follows:

> "After my said Executrix has disposed of all other property which I own at the time of my death, including the Commercial Street Lots, then I direct that said Executrix sell said warehouse property for the best price obtainable, and apply said proceeds to pay off any encumbrance which may exist against said warehouse and distribute the balance as follows:
>
> "(1) Ten & 00/00 Dollars ($10.00) each to my stepchildren, *Bernard Deacon, Dorothy Deacon* and *Betty Deacon:* of San Diego, California;

"(2) One-fifth of the balance to each of the following:

Mrs. Agnes Clark, my cousin, of El Cajon, California;

Mrs. Kathryn Brunne, of 1510 State Street, San Diego, California;

Victor LeFrooth, my brother, of Strandquist, Minnesota;

Anna Erickson, my sister, of Strandquist, Minnesota;

Victor Holmstrom, my cousin, of Strandquist, Minnesota."

Paragraph Sixth directs the sale of certain other property, the payment of certain debts, and distribution of the balance in equal shares to the same persons named above in Paragraph Fifth. Paragraph Seventh bequeaths all personal property to Mrs. Kathryn Brunne. Paragraphs Eighth, Ninth and Tenth each bequeath certain specified property to legatees therein named. Paragraphs Eleventh and Twelfth deal entirely with the disposition of certain property located in Marshall County, Minnesota to legatees therein named. Paragraphs Thirteenth, Fourteenth, and Fifteenth deal with the appointment of executors in different states.

The will does not contain any general residuary clause.

The trial court denied the petition of appellant Mrs. Agnes Clark, who is one of the legatees named in said Paragraph Fifth, and ordered that any balance remaining from the property mentioned in Paragraph Second be distributed according to the laws of intestacy.

It is the contention of appellant that the "Nineteenth Street properties", which constitute the properties mentioned in said Paragraph Second, should pass in accordance with the provisions of said Paragraph Fifth of the will, and that the Probate Court erred in denying appellant's petition. She cites in support of her contention the rules of construction set forth in sections 101 and 102 of the Probate Code and numerous authorities which in essence simply repeat the rules announced in those two sections. Probate Code, section 101, insofar as it is here pertinent, reads as follows: "A will is to be construed according to the intention of the testator. Where his intention can not have effect to its full extent, it must have effect as far as possible."

That these rules are to be observed by the courts in interpreting wills has been clearly recognized in a long line of cases, but we think the recitation from any considerable number is of small value since the rules on the point in question have been recited in fairly uniform language throughout these cases. The subject is sufficiently covered for our purposes in In re Estate of Beldon, 11 Cal.2d 108, 111, 112 [1, 2, 3, 4], 77 P. 2d 1052, 1053:

> "'The making of a will raises a presumption that the testator intended to dispose of all his property. Residuary clauses are generally inserted for the purpose of making that disposition complete, and these clauses are always to receive a broad and liberal interpretation, with a view of preventing intestacy as to any portion of the estate of the testator; and this general rule is in harmony with the declaration of our Code that the provisions of a will must be construed, if possible, so as to effect that purpose.' O'Connor v. Murphy, 147 Cal. 148, 153, 81 P. 406, 408. But there is no room for application of the rule if the testator's language, taken in the light of surrounding circumstances, will not reasonably admit of more than one construction. A court's inquiry in construing a will is limited to ascertaining what the testator meant by the language which was used. If he used language which results in intestacy, and there can be no doubt about the meaning of the language which was used, the court must hold that intestacy was intended. A testator has the right to make a will which does not dispose of all of his property but leaves a residue to pass to his heirs under the law of succession. Such a will is not the

> usual one, but when the language which leads to that result is clear the will must be given effect accordingly. In re Estate of Young, 123 Cal. 337, 55 P. 1011; In re Estate of Blake, 157 Cal. 448, 108 P. 287; In re Estate of Johnson, 107 Cal.App. 236, 290 P. 314.
>
> "Possibly David William Beldon intended to leave his property as it was distributed by the decree of the probate court. But he did not express this intention in his will. Certainly he did not intend to leave 15 per cent of the residue of his estate to each of seven persons with 10 per cent to another, and there is nothing to support the division of one of the 15 per cent shares between the '2 Grandchildren' except mathematical necessity. To say that because a will does not dispose of all of the testator's property it is ambiguous and must be construed so as to prevent intestacy, either total or partial, is to use a rule of construction as the reason for construction. But a will is never open to construction merely because it does not dispose of all of the testator's property. 'Courts are not permitted in order to avoid a conclusion of intestacy to adopt a construction based on conjecture as to what the testator may have intended, although not expressed.'"

In re Estate of Carroll, 62 Cal.App.2d 798, 800 [1], 145 P.2d 644; In re Estate of Iburg, 196 Cal. 333, 334 [1], 238 P. 74; In re Estate of Turney, 101 Cal.App.2d 720, 726 [2], 226 P.2d 80; In re Estate of Bradley, 86 Cal.App. 173, 179, 260 P. 575; In re Estate of Blake, 157 Cal. 448, 467, 108 P. 287; In re Estate of Johnson, 107 Cal.App. 236, 239 [1–2], 290 P. 314; and other cases cited by appellant, simply reiterate the rule set forth in In re Estate of Beldon, supra, or some part of such rules.

The rule that ambiguities may be explained by references or recital thereof in any part of the will and that all parts are to be construed in relation to each other so as to, if possible, form one consistent whole except when the parts are absolutely irreconcilable, is enunciated, in Probate Code, section 103, recognized and applied uniformly in courts of this state. Vincent v. Security-First Nat. Bank, 67 Cal.App.2d 602, 608 [2], 155 P.2d 63; In re Estate of Salmonski, 38 Cal.2d 199, 209 [8], 238 P.2d 966. Likewise, the rule of Probate Code, section 106 has been recognized and applied in numerous cases. In re Estate of Lovejoy, 38 Cal.App.2d 69, 71 [1], 100 P.2d 547.

[1, 2] There is nothing in the will which by its four corners fairly and reasonably connects Paragraph Second to Paragraph Fifth, nor makes either dependent on the other. This court cannot write words into a will that are not fairly and reasonably contained therein. It may well be that the testatrix had some intention other than that set forth in the will. It is reasonable to believe that she had in mind putting in a general residuary clause but, if so, she did not disclose that intention to us. As was said in In re Estate of Carroll, supra [62 Cal.App.2d 798, 145 P.2d 645], "Courts are not to look for 'some undeclared purpose which may be imagined to have been in his mind, but the intention disclosed by the words he has used.'"

[3] As was said In re Estate of Lewis, 91 Cal.App.2d 322, 325 [3], 204 P.2d 898, 900;

> "The interpretation given to this paragraph of the will by the trial court appears to be reasonable and consistent with the intent of the testator and, under well established rules, that interpretation may not be disturbed on appeal even though another interpretation is possible."

In our opinion the will does not admit of any other reasonable interpretation than that given by the trial court. In our view its judgment was correct.

The order is affirmed.

MUSSELL, Acting P. J., concurs.

172 Cal.App.2d 384

James G. KOLIAS, Plaintiff and Respondent,
v.
C. J. COLLIGAN, Defendant and Appellant.
Civ. 18001.

District Court of Appeal, First District, Division 2, California.
July 28, 1959.

Action by owner of property against building contractor for amount paid to contractor for extra work. The Superior Court, City and County of San Francisco, Theresa Meikle, J., rendered judgment for property owner, and contractor appealed. The District Court of Appeal, Draper, J., held that evidence established that payment was made under compulsion and was not voluntary.

Affirmed.

1. Contracts ⟹232

Work performed by a building contractor in addition to that contracted for is compensable and reasonable charges for extra work are recoverable.

2. Appeal and Error ⟹1052(7)
Payment ⟹89(5)

In action by landowner against building contractor for amount he had paid to contractor for extra work, wherein much evidence was introduced as to whether payment was voluntary, admission of evidence relating to reasonable value of extra work was not an abuse of discretion on ground that owner voluntarily paid charges and the payments voluntarily made were not recoverable and was not prejudicial since issue was fully tried and determined against contractor.

3. Payment ⟹89(5)

In action against contractor by property owner for amount paid to contractor for extra work in connection with construction under agreement whereby property owner conveyed title to property to woman who was to reconvey it upon completion of buildings and obtaining of long-term loans, evidence sustained finding that property owner, as a reasonably prudent person, acted under compulsion in making payment for extra work.

4. Payment ⟹89(1)

Action for amount paid by property owner to contractor for extra work was not barred by laches in absence of indication that any evidence on subject of payment became unavailable between payment and filing of action or evidence of any other detriment to contractor by reason of delay.

5. Assumpsit, Action of ⟹18

Allegation of demand for payment is not essential to common count except in special circumstances.

6. Payment ⟹89(4)

Complaint of property owner against contractor for amount paid to contractor for extra work was not defective because it failed to allege a demand for payment.

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Marvin J. Colangelo, San Francisco, for appellant.

James P. Preovolos, San Francisco, for respondent.

DRAPER, Justice.

This action arises out of a construction contract. Knowing that a commercial concern desired to lease a building built to its specifications, defendant Colligan negotiated with plaintiff, who owned vacant land in an industrial section of San Francisco. By letter, Colligan offered to plan, build, finance and lease a building for plaintiff for $67,500. Plaintiff accepted the offer. Long-term financing in the sum of $50,000 would not be available until completion of the building. As part of his "package deal" Colligan arranged for Mrs. Waegemann (named as a defendant herein but not served) to provide the interim financing, and also to loan $17,500 on security of a second deed of trust. To secure Mrs. Waegemann's advances for the interim financing, plaintiff's property was transferred to her, to be reconveyed to plaintiff when the building was completed and the long-term loans were made. Plaintiff asked that the location of the building on the lot be changed somewhat from that planned by Colligan. The latter notified plaintiff that this would require additional work and, some four months before completion, sent a letter advising plaintiff of this fact and specifying the amounts to be charged for a portion of this extra work. Plaintiff did not sign an approval of this letter until shortly after completion of the building. At about the time of this acceptance, Colligan sent plaintiff a bill detailing all extras, in an amount totalling some $9,000. Seven months later, plaintiff paid the charges for extras in full. One day less than two years after payment, he brought this action to recover $8,455.74 paid for extra work. Defendant cross-complained for interest and rents amounting to $3,431.80 which he claims was erroneously omitted from his bills to plaintiff. After trial without a jury, the court awarded plaintiff $2,629 on the complaint, granted cross-complainant $1,271, and entered judgment in favor of plaintiff for the net amount of $1,358. Defendant appeals.

[1] Appellant first argues that work performed by a building contractor in addition to that contracted for is compensable. But respondent concedes that reasonable charges for extra work are recoverable. The only question here is whether the charges represent the reasonable value of such work. This is clearly the theory upon which the case was tried.

[2] Appellant next asserts error in the admission of any evidence relating to the reasonable value of the extra work. The argument is that respondent voluntarily paid these charges, and that payments voluntarily made are not recoverable. But in overruling appellant's single objection to such evidence, the court pointed out that he would be allowed to offer evidence as to the claimed voluntary character of the payment. Much evidence on this issue was in fact introduced by both parties. At most, the objection raised a question as to the order of proof. We find no abuse of discretion in the ruling. In any event, appellant was in no way prejudiced, since the issue was fully tried and was determined against him.

[3] There is substantial evidence that neither respondent's acknowledgment of the charges nor his payment of them was voluntary. Appellant's joint venturer, Mrs. Waegemann, held title to respondent's property. There is evidence that she and appellant would not reconvey to respondent until he acknowledged and paid the charges for extra work. It follows that the acknowledgment and payment here were made under compulsion, and were not voluntary. See Trower v. City and County, 152 Cal. 479, 483, 92 P. 1025, 15 L.R.A.,N.S., 183. Whether respondent, as a reasonably prudent person, acted under compulsion is a question of fact for the trier of fact (Steffen v. Refrigeration Discount Corp., 91 Cal. App.2d 494, 205 P.2d 727), which has, on substantial evidence, resolved it against appellant.

[4] Appellant argues that respondent's action is barred by laches. Assuming availability of this defense, it has no application here. There is no showing of any disadvantage to appellant by reason of delay. There is no remote indication that any evidence on this subject became unavailable in the period between payment and filing of this action. Appellant suggests no other detriment to him by reason of this delay. This fact is fatal to his claim of laches. Wilkerson v. Thomas, 121 Cal.App.2d 479, 489–490, 263 P.2d 678.

[5, 6] Appellant also urges that the complaint is defective in failing to allege a demand for payment. However, the California rule seems clear that allegation of demand is not essential to the common count (Quimby v. Lyon, 63 Cal. 394) except in special circumstances (Dunham v. McDonald, 34 Cal.App. 744, 168 P. 1063) which are not present here. This point was

not presented to the trial court, either by demurrer or otherwise.

Judgment affirmed.

KAUFMAN, P. J., and DOOLING, J., concur.

172 Cal.App.2d 302

David LANE, Plaintiff and Appellant,

v.

Harmon B. DAVIS and Ruby A. Davis, Defendants and Respondents.

Civ. 23591.

District Court of Appeal, Second District, Division 2, California.

July 24, 1959.

Real estate broker, who had received 2½ percent commission for procuring purchaser for theater building, brought action against owners to recover additional 2½ percent commission. The Superior Court of Los Angeles County, Kenneth C. Newell, J., entered judgment of dismissal, and the broker appealed. The District Court of Appeal, Fox, P. J., held that demurrer was properly sustained to first purported cause of action without leave to amend, and that second purported cause of action was insufficient to allege a cause of action for reformation, but that demurrer should not have been sustained thereto without leave to amend, where owners did not specifically question sufficiency of second cause of action with respect to failure of broker to allege prior agreement until filing of demurrer, and it appeared that broker could have stated a cause of action by alleging in the body of the complaint that which was contained in the prayer.

Judgment affirmed as to the first cause of action, and judgment reversed as to the second cause of action with directions to grant leave to amend.

1. Fraud ⚷41

Reformation of Instruments ⚷36(1)

In action by real estate broker, who had received 2½ percent commission for procuring purchaser for theatre building, against owners to recover additional 2½ percent commission, first purported cause of action alleging that broker entered into written agreement providing for only 2½ percent commission because of alleged false and fraudulent representations of owners that they were going to suffer a loss on the sale of the theatre when in truth theatre had cost owners only $65,000 and at time of making a written agreement owners, without knowledge of broker, had already sold theatre to purchaser for $135,000 and that previously owners had orally agreed to pay 5 percent commission to broker failed to allege a cause of action either for fraud or for reformation. West's Ann.Civ.Code, § 1624, subd. 5.

2. Brokers ⚷43(2)

Oral agreement by owners to pay certain commission to broker for procuring purchaser of realty is invalid and unenforceable. West's Ann.Civ.Code, § 1624, subd. 5.

3. Fraud ⚷25

A cause of action for fraud will not lie unless detriment has been occasioned by the alleged fraud.

4. Reformation of Instruments ⚷21

Fraud, which constitutes a ground for reformation, consists of representation that writing is in conformity with intended agreement, or that writing to be made will be in conformity therewith.

5. Contracts ⚷187(1)

A real estate broker may recover as a third-party beneficiary of a contract between the buyer and seller of realty, though not named in the contract, so long as the contract, or a portion thereof, was made expressly for his benefit.

6. Reformation of Instruments ⚷36(1)

A complaint for reformation of a contract should allege what the real agreement was, what the agreement, as reduced to writing, was, and where writing fails to embody the real agreement, and it is also necessary to aver facts showing how the mistake was made, whose mistake it was, and what brought it about, so that mutuality may appear.

7. Reformation of Instruments ⚿1, 6

Purpose of reformation is to correct a written instrument in order to effectuate a common intention of both parties, which was incorrectly reduced to writing, and, in order for plaintiff to obtain such relief, there must have been an understanding between the parties on all essential terms, otherwise there would be no standard to which the writing can be reformed.

8. Reformation of Instruments ⚿36(2)

In action by real estate broker, who had received 2½ percent commission for procuring purchaser for theatre building, against owners to recover additional 2½ percent commission, second purported cause of action alleging that broker was a third-party beneficiary under escrow instructions providing for payment of 5 percent brokerage commission by purchaser in escrow was insufficient to allege a cause of action for reformation, where it failed to allege facts showing what the real agreement was, either by direct allegation or by general statement sufficiently comprehensive and complete to place in issue the substance of the necessary prior agreement.

9. Pleading ⚿225(1)

In action by real estate broker, who had received 2½ percent commission for procuring purchaser for theatre building, against owners to recover additional 2½ percent commission, demurrer to defective second cause of action seeking reformation should not have been sustained without leave to amend, where owners did not specifically question sufficiency of second cause of action with respect to failure to allege prior agreement until filing of demurrer, and broker could have stated a cause of action in second cause of action by alleging in the body of the second cause of action what was contained in the prayer.

10. Pleading ⚿225(1)

Though statement in prayer of complaint cannot bolster an otherwise insufficient pleading, it may be considered when determining the probability of pleader being able to state a cause of action.

11. Pleading ⚿225(1)

A demurrer should not be sustained without leave to amend where it appears probable that a cause of action can be stated.

◆

R. H. Aarons and Robert J. Johnston, Pasadena, for appellant.

Gepner & Fox, Philip N. Gepner, Los Angeles, for respondents.

FOX, Presiding Justice.

Plaintiff appeals from a judgment of dismissal entered after defendants' demurrer to his second amended complaint, which seeks to recover a real estate brokerage commission, was sustained without leave to amend.

The defendants were owners of a certain theatre building in Pasadena. The plaintiff, a licensed real estate broker, was orally engaged to secure a purchaser for this property; if successful, he was to receive a 5 per cent commission. The oral agreement was entered into during December of 1955. Subsequently, through plaintiff's efforts, the Salvation Army Corporation became interested in the property. Thereafter, on August 23, 1956, the plaintiff and defendant H. B. Davis executed the following written agreement:

> "Agreement of
> Commission. August 23, 1956.
>
> "It is hereby mutually agreed upon by both of the undersigned that in the event of a sale of the Pasadena Theatre Building to the Salvation Army at any time within one year from date, that the agent herein will accept 2½% of the total selling price or the amount of ½ of the customary 5% commission; and in the event of a lease the same ruling will apply, ½

of the customary paid real estate commission.

"David Lane
"H. B. Davis."

The escrow instructions entered into by defendants and the buyer, the Salvation Army Corporation, provided that a full 5 per cent commission was to be paid through escrow, one half of which was to be paid to Richard Davis and the other one half to plaintiff. Richard Davis, who is defendant H. B. Davis' brother, was not a licensed real estate broker or salesman.

Plaintiff apparently has been paid a 2½ per cent commission and is seeking in this action to recover an additional 2½ per cent. His second amended complaint attempts to state two causes of action. The first is that he entered into the above written agreement providing for only a 2½ per cent commission as a result of the defendants' false and fraudulent representations that they were going to suffer a loss on the sale of the property. Plaintiff alleged in this regard "That in truth and in fact said building had cost the defendants only $65,000.00 and at the time of the making of said agreement, the said defendants, without the knowledge of the plaintiff, had already sold the property to the said Salvation Army for the price of $135,000.00, and had in their possession an earnest money deposit in the amount of $10,000.00."

In his second cause of action, plaintiff alleges that he is a third party beneficiary under the escrow instructions providing for payment of a brokerage commission; that the buyer intended to provide in said instructions that a full 5 per cent commission be paid to a broker and salesman; that Richard Davis had rendered no services and held no license and was in fact a "nominee or dummy" used by the defendants to avoid paying a full 5 per cent commission; and that buyers would not have consummated the agreement had they known of the defendants' scheme to defraud the plaintiff. Plaintiff prays for damages and for a reformation of the above agreements. A general demurrer to each cause of action alleged in the second amended complaint was sustained without leave to amend, following which a judgment was entered that plaintiff take nothing by his complaint. Plaintiff appeals from this judgment.

[1-3] As to the first cause of action, the demurrer was properly sustained without leave to amend. The second amended complaint shows that the only agreement by which defendants promised to pay a 5 per cent commission to plaintiff was oral. Such an agreement is invalid and unenforceable. Civ.Code, § 1624, subd. 5; Augustine v. Trucco, 124 Cal.App.2d 229, 237-238, 268 P.2d 780. As to the written instrument of August, 1956, the complaint alleges that it was executed *after* an agreement had been reached with and a deposit received from the purchaser. Under such circumstances, even granting the defendants made false and fraudulent representations to the plaintiff, it would have been impossible for plaintiff to have relied on such representations to his detriment for the obvious reason that he had already rendered his services in procuring a purchaser. Plaintiff suffered no injury as a result of the defendants' fraud for at the time the representations material to this action were made, plaintiff had no enforceable claim to any compensation relative to the sale of the defendants' property. It is axiomatic that a cause of action for fraud will not lie unless detriment has been occasioned by the alleged fraud. As stated in Barron Estate Co. v. Woodruff Co., 163 Cal. 561, 571, 126 P. 351, 355, 42 L.R.A.,N.S., 125, "It is fundamental, of course, that, no matter what the nature of the fraud or deceit, unless detriment has been occasioned thereby, plaintiff has no cause of action." See also Hill v. Wrather, 158 Cal.App.2d 818, 824, 323 P.2d 567; Baker v. Littman, 138 Cal.App.2d 510, 516, 292 P.2d 595; Abbot v. Stevens, 133 Cal. App.2d 242, 247, 284 P.2d 159. Therefore, as it affirmatively appears on the face of plaintiff's second amended complaint that he suffered no detriment in reliance upon defendants' misrepresentations, the sus-

taining of the demurrer without leave to amend the first cause of action must be affirmed. Any rights to compensation for managerial or related services rendered by plaintiff do not appear embraced within the terms of the August, 1956, agreement and therefore are not herein involved. Furthermore, counsel for plaintiff during oral argument made it clear that in this action plaintiff was not attempting to collect for any such services.

[4] If plaintiff's first cause of action be deemed one for reformation, it also fails to state sufficient facts. The only ground for reformation alleged or suggested by the averments is that of fraud. "The fraud which constitutes a ground for reformation consists of the representation that the writing is in conformity with the intended agreement, or that a writing to be made will be in conformity therewith." (2 Witkin, California Procedure, p. 1397.) The fraud alleged in the instant complaint went only to the inducement to enter into the contract and fraud of this character will not warrant reformation for the obvious reason that there is no common intention or understanding between the parties that may be utilized as a standard to which the writing could be reformed. See Lemoge Electric v. County of San Mateo, 46 Cal.2d 659, 663, 297 P.2d 638. As succinctly stated in Professor Williston's treatise on the law of contracts (5 Williston, Contracts, § 1525, pp. 4272–4273 (1937 ed.)), "* * * if the contract agreed upon is embodied in the writing, the fact that the agreement was induced by fraud is not ground for reformation." See Harding v. Robinson, 175 Cal. 534, 541, 166 P. 808.

With respect to plaintiff's second cause of action, wherein he is seeking to have the escrow instruction reformed to provide for the payment of a commission to him of 5 per cent rather than 2½ per cent, we are of the opinion that he failed to state a cause of action, but that he should have been given leave to amend.

[5] A real estate broker may recover as a third party beneficiary of a contract between the buyer and seller of real property. Calhoun v. Downs, 211 Cal. 766, 297 P. 548; Watson v. Aced, 156 Cal.App.2d 87, 319 P.2d 83. Such recovery is permitted although the third party is not named in the contract so long as the contract (or a portion thereof) was made expressly for his benefit. Calhoun v. Downs, supra; Watson v. Aced, supra; Shell v. Schmidt, 126 Cal.App.2d 279, 272 P.2d 82. As stated in the Shell case, 126 Cal.App.2d at page 290, 272 P.2d at page 89: "It is not required that the third party beneficiary be specifically named as a beneficiary. All that section 1559 [Civil Code] requires is that the contract be 'made expressly for the benefit of a third person,' and 'expressly' simply means 'in an express manner; in direct or unmistakable terms; explicitly; definitely; directly.' (Citation.) Where the contract is for the benefit of a class any member or members of the intended class may enforce it." Defendants do not contend plaintiff was not the beneficiary of such a contract. No reason appears why the plaintiff, if he could maintain an action on the contract, may not have it reformed. "A third party beneficiary may maintain the action [for reformation] under proper circumstances. For example, a third party intended to be insured under a public liability policy covering the operation of motor trucks may maintain an action against the insurer, without joining the named insured, where the insured will not be affected in any manner by the decree of reformation. Or the action may be maintained by one claiming as beneficiary under an annuity policy after the death of the primary annuitant. And a real estate broker may sue to reform a contract for the sale of real estate by inserting in blanks in the contract form his name and the amount of his commission." 42 Cal.Jur.2d, § 23, pp. 602–603.

[6] The allegations necessary to state a cause of action for reformation are outlined in Johnson v. Sun Realty Co., 138 Cal.App. 296, 300, 32 P.2d 393, 395, as follows: "A complaint for the reformation of a contract should allege what the real agreement was, what the agreement as reduced to writing was, and where the writing fails to embody

the real agreement. It is also necessary to aver facts showing how the mistake was made, whose mistake it was, and what brought it about, so that mutuality may appear." See also Auerbach v. Healy, 174 Cal. 60, 62, 161 P. 1157. Plaintiff alleges in the instant pleading that "the provision in the escrow instructions for the payment of a real estate commission was a third party beneficiary contract intended by the buyer * * * to be for the bona fide payment of a standard and customary commission to a licensed real estate broker or salesman. That * * * said agreement [escrow instructions] does not embody the true agreement between the defendants and the buyer with regard to the purchase of said premises and the payment of a real estate broker's commission." Plaintiff then alleges that the buyer "would not have executed said escrow instructions nor consummated the agreement represented thereby" if the buyer knew of defendants' scheme to defraud plaintiff of the customary commission and that "the true agreement intended by said buyer was to pay a full and customary commission to the plaintiff. * * *"

[7, 8] From the foregoing, it is clear that the complaint does not state, either directly or by reasonable inference, what the defendants and the buyer orally agreed to, or if there was any actual understanding with respect to the payment of commissions which was mutually agreed upon but because of fraud was not expressed in the escrow instructions. "The purpose of reformation is to correct a written instrument in order to effectuate a common intention of both parties which was incorrectly reduced to writing. (Citation.) In order for plaintiff to obtain this relief there must have been an understanding between the parties on all essential terms, otherwise there would be no standard to which the writing could be reformed. (Citations.)" Lemoge Electric v. County of San Mateo, 46 Cal.2d 659, 663, 297 P.2d 638, 640. Viewing the pleadings most favorably to the plaintiff, it is merely alleged that (1) defendants acted fraudulently, (2) the escrow instructions do not embody the true agreement between the buyer and sellers, and (3) the buyer actually intended that plaintiff receive a full commission. It was not alleged that the defendants actually agreed with the buyer to pay plaintiff a 5 per cent commission or to pay a commission only to a licensed broker or salesman. The allegations contained in the complaint are insufficient to show what the real agreement was, either by direct allegation or by a general statement sufficiently comprehensive and complete to place in issue the substance of the necessary prior agreement. Johnson v. Sun Realty Co., supra.

[9–11] We are of the view, however, that plaintiff should have been given leave to amend. An examination of the points and authorities in support of the demurrers interposed by the defendants disclose that defendants did not specifically question the sufficiency of plaintiff's second cause of action with respect to his failure to allege the prior agreement until the filing of the demurrer to the instant pleading, which was sustained without leave to amend. We are not, therefore, presented with a case where, after being informed of the omission of a necessary allegation the plaintiff amends his complaint yet again fails to include the previously omitted averment. Plaintiff, in his prayer, does state what the true agreement was. While it is true, of course, that a statement in the prayer cannot bolster an otherwise insufficient pleading, it certainly may be considered when determining the probability of the pleader being able to amend to state a cause of action. When so considered, it appears that plaintiff could have stated a cause of action by alleging in the body of his complaint that which was contained in his prayer. A demurrer should not be sustained without leave to amend where it appears probable that a cause of action can be stated. See 2 Witkin, California Procedure, § 505, and cases cited therein.

The judgment is affirmed as to the first cause of action; as to the second cause of action, the judgment is reversed, with directions to the trial court to grant plaintiff leave to amend.

HERNDON, J., concurs.

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172 Cal.App.2d 334

**PEOPLE of State of California,
Plaintiff and Respondent,
v.
Millard PATTERSON and Kenneth
Warner, Defendants and Appellants.
No. 3628.**

District Court of Appeal, First District,
Division 2, California.
July 27, 1959.
Hearing Denied Sept. 22, 1959.

Defendants were convicted of first degree robbery and first degree burglary. The Superior Court, City and County of San Francisco, C. Harold Caulfield, J., rendered judgments and defendants appealed from judgments and from denial of their motions for new trial. The District Court of Appeal, Dooling, J., held that although reporter's transcript was filed more than six months after filing of defendants' notice of appeal contrary to rule on appeal providing for filing within 20 days after filing of notice of appeal, defendants were not entitled to be released from prison on ground that they had been deprived of their right to a speedy trial and appeal therefrom guaranteed under constitutional provisions of due process and equal protection in view of fact that delay in preparing transcript could have no bearing on validity of matters which preceded filing of appeal or upon merits of appeal.

Affirmed.

1. Constitutional Law ⇨250, 271

Although reporter's transcript was filed more than six months after filing of defendants' notice of appeal contrary to rule on appeal providing for filing within 20 days after filing of notice of appeal, defendants were not entitled to be released from prison on ground that they had been deprived of their right to a speedy trial and appeal therefrom guaranteed under constitutional provisions of due process and equal protection in view of fact that delay in preparing transcript could have no bearing on validity of matters which preceded filing of appeal or upon merits of appeal. West's Ann.Rules on Appeal, rule 35(b, d).

2. Criminal Law ⇨1171(1)

In prosecution for first-degree robbery and first-degree burglary, statement of defendants' counsel to one defendant that defendant should not be coy with him and question as to bake shops owned by defendant during period of time and how much time he had with robbery business were not prejudicial where it seemed clear that the attorney was attempting to be sarcastic and questions prior to and after the one cited elicited testimony that since 1928 defendant had owned and operated legitimate businesses and that from 1928 until his arrest in 1957 he had been off work only three weeks.

◆

Brown, Smith & Taber, Oakland, for appellants.

Stanley Mosk, Atty. Gen., Albert W. Harris, Jr., Deputy Atty. Gen., for respondent.

DOOLING, Justice.

Defendants were convicted of first-degree robbery and first-degree burglary. Pen.Code §§ 211, 459. They appeal from the judgments and from the denial of their motions for a new trial.

The evidence shows that on November 24, 1957 at about 12:15 a. m., the night watchman at 111 Sutter Building in San Francisco admitted appellants into the building and when he asked them to sign a register, each man indicated a gun tucked in his trouser band. The watchman was directed to take appellants to the 18th floor.

On this floor appellants, using the watchman's keys, entered an office. The watchman was made to stand in a locker and appellant Warner "covered" him with a revolver. He could not see Patterson but could hear the sound of drawers being opened and closed. Later the watchman was made to lie face down on the floor, his hands and feet were bound, and he was gagged with a towel. His wallet was taken by Patterson and his money was removed. Later it was discovered that offices on the 18th and 22nd floors had been entered, drawers had been opened, and it appeared that someone had attempted to open file cabinets. When the police arrived at 2 a. m. they found appellants inside a walk-in refrigerator in the B-G Restaurant located in the building. At this time the watchman positively identified appellants as the men who forced their way into the building and robbed him. Two guns were found in the refrigerator, an automatic pistol in a mustard crock and a revolver in a pickle crock.

[1] Appellants do not suggest that the evidence does not support the judgments nor do they indicate any errors occurring at trial. They point to the fact that the reporter's transcript was filed more than 6 months after the filing of their notice of appeal. The rules on appeal provide that the reporter's transcript shall be filed within 20 days after the filing of the notice of appeal and that such period may be extended for an additional 60 days. Rule 35(b) and (d).

With no citation of authority appellants assert that they should be released from prison because they have been deprived of their right to a speedy trial and appeal therefrom, "* * * a right which is guaranteed to all citizens under the Constitutional provisions of due process and equal protection."

There is clearly no merit to the contention. A similar argument was presented in People v. Harrison, 129 Cal.App.2d 197, at page 203, 276 P.2d 188, 193, and while the delay in filing the transcript was not so long the court said: "* * * the fact that there may have been some unjustified delay in preparing the transcript could have no bearing upon the validity of the matters which preceded the filing of the appeal or upon the merits of the appeal."

Appellants contend also that they were denied due process of law in that their attorney at the trial did not represent their interests.

[2] A reading of the record indicates that there is no merit to this assertion. Appellants cite the statements of their counsel to Warner, "Don't be coy with me, Mr. Warner" and "Well, don't be coy, now." It is difficult to find anything "devastating" to appellants in these two comments. The following statement is cited to indicate prejudicial misconduct. "And during that time, you owned bake shops in how many different locations and gone through some—well, no—how much time have you had with this so called robbery business?" The People objected and the question was stricken. It would seem clear that the attorney was attempting to be sarcastic. The questions prior to and after the one cited elicited testimony that since 1928, appellant Warner had owned and operated legitimate businesses and from 1928 until the day of his arrest he had been off work only three weeks. The statement could not have prejudiced Warner.

Appellants submit that there must have been other instances of misconduct that do not appear in the record. They cite statements of the trial judge, made outside the presence of the jury:

"The Court: The motion for mistrial is denied.

"And, at this time,—I do this with extreme regret, Mr. Dana, and with great reluctance—I don't know what the difficulty is, but the jury has possibly some reason to wonder what causes your mannerisms before the jury. I know that they are blameless and I am not censuring you in any manner, whatever, but I have been bothered about the situation.

"Mr. Dana: Has the jury made some comment?

"The Court: Pardon?

"Mr. Dana: Has the jury made some comment?

"The Court: No, there has been no comment, at all, but I have observed your demeanor, your manner and so forth; whether it is physical ailment or physical disability, or what it is, I do not know and I do not want to pass upon it at this time, but I am very anxious to see it does not prejudice your clients. But, I have to keep the case within bounds and I have to stop unnecessary eruptions of counsel and comments of counsel and I will do that whether the District Attorney is guilty or defense counsel is guilty, and I always have.

"The motion for mistrial is denied.

"Mr. Dana: Well, if there is any knowledge of the Judge that the jury are prejudiced at this point—

"The Court: There has been no comment, at all, made by the jury at all [sic].

"Mr. Dana: Well, I mean, anything to indicate that, then I think—

"The Court: No, there is nothing at all, but it is only the impression that I have, myself, and I don't know, I have no reason to think that the jury shares the impression the Court has, but I am just telling you so I hope you will try and be circumspect, as conditions permit.

"Mr. Dana: Well, Your Honor, I try to be circumspect. I always try to fight my case.

"The Court: I don't mind your putting up a vigorous battle. You are making a splendid defense for your clients by conducting an able and vigorous cross-examination and direct examination, and I am not criticising your legal ability, at all, I have the highest respect for you, Paul.

"Mr. Dana: Well, with respect to any mannerism that I have displayed—this could be on or off the record—I would appreciate you telling me and—

"The Court: No, I will let it go. I have characterized it as far as I think is proper, for the record.

"Mr. Dana: All right. Thank you.

"The Court: I think we understand one another."

The trial judge did not consider that the actions of the attorney warranted the granting of a mistrial; in fact, he stated that "You are making a splendid defense * * *." As stated in People v. Wein, 50 Cal.2d 383, 410, 326 P.2d 457, 473: "The handling of the defense by counsel of the accused's own choice will not be declared inadequate except in those rare cases where his counsel displays such a lack of diligence and competence as to reduce the trial to a 'farce or a sham.'"

The proof of defendants' guilt was positive and complete and it is impossible in the state of this record to find any prejudice to appellants in any of the matters urged on this appeal.

Judgments and orders denying new trial affirmed.

KAUFMAN, P. J., and DRAPER, J., concur.

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172 Cal.App.2d 536

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Arthur BRYSON, Defendant and Appellant.

Cr. 6480.

District Court of Appeal, Second District, Division 3, California.

July 31, 1959.

Defendant pleaded guilty to robbery and denied having suffered two prior felony convictions as alleged in the information. The Superior Court of Los Angeles County, Maurice C. Sparling, J., determined the offense to be robbery of the second degree and denied defendant's motion to withdraw his guilty plea and found the priors to be true and denied probation and sentenced defendant to state prison for the term prescribed by law. Defendant appealed from the judgment. The District Court of Appeal, Shinn, P. J., held that mere statements contained in probation report which, in turn, were based upon information gathered from the files of various police departments and other law enforcement agencies, did not constitute the requisite proof of the prior convictions.

Reversed and remanded with directions.

1. Criminal Law ⚷274

In prosecution for robbery, defendant's plea of guilty would not be set aside upon defendant's mere assertion, unsupported by any showing of facts, that defendant did not really want to plead guilty but for some reason or other he did and that there had been an arrangement worked out between the alleged victim of the robbery and the defendant so that the defendant would pull the robbery and then receive $500 from the victim for doing so and the victim would claim the insurance.

2. Criminal Law ⚷1202(3)

Where defendant pleaded guilty to robbery and denied having suffered two prior felony convictions, mere statements contained in probation report which, in turn, were based upon information gathered from the files of various police departments and other law enforcement agencies were insufficient to prove the prior felony convictions.

3. Criminal Law ⚷1202(3)

Where defendant accused of robbery denies that he has suffered two prior felony convictions as alleged in the information, the People are required to prove the priors by competent evidence, and a sufficient showing can be made by offering certified copies of the judgments and commitments in each case or certified copies of the state prison records, together with proof that defendant is the person referred to in the documents.

◆

Arthur Bryson, in pro. per.

Stanley Mosk, Atty. Gen., for respondent.

SHINN, Presiding Justice.

Arthur Bryson pleaded guilty to robbery and denied having suffered two prior felony convictions as alleged in the information. The court determined the offense to be robbery of the second degree and disposition of the priors was continued to the hearing on probation and sentence. At that time, Bryson made a motion to withdraw his guilty plea; the motion was denied; the court found the priors to be true; probation was denied; and Bryson was sentenced to State Prison for the term prescribed by law. He appeals from the judgment.

Upon application of appellant for appointment of counsel, the matter was referred to the Committee on Criminal Appeals of the Los Angeles Bar Association with a request for a report which would call our attention to any matter disclosed by the record which would indicate that Bryson might be entitled to some relief. After receiving a report from a member of the Committee that no meritorious ground of appeal had been found, and in accordance with our settled practice, we examined the record in order to ascertain whether appointment of counsel would serve any useful purpose. Having determined that the appointment of counsel would be unjustified we denied the application and notified appellant of our order, substantially extending his time to file a brief. No brief having been filed, we have re-examined the record and are disposing of the appeal by written opinion.

[1] Bryson was represented by a deputy public defender during all stages of the trial proceedings. In moving to set aside the plea of guilty to robbery his counsel stated: "I notice in the probation report also that he contends that he didn't really want to plead guilty, but for some reason

or other he did. He claims that actually there was an arrangement worked out between the alleged victim of the robbery and the defendant so that he would pull the robbery and then receive $500 from the victim for doing so and the victim would claim the insurance. The defendant has written a letter to the office saying he wishes to withdraw that plea. So I make that motion at this time, your Honor." No showing was made of facts which would have warranted the court in setting aside the plea. The motion was properly denied. (14 Cal.Jur.2d 510–12.)

[2, 3] However, the People failed to prove the prior felony convictions. It was alleged in the information that appellant had been convicted of robbery in 1938 and of violating Vehicle Code, § 503 in 1953, and had served terms of imprisonment in State Prison. Bryson having denied the priors, the People were required to prove them by competent evidence. A sufficient showing would have been made by offering certified copies of the judgments and commitments in each case or certified copies of the State Prison records, together with proof that appellant was the person referred to in the documents. (24 Cal.Jur.2d 626–27.) No evidence was offered by the People. It appears from the record that the finding as to the prior convictions was predicated upon statements contained in the probation report which, in turn, were based upon information gathered from the files of various police departments and other law enforcement agencies. The hearsay statements in the probation report did not constitute the requisite proof of the priors and the adjudication that appellant had suffered two prior convictions was without support in the evidence.

The judgment is reversed and the cause remanded to the trial court with direction to that court that if, within 20 days after the filing therein of the remittitur from this court, the district attorney shall apply for an order dismissing that portion of the information which charges appellant with having been convicted of two felonies prior to the commission of the offense of robbery charged therein, and said application be granted, and the court shall pronounce judgment and sentence upon appellant, thereupon such judgment shall stand affirmed. If the district attorney shall not within said period of 20 days make said application, or if it is made and denied, the trial court shall grant appellant a new trial as to the accusation of the former convictions only.

PARKER WOOD and VALLÉE, JJ., concur.

172 Cal.App.2d 522

Elmer O. BRUDVIG and Wave B. Brudvig, his wife, Plaintiffs and Respondents,
v.
J. H. RENNER, also known as John H. Renner, and Marion K. Renner, Defendants and Appellants.
No. 18501.

District Court of Appeal, First District,
Division 2, California.
July 31, 1959.

Purchaser's action against vendor for specific performance of contract covering real estate. The Superior Court, County of Santa Cruz, Gilbert B. Perry, J., entered decree of specific performance for purchaser and vendor appealed. The District Court of Appeal, Draper, J., held that where vendor owned an irregularly shaped three-acre parcel at location in question, agreement of sale which described property as two-acres more or less with home was insufficient to support a decree of specific performance.

Reversed and remanded.

1. Vendor and Purchaser 🔑22

Description of property in agreement of sale as being two-acres more or less with home located at a certain address would not be uncertain if description contained all land owned by vendor at that location or all the property known as a certain address.

2. Specific Performance ⚿29(2)

Where vendor owned at location in question an irregularly shaped three-acre parcel of land, description in agreement for sale of real estate of two-acres more or less with a home located at a specified address was insufficient to support a decree of specific performance in favor of purchaser. West's Ann.Civ.Code, § 3390, subd. 6.

3. Evidence ⚿460(2)

In an action for specific performance, parol evidence may aid contract description only in limited situations.

4. Specific Performance ⚿29(2)

Where real estate description in contract for sale of real estate lacked required specificity, decree of specific performance could not be entered. West's Ann.Civ.Code, § 3390, subd. 6.

5. Vendor and Purchaser ⚿345

Fact that description in contract for sale of real estate is not sufficiently certain for specific performance does not preclude recovery of damages for its breach.

6. Specific Performance ⚿116½

Even if complaint requesting specific performance of contract to sell real estate did not pray for damages, an amendment to allege damages could be permitted even though it had been determined that contract's description was insufficient to support a decree of specific performance.

◆

Ross & Harris, John G. Barnes, Jr., Santa Barbara, for appellants.

Raymond H. Goodrich, Joseph C. Davish, Santa Cruz, for respondents.

DRAPER, Justice.

Decree of specific performance of a contract for sale of real estate directs defendant owner to convey described land to plaintiff buyer. Defendant appeals.

As is the case with so many such disputes, the agreement of sale was drawn by a real estate salesman. It describes the property as:

> "2-acres more or less, with New Home, located at 4053 Branciforte Drive, Santa Cruz, California; legally known as Dr. J. H. Renner property."

[1] There would be no uncertainty if this description covered all the land owned by defendant at that location (Towle v. Carmelo L. & C. Co., 99 Cal. 397, 33 P. 1126), or all the property known as 4053 Branciforte Drive (Finn v. Goldstein, 201 Cal. 605, 258 P. 85; Burnett v. Kullak, 76 Cal. 535, 18 P. 401).

But it is admitted that the contract dealt only with a portion of defendant's land. The complaint sets out a metes and bounds description of exactly two acres—concededly less than the area owned and occupied by Renner. Defendant owned 18 acres which he had fully occupied for some time. Shortly before this contract, he had agreed to sell some 15 acres to another, but he still retained both legal and equitable title to about three acres. Plaintiff testified that he desired to buy, and negotiated for, exactly two acres. He asked deletion of the "more or less" phrase, but was told by the salesman that it meant only a minor variation, and was commonly included in such contracts "to keep it from going into Court." Defendant's answer alleges that plaintiff is entitled only to land described therein, consisting of only 0.94 acre. Thus neither the pleadings nor the evidence permit construing the contract to cover the entire Renner land.

[2] The question then becomes whether the agreement designates a two-acre parcel of the total three acres with the certainty required to support a decree of specific performance. We conclude that it does not. The three-acre piece is irregularly shaped. There are many possible means of carving from it two acres which would include the home described in the contract

The solution proposed by plaintiff would make the northerly boundary parallel with the southerly property line. But his own surveyor, who conceived this method of determining the question, testified that his choice of the northerly line was "arbitrary." It is clear that the contract description is inadequate to support a decree of specific performance.

[3, 4] In an action for specific performance, parol evidence may aid the contract description only in limited situations (see review of the cases in Corona Unified School Dist. v. Vejar, 165 Cal.App.2d 561, 332 P.2d 294). The description before us could be made definite only by resorting to parol evidence for addition of terms to the contract, rather than for aid in construction of the contract terms. But even if we disregard all restrictions upon the use of the parol evidence in this case, the evidence introduced falls far short of spelling out a description sufficiently certain to support the relief here sought. Lacking the required specificity (Civ.Code, § 3390, subd. 6; Corona Unified School Dist. v. Vejar, supra), the decree cannot be affirmed. Plaintiff suggests that he has the right to select any two cases of defendant's land. If the contract so provided, it would be sufficiently certain. Fleishman v. Wood, 135 Cal. 256, 67 P. 276. But the agreement contains no such provision, and it seems clear that none can be implied or inferred. Hines v. Copeland, 23 Cal.App. 36, 136 P. 728.

[5, 6] The fact that the contract is not sufficiently certain for specific performance does not, however, preclude recovery of damages for its breach. Pascoe v. Morrison, 219 Cal. 54, 25 P.2d 9. The complaint here alleges and prays for damages resulting from defendant's failure to convey. Even if it did not, amendment to allege damages could be permitted. Long Beach Drug Co. v. United Drug Co., 13 Cal.2d 158, 172–173, 88 P.2d 698; 89 P.2d 386. The damages awarded in the case at bar were wholly incidental to the grant of specific performance. The trial court may well consider that another measure should be applied in the light of our holding that specific performance cannot be had. The issue of damages is not argued on the present appeal. We do not by this opinion determine that issue in any way. Rather, the case will be remanded for such further proceedings as the trial court may determine proper upon the issue of damages.

Judgment reversed.

KAUFMAN, P. J., and DOOLING, J., concur.

John BISHEL and Helen Bishel, Plaintiffs and Respondents,

v.

T. R. FARIA, Defendant and Appellant.*

Civ. 9638.

District Court of Appeal, Third District, California.

July 29, 1959.

Hearing Granted Sept. 22, 1959.

Action to establish common boundary line between lands of plaintiffs and defendant on opposite sides of San Joaquin River and to quiet title. The Superior Court, Madera County, Stanley Murray, J., rendered judgment establishing boundary line, and defendant appealed. The District Court of Appeal, Warne, J. pro tem., held that West's Ann.Gov.Code § 23120, describing boundary line of Madera County as running "up the middle" of San Joaquin River, used quoted phrase as meaning that point midway between the permanent banks of river which confine the waters to river channel throughout the entire width when stream is carrying its maximum, usual, and normal quantity of water.

Judgment reversed.

* Opinion vacated 1 Cal.Rptr. 153, 347 P.2d 289.

1. Counties ⚷7

Government Code provision that the word "up", as applied to a river in statutory boundary descriptions of the several counties, means the middle of the main channel of river, is ineffective when it is otherwise declared in the description. West's Ann.Gov.Code, §§ 23070, 23074.

2. Counties ⚷7

Government Code provision that the word "up", as applied to a river in statutory boundary descriptions of the several counties, means the middle of main channel of river, was ineffective as applied to Madera County, since Government Code description of Madera County as bounded by San Joaquin River expressly describes such boundary line as running "up the middle of said river," as distinguished from merely "up" the river. West's Ann.Gov.Code, §§ 23070, 23074, 23120.

3. Counties ⚷7

Government Code description of boundary of Madera County as running up the middle of San Joaquin River disclosed legislative intent that such boundary line should extend along the middle of San Joaquin River as it normally flows during periods of high water, as distinguished from its channel during periods of low water. West's Ann.Civ.Code, § 830; West's Ann.Gov.Code, §§ 23070, 23120.

4. Waters and Water Courses ⚷89

In absence of language to the contrary, the "bed" of a nonnavigable river must be deemed to be bounded by the permanent banks which confine the waters in their course at their highest level.

See publication Words and Phrases, for other judicial constructions and definitions of "Bed".

5. Waters and Water Courses ⚷89

The "banks" of a nonnavigable river are the boundaries which confine the water to its channel throughout the entire width when stream is carrying its maximum quantity of water.

See publication Words and Phrases, for other judicial constructions and definitions of "Banks".

6. Counties ⚷7

Government Code description of boundary of Madera County as running "up the middle" of San Joaquin River at a point at which it is a nonnavigable stream used quoted phrase as meaning at that point midway between permanent banks of river which confine the waters to river channel throughout the entire width when stream is carrying its maximum, usual and normal quantity of water. West's Ann.Civ.Code, § 830; West's Ann.Gov.Code, §§ 23070, 23074, 23100 et seq., 23120.

See publication Words and Phrases, for other judicial constructions and definitions of "Up the Middle".

◆

F. Louis Gomes and Franklyn E. Wyland, Jr., Fresno, for appellant.

Green, Green & Bartow, Madera, for respondents.

WARNE, Justice pro tem.

This is an appeal from the judgment in an action to establish the common boundary line of appellant's and respondents' respective lands and to quiet title. Appellant's land is situate in Fresno County and borders on the San Joaquin River on the south, while respondents' lands lie immediately opposite appellant's lands and extend along the north bank of the river.

The San Joaquin River flows in a general westerly direction between said parcels of land and is a nonnavigable stream at said location. The record shows that the average water flow on the yearly basis varies between approximately three and five thousand second feet. In the months of March, April, May and June there is an average flow of from five to twelve thousand second feet.

Located within the bed of the river, and off shore from the north bank, is a sand, gravel and alluvial deposit. During the eight or nine month period of low water, this deposit is connected and attached to the north bank of the river, but during the periods of three or four months of high water it is substantially, if not entirely, submerged. When not entirely submerged an island is formed and water flows between the north bank of the river and the north side of the so-called island.

The trial court found that the main channel of the river was a point midway between the south bank of the river and the south bank of the so-called island or alluvial deposit, and that said center line of the main channel of the San Joaquin River is the true boundary line between the lands of the plaintiffs and the lands of the defendant.

The parties stipulated that the true boundary line between their lands is "the middle of the * * * stream" as provided by section 830 of the Civil Code, and that said line is the same as the legal boundary line within the area involved dividing Fresno County and Madera County, that is, the middle of the river as provided in section 23120 of the Government Code. However appellant contends that neither the facts nor the law support the trial court's finding that the true boundary of his and respondents' lands lies along the center line of what is the main channel of the stream during the eight or nine months of the year when it does not flow on the north side of the so-called island. Appellant contends that the center line of the river must be found to be midway between the permanent banks which confine the waters in the course of their highest normal level.

[1-3] We feel that there is merit in appellant's contention, and especially so by reason of the stipulation that the boundary line in question is the same as the boundary line dividing Fresno County and Madera County at that point. Section 23120 of the Government Code describes the boundary of Madera County as "following up the middle of said river," and although section 23074 of the Government Code provides that the word "up" as applied to boundary descriptions of the several counties means the middle of the main channel thereof, that section is ineffective when it is otherwise declared in the descriptions. Sec. 23070, Government Code. We have that very situation here since the description of Madera County as bounded by the San Joaquin River expressly describes that line as running "up the middle of said river" as distinguished from merely "up" the river. An examination of the boundary description of the several counties in California where a creek or river forms a portion of the boundary line reveals that in nearly every case, with the exception of Madera County, the Legislature in describing such boundary merely used the words "up" or "down" the creek or river, without further qualifications such as "up the middle of said river." Boundaries of Counties, Ch. 2, Art. 2, Government Code. Hence we feel that when the Legislature established the boundary line of Madera County it intended that the line should extend along the middle of the river as it normally flows during periods of high water as distinguished from its channel during periods of low water.

[4, 5] In Mammoth Gold Dredging Co. v. Forbes, 39 Cal.App.2d 739, 751-752, 104 P.2d 131, 137, the court set forth principles of law which are pertinent to the issues involved in this case, although that case presented a question as to what the intention of the grantor was when he used the term "present high water mark on the right bank of the Yuba River." The court said: "In the absence of language to the contrary, the bed of a nonnavigable river must be deemed to be bounded by the permanent banks which confine the waters in their course at their highest level. The banks of a river are the boundaries which confine the water to its channel throughout the entire width when the stream is carrying its maximum quantity of water. That definition is peculiarly applicable to those California rivers which depend upon periodical supply of water from winter rains and melted snow, and which diminish in the summer time to mere rivulets which aimlessly wander about over dry gravel beds. Ventura Land & Power Co. v. Meiners, 136 Cal. 284, 290, 68 P. 818, 820, 89 Am.St.Rep. 128. In the last case cited it is said: 'According to the most approved definitions, the banks of rivers or other water courses

are "those boundaries * * * which contain their waters at their highest flow"; or, as otherwise expressed by the same judge, they are "the fast land which confines the water of a river in its channel or bed, in its whole width." * * * "By this term is understood what contains the river in its natural channel, when there is the greatest flow of water." * * * The principle thus established is peculiarly appropriate to this state where the changes in rainfall from year to year may be said to be periodical. * * * Both definitions agree in holding that the bed of the river is bounded by the permanent or fast banks by which its waters are confined.'

"The ordinary maximum flow of water in a river during the wet season of each year may not be deemed to be mere 'flood' or 'storm waters'. The average level of the water attained by such a river in its annual seasonal flow establishes its high water mark as defined by the authorities. That rule is applied to the San Joaquin River, which is similar in character to the Yuba River, in the case of Herminghaus v. Southern California Edison Co., 200 Cal. 81, where at page 88, 252 P. 607, at page 610, the Supreme Court said:

" 'The natural flow of water in said San Joaquin River is, and has always been and always will be, if unobstructed, variable in quantity in the course of each and every year; that is to say, the same is, has been, and will be largest and most abundant at times of heavy rainfall over its watershed in said mountains in each winter season, and will also have a larger accretion in the spring and summer season by reason of the melting of the snows in said mountains; that these annually occurring accretions in the amount and flow of the waters of said river are natural and regular, and occur in their usual, expected, and accustomed seasons, and result in an increased amount and flow of the waters of said river. * * * The conclusion is inevitable that the waters of the San Joaquin river annually flowing therein before and during and after these regularly occurring accretions in the volume thereof *constitute the usual and ordinary flow of said river* * * *' "

[6] It follows that "middle of the river," as that term was used in describing the boundary of Fresno County, means that point midway between the permanent banks of the San Joaquin River which confine the waters to its channel throughout the entire width when the stream is carrying its maximum, usual and normal quantity of water.

San Pedro, etc. R. R. Co. v. Simons Brick Co., 45 Cal.App. 57, 187 P. 62, cited by respondents, is not applicable to the factual situation in the instant case. That case involves a boundary dispute brought about by a deed describing a piece of property by metes and bounds commencing at a point "near" the Los Angeles River. It was found by the court that "near" did not mean coincident with the bank of the stream, since the Los Angeles River during periods of "normal" flow was at best a trickling stream which sometimes did not carry any water at all and that it was only during storms and flood periods that it had an extended river bed. Impliedly the river had no permanent banks.

Since we have determined what should be the location of the boundary line between Fresno County and Madera County, as those counties border on the San Joaquin River, we deem it unnecessary to discuss other points presented in the briefs.

The judgment is reversed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

172 Cal.App.2d 338

Anna Rose SHEPPARD, Carol Ann Sheppard, a Minor, by and through her Guardian ad litem, Anna Rose Sheppard, Plaintiffs,

v.

CITY OF LOS ANGELES, Defendant and Respondent,

Anna Rose Sheppard, Appellant.

Civ. 23400.

District Court of Appeal, Second District, Division 2, California.

July 27, 1959.

Action by pedestrian, individually and as guardian ad litem of her 10-year-old daughter, against city for injuries received by pedestrian and daughter at scene of fire allegedly due to negligent operation of city fire truck and defective condition of public property. The Superior Court, Los Angeles County, Brodie Ahlport, J., entered judgment on verdict for daughter but against pedestrian, and pedestrian appealed. The District Court of Appeal, Fox, P. J., held that evidence warranted giving of instruction on assumption of risk doctrine and on doctrine that "to look is to see", and that giving of unavoidable accident instruction was not prejudicial error.

Judgment affirmed.

1. Trial ⚷203(1)

Court has duty, upon request, to instruct jury on every theory which finds support in the law and evidence of the case, but it is error to instruct on a theory which does not have such support.

2. Automobiles ⚷246(58)

In action by pedestrian for injuries received allegedly due to negligent operation of city fire truck and defective condition of public property, evidence, which revealed that pedestrian was walking with her daughter when forced over drop-off at edge of road by oncoming fire truck, but that pedestrian had seen the approach of a vehicle with bright lights and could have informed firemen that someone was in the burning building without walking next to the unprotected drop-off on a narrow street in face of the approaching fire truck, warranted giving of assumption of risk instruction.

3. Negligence ⚷105

Elements of defense of assumption of risk are a person's knowledge and appreciation of danger and his voluntary acceptance of risk.

4. Negligence ⚷105

Actual knowledge of risk, as distinguished from constructive notice thereof, is required under defense of assumption of risk, but actual knowledge may be inferred from circumstances.

5. Automobiles ⚷246(58)

In action by pedestrian for injuries received by pedestrian at scene of fire allegedly due to negligent operation of city fire truck and defective condition of public property, evidence, which revealed that pedestrian was injured when forced off an unprotected drop-off on a narrow street by an approaching fire truck after pedestrian had observed the bright lights of a vehicle coming toward her, was sufficient to warrant giving the "to look is to see" instruction.

6. Appeal and Error ⚷1064(1)
Negligence ⚷140

Generally, giving of unavoidable accident instruction constitutes error, but giving of such instruction will not require reversal of judgment unless such error was prejudicial. West's Ann.Code Civ.Proc. § 475.

7. Appeal and Error ⚷1064(1)

Determination of questions whether probable effect of unavoidable accident instruction has been to mislead jury and whether the error is sufficient to require reversal of judgment depends upon all circumstances of case, including evidence and other instructions given.

8. Appeal and Error ⚷930(1)

On appeal, District Court of Appeal must indulge in every reasonable intendment in favor of the verdict.

9. Appeal and Error ⟹1068(1)

In action by pedestrian, individually and as guardian ad litem of her 10-year-old daughter, against city for injuries received by pedestrian and daughter at scene of fire allegedly due to negligent operation of city fire truck and defective condition of public property, giving of unavoidable accident instruction was not prejudicial error in view of verdict for daughter and of evidence that pedestrian had not acted reasonably with respect to her own safety and that daughter had merely followed pedestrian who was leading daughter by the hand.

◆

Gray & Guy, Beverly Hills, and Walter P. Christensen, San Diego, for appellant.

Roger Arnebergh, City Atty., Bourke Jones, Asst. City Atty., Joseph N. Owen, William E. Still, Weldon L. Weber, Deputy City Attys., Los Angeles, for respondent.

FOX, Presiding Justice.

Plaintiff seeks to recover damages for personal injuries caused by the negligent operation of the City's fire fighting equipment and alleged dangerous and defective condition of public property. A jury returned a verdict against her. She has appealed from the ensuing judgment.

In seeking a reversal plaintiff contends that the court prejudicially erred in instructing the jury on (1) assumption of risk, (2) "to look is to see," and (3) unavoidable accident.

At the time of the incidents here involved, the evening of January 15, 1956, plaintiff had resided at 3835 Lincoln High Place, in Los Angeles, for 17 years. This is a hilly area. The street curves considerably though it runs generally in an easterly and westerly direction. Plaintiff's home was on the north side of the street at the top of the hill. A series of steps lead from plaintiff's house down to the street, which is approximately 20 feet wide. There was a retaining wall some 6 to 8 feet in height on plaintiff's side of the street; on the other side was a low curb. There was no sidewalk. There was a drop-off of several feet on the curb side of the street. There was no hand rail on the curb side. On the evening in question plaintiff observed that her next-door neighbor's house (to the west) was on fire. Being unable to reach the occupants by telephone, she reported the fire to the fire department. The first fire truck to arrive "parked in the street in front of the garages below her home." Plaintiff then proceeded down her steps to the street with her daughter, Carol Ann, age ten, for the purpose of informing the firemen at the entrance to the premises on fire that someone was in the house. Upon reaching the street plaintiff observed that the fire truck had parked so close to the retaining wall in front of her property that she was unable to go between the truck and the wall. So, she and her daughter went in front of the truck and then, hand in hand, proceeded down the hill within a couple of feet of the curb on the right-hand side of the parked fire truck. Plaintiff "was aware of her proximity to the edge of the street." As they were walking down the hill a second fire truck was coming up the hill. It had stopped at the bottom of the hill so that a line could be laid from the fire hydrant. As this fire truck came up the hill there were automobiles parked on the left against the retaining wall; the siren was in operation and "in addition to the regular headlights there were red lights, one on each side of the vehicle, which were burning, and there was one in the middle revolving."

As Carol Ann and plaintiff crossed the street to the side where the curbing was located Carol Ann saw the second fire truck coming around the corner at the bottom of the hill and told her mother that another truck was approaching. Plaintiff squeezed Carol Ann's hand, which indicated to her that her mother had heard what she had said. Carol Ann could hear the noise of the truck as it came up the hill and observed its bright lights. "She continued on down the hill behind her mother holding her hand."

Plaintiff testified that as she went down the hill "she had her eyes on the ground to watch the street where she was walking, and she was not looking out in front." She further testified that she neither saw nor heard the second truck before the accident, nor did she see any red lights or hear the siren. She did state, however, that "she noticed lights in the roadway coming towards her and that these lights were blinding;" that she "continued walking down the hill because it was closer for her to keep traveling in the direction that she was walking to get out of the street than to turn around and retrace her steps towards the top of the hill. * * *" She also testified that "the only noise she heard was a shout, 'Look out lady,' just before the second fire truck came by her." "The voice seemed to come from the direction of the garages which were located in the retaining wall across the street." Upon hearing this shout, "she stopped and turned around to her left placing her back towards the middle of the street to see what and who was shouting. As she turned to look in the direction from which the voice came she felt a sharp nudge in the small of her back and she was forced over the wall and fell to the ground below sustaining personal injuries," for which she brought this suit. Carol Ann also fell from the wall receiving injuries for which the jury awarded her $500 damages. This latter phase of the case is not involved in this appeal.

[1-4] It is the duty of the court, upon request, to instruct the jury on every theory of the case that finds support in the law and evidence, but it is error to instruct on a theory that does not have such support. Daniels v. City & County of San Francisco, 40 Cal.2d 614, 623, 255 P.2d 785; Nelson v. Angel, 124 Cal.App.2d 861, 866, 269 P.2d 626; 48 Cal.Jur.2d, § 188, pp. 216–217. Applying these principles to the facts in the instant case, we are of the opinion that it was proper for the court to give the assumption of risk instruction. The elements of this defense are "a person's knowledge and appreciation of the danger and his voluntary acceptance of the risk." Prescott v. Ralph's Grocery Co., 42 Cal.2d 158, 162, 265 P.2d 904, 906. Actual knowledge of the risk as distinguished from constructive notice thereof is required. "But actual knowledge of the risk may be inferred from the circumstances." Gomes v. Byrne, 51 Cal.2d 418, 333 P.2d 754, 755.

In the instant case plaintiff, having lived at this location for 17 years, was obviously familiar with the narrowness of the street, the fact that there were no sidewalks, that there was a drop-off on the other side of the street, that there was no hand rail or other protection except for a low curb, and that the street leading up the hill to her home had curves in it. There was testimony that as the second fire truck proceeded up the hill, in addition to its normal headlights, three red lights (one on either side and one revolving in the middle) and the siren were in operation. Carol Ann heard the noise of this truck, observed it approaching them, and told her mother who squeezed her hand. Although plaintiff denied knowledge of the approaching truck she admitted seeing a vehicle with bright lights "coming towards her." From the foregoing the jury could readily conclude that plaintiff actually knew a second fire truck was approaching. From this factual setting the jury could reasonably infer that plaintiff knew that if she proceeded down the street she was likely to be hit or forced over the curb. With this knowledge she nevertheless continued to walk down the hill on the drop-off side of the street. Under this evidence an instruction on assumption of risk was proper.

Plaintiff argues, however, that she did not voluntarily assume any risk for the reason that she was discharging a moral duty by her attempt to inform the firemen that someone was in the burning house. There is no question but that plaintiff could have conveyed this information to the firemen without walking next to an unprotected drop-off on a narrow street in the face of an approaching fire truck. She voluntarily selected this method.

[5] It is next contended by plaintiff that the court erred in giving the "to look is to see" instruction. The giving of such instruction does not constitute error in view of the facts presented in the case at bar. See Shehtanian v. Kenny, 156 Cal. App.2d 576, 579, 319 P.2d 699; MacLean v. City & County of San Francisco, 151 Cal.App.2d 133, 141–142, 311 P.2d 158; Rubalcaba v. Sweeney, 168 Cal.App.2d 1. 335 P.2d 157.

[6–9] Finally, plaintiff argues that prejudicial error was committed by the giving of the unavoidable accident instruction. Generally, the giving of such instruction is error. Alarid v. Vanier, 50 Cal.2d 617, 625, 327 P.2d 897; Butigan v. Yellow Cab Co., 49 Cal.2d 652, 658–660, 320 P.2d 500; Amar v. Union Oil Co. of California, 166 Cal.App.2d 424, 333 P.2d 449. Granting that this instruction should not have been given in the instant case, we may not reverse the judgment on this ground unless the error was prejudicial. Code Civ.Proc. § 475. "The determination whether, in a specific instance, the probable effect of the instruction [unavoidable accident] has been to mislead the jury and whether the error has been prejudicial so as to require reversal depends on all the circumstances of the case, including the evidence and the other instructions given. No precise formula can be drawn." Butigan v. Yellow Cab Co., supra, 49 Cal.2d at pages 660–661, 320 P.2d at page 505. If the jury were confused by the instruction and received the impression that unavoidability was a distinct issue to be decided, that such was a separate defense, and based their judgment thereon rather than determining liability on the basis of negligence and proximate causation, it would be difficult to explain the verdict in favor of plaintiff's daughter. That is, if the jury believed the accident was "unavoidable," and on that basis found against the plaintiff, since the accident was equally "unavoidable" with reference to the daughter, the verdict would necessarily have been against her also. The reasonable inference from a verdict for the daughter is that the jury was not misled by the erroneous instruction. On appeal, we must indulge in every reasonable intendment in favor of the verdict. Butticci v. Schindel Furniture Co., 152 Cal.App.2d 165, 170, 313 P.2d 62. It does not appear that a different verdict would have been probable had the instruction not been given. There was evidence from which the jury could have properly concluded that plaintiff did not act reasonably with respect to her own safety. Also, the jury could have found that plaintiff assumed the risk. On the other hand, the evidence strongly suggests that the daughter neither voluntarily assumed the risk nor was guilty of contributory negligence since she merely followed her mother who was leading her by the hand. This would reasonably explain the verdict in her favor.

In Martz v. Ruiz, 158 Cal.App.2d 590, 322 P.2d 981, the unavoidable accident instruction was held prejudicial. There, a judgment was rendered against all plaintiffs, one of whom was a passenger, 14 years of age, in the back seat of the Martz automobile, against whom no contributory negligence was alleged. The verdict against him was "an indication that the jury was misled" (Martz v. Ruiz, supra, 158 Cal.App.2d at page 592, 322 P.2d at page 982) by the unavoidable accident instruction. In contrast, however, the jury in the instant case found in favor of the child, thus indicating that it was not confused or misled. See also Butigan v. Yellow Cab Co., supra, where a verdict favorable to all defendants indicated that the jury was misled to the plaintiff's prejudice. Under all of the circumstances of this case, we do not believe plaintiff was denied a fair trial. See Halleck v. Brown, 164 Cal.App. 2d 586, 590, 330 P.2d 852.

The judgment is affirmed.

ASHBURN and HERNDON, JJ., concur.

172 Cal.App.2d 490

PEOPLE of State of California, Plaintiff and Respondent,
v.
Howard Richard BARRERA, Defendant and Appellant.
Cr. 6587.

District Court of Appeal, Second District, Division 3, California.
July 20, 1959.

Prosecution for selling and furnishing marijuana. From adverse judgment of the Superior Court, Los Angeles County, Lewis Drucker, J., the defendant appealed. The District Court of Appeal, Shinn, P. J., held that the evidence was sufficient to sustain the conviction.

Judgment affirmed.

1. Poisons ⚿9

Evidence was sufficient to sustain conviction for selling and furnishing marijuana.

2. Criminal Law ⚿741(1)

Weight to be given to testimony of witnesses is a matter for the trier of fact.

◆

Howard Richard Barrera, in pro. per., for appellant.

Stanley Mosk, Atty. Gen., for respondent.

SHINN, Presiding Justice.

In a court trial upon an information charging him in Count I with possessing marijuana and in Count II with selling and furnishing marijuana, Howard Richard Barrera was found guilty of Count II and Count I was dismissed in the interests of justice. He appeals from the judgment.

Upon application of appellant for appointment of counsel the matter was referred to the Committee on Criminal Appeals of the Los Angeles Bar Association with a request for a report which would direct our attention to any matter disclosed by the record which would indicate that the applicant might be entitled to some relief. Upon receipt of a report from a member of the Committee that no meritorious ground of appeal had been found, and in accordance with our settled practice, we examined the record in order to ascertain whether appointment of counsel would serve any useful purpose. Having determined that the appeal appeared to be without merit we denied the application for appointment of counsel and notified appellant of our order, substantially extending his time to file a brief. No brief having been filed, we have re-examined the record and are disposing of the appeal by written opinion.

[1] The evidence consisted of that received at the preliminary hearing and additional evidence introduced at the trial. Leo Berman, a Los Angeles County sheriff's deputy, testified that he made arrangements with Michael Mosca to buy two tins of marijuana. On July 23, 1958, he went to Mosca's house, where he met Mosca and a man named Walker. The three men got into Berman's car and drove to an address in Lennox mentioned by Mosca; Berman gave Mosca two ten dollar bills. Upon their arrival, Mosca got out of the car, entered a house and returned after a few minutes, stating that his connection was not there. Mosca then directed Berman to an apartment house in Inglewood. Mosca entered the premises and returned a few minutes later in the company of appellant. After Mosca introduced Barrera to Berman, the latter asked appellant to purchase two tins of marijuana for him. Barrera told him to drive to another location in Inglewood; the officer complied. As appellant got out of the car, he said: "I will see what I can do, I don't know whether this fellow has anything." When Barrera returned he got into the back seat of the car and handed to Mosca two wax paper bags, which Mosca handed to Officer Berman; the bags were proved to contain marijuana. Appellant told Berman: "These might be a little short but it's the best I can do."

Mosca was called as a witness for the People at the preliminary hearing. In response to questioning by the deputy district attorney, he admitted being in the company of Officer Berman on July 23rd and admitted meeting appellant. However, he denied that Berman had given him any money and when asked whether he was present when Barrera returned to the car with the two packages of marijuana he denied having seen anything. The deputy stated that he was surprised by this testimony of the witness and sought leave to ask leading questions; appellant objected; after some discussion between the court and counsel the objection was sustained.

At the trial, Mosca was called as a witness for the defense. It was made to appear that he was under commitment to the Youth Authority for a narcotics violation. Mosca testified that he accompanied Berman and Walker on their search for marijuana. He had previously accompanied the officer and had been present on occasions when narcotics were sold to others. He asked Barrera whether he could obtain marijuana for Berman and appellant said he did not know but he would try to get some. Barrera did not hand him any marijuana and he did not hand any to the officer. Although he was sitting next to appellant in the back seat of the car he did not see any marijuana in Barrera's possession. He first testified that Berman gave him two ten dollar bills and that he returned them to the officer but on cross-examination he stated that his testimony was mistaken and that Berman had given him the money on a previous occasion.

Appellant testified in his own behalf that he did not sell any marijuana to Mosca and was not in possession of marijuana on July 23rd. Berman and Mosca asked him to contact a seller of narcotics and he tried to do so, but marijuana was unavailable at the Inglewood location he visited. He received no money from Mosca and nothing was promised him in exchange for his services.

[2] As mentioned earlier, Barrera was convicted of selling and furnishing marijuana and the possession count was dismissed. The evidence was amply sufficient to establish his guilt of furnishing contraband. It was a reasonable inference from the testimony of Officer Berman that Mosca gave appellant the $20 he received from the officer and that appellant returned with marijuana which he obtained from an anonymous seller. The court rejected the testimony of Barrera and Mosca and gave full credit to the testimony of Berman. We can do no less. People v. Pastrana, 136 Cal.App.2d 358, 288 P.2d 568. In view of appellant's admitted willingness to place Berman in contact with a seller of narcotics, there was no basis for a contention that he was entrapped into committing the offense. Barrera was ably represented by a deputy public defender and the case was tried without error.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

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172 Cal.App.2d 266

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Elmer Edward RAMSEY, Jr., Defendant and Appellant.

Cr. 3571.

District Court of Appeal, First District, Division 1, California.

July 23, 1959.

Prosecution for robbery. From adverse judgment of the Superior Court, Santa Clara County, William F. James, J., the defendant appealed. The District Court of Appeal, Tobriner, J., held that alleged misconduct of prosecutor in stating in her opening statement that she would show that day after robbery husband of defendant's sister-in-law was asked that if anybody questioned him about what defendant was doing if he would say that defendant was at show with brother-in-law and his family and in asking police officer if he attempted to serve subpoena on brother-in-law and in asking sister-in-law if she were in contact with her husband and in asking defendant's wife where she was hiding her brother-in-law, did not cause a miscarriage of justice, especially when instructions were given to remove adverse effect of alleged misconduct.

Judgment affirmed.

1. Criminal Law ⚷703

It is duty of prosecutor to refrain in his opening statement from referring to facts which he cannot or will not be permitted to prove, but failure to produce proffered proof either on account of rules of evidence or for any other reason does not necessarily indicate prejudice.

2. Criminal Law ⚷703

Opening statement does not constitute and cannot be considered as evidence and binds no one by its recital, and one who asserts it as misconduct must prove more than the mere failure to adduce the testimony described in it.

3. Criminal Law ⚷317

In prosecution for robbery wherein prosecutor in opening statement stated that she would show that day after robbery defendant approached his wife's brother-in-law and asked him that if anybody questioned him about what defendant was doing on Sunday evening if he would say that defendant was at show with brother-in-law and his family, failure of prosecutor to produce brother-in-law did not establish deliberative intent of prosecutor not to produce the brother-in-law.

4. Criminal Law ⚷1037(1)

On appeal, rule applicable to objection as to form of a question is equally applicable to composition of opening statement.

5. Criminal Law ⚷1171(2)

In prosecution for robbery, wherein prosecutor in opening statement stated that she would show that day after robbery brother-in-law of defendant's wife was approached by defendant and asked if anybody questioned him about what defendant was doing on Sunday evening if he would say that defendant was at show with brother-in-law and his family and prosecutor failed to produce brother-in-law as a witness, opening statement did not per se constitute prejudicial error.

6. Criminal Law ⚷1171(1)

In prosecution for robbery, wherein prosecutor in opening statement asserted that she would show that day after robbery brother-in-law of defendant's wife was approached by defendant and asked that if anybody questioned him about what defendant was doing on Sunday evening he would say that defendant was with brother-in-law and his family at show, prosecutor's questioning of police officer, who was a witness' for state, if he had made any attempt to serve subpoena on brother-in-law, did not constitute prejudicial error when court immediately sustained objection to the question.

7. Criminal Law ⚷1170½(6)

Reversible error does not flow from an irrelevant question nipped in the bud by a sustained objection.

8. Criminal Law ⚷1171(1)

In prosecution for robbery, wherein prosecutor in her opening statement asserted that she would show that day after robbery brother-in-law of defendant's wife was approached by defendant and asked, if anybody questioned him about what defendant was doing on Sunday evening, if he would say that defendant was at show with brother-in-law and his family, prosecution's questioning of defendant's sister-in-law as to location of her husband and the following attempt at impeachment did not constitute prejudicial error.

9. Criminal Law ⚷1037(2)

Prejudicial misconduct does not result from an irrelevant question to which objection is made, in absence of a request to court to admonish jury to disregard the question, when such admonition would have been sufficient to cure any effect question might have produced.

10. Criminal Law ⟹1171(1)

In prosecution for robbery, wherein prosecutor in her opening statement asserted that she would show that day after robbery brother-in-law of defendant's wife was approached by defendant and asked, if anybody questioned him about what defendant was doing on Sunday evening, if he would say that defendant was at show with brother-in-law and his family, any prejudice resulting from prosecutor's attempt to impeach sister-in-law by questions as to her conversation with her husband in which he reputedly said he did not see defendant at movie was cured when court refused to allow the question and it was withdrawn.

11. Criminal Law ⟹1171(1)

In prosecution for robbery, wherein prosecutor in her opening statement asserted that she would show that day after robbery brother-in-law of defendant's wife was approached by defendant and asked, if anybody questioned him about what defendant was doing on Sunday evening, if he would say that defendant was at show with brother-in-law and his family, questioning of defendant's wife as to where she was hiding her brother-in-law was not sufficient to constitute prejudicial error.

12. Criminal Law ⟹1186(4)

A miscarriage of justice should be declared only when court, after examination of entire cause, including the evidence, is of opinion that it is reasonably probable that a result more favorable to appealing party would have been reached in the absence of the error. West's Ann.Const. art. 6, § 4½; West's Ann.Pen.Code, § 211.

13. Criminal Law ⟹1186(4)

In prosecution for robbery, alleged misconduct of prosecutor in stating in her opening statement that she would show that day after robbery husband of defendant's sister-in-law was asked that if anybody questioned him about what defendant was doing he would say that defendant was at show with brother-in-law and his family, and in asking police officer if he attempted to serve subpoena on brother-in-law and in asking sister-in-law if she were in contact with her husband and in asking defendant's wife where she was hiding her brother-in-law, did not cause a miscarriage of justice, especially when instructions were given to remove adverse effect of alleged misconduct. West's Ann.Const. art. 6, § 4½; West's Ann.Pen.Code, § 211.

14. Criminal Law ⟹1171(1)

In prosecution for robbery, wherein prosecution introduced testimony of police officer to show that on an occasion three months prior to robbery officer found a rope knotted in same fashion in defendant's automobile as rope used in trussing robbed clerks and prosecution intimated that defendant's attorney did not want witness to tell what else defendant had in his possession at that time but on cross-examination of police officer it was shown that defendant was waiting for his wife at her place of work on that occasion because someone had been bothering her and that was reason he had a weapon in automobile, error, if any, flowing from the possible improper intimation of prosecution was cured by the cross-examination.

15. Criminal Law ⟹345

In prosecution for robbery, testimony of police officer that on a prior occasion three months before robbery he found in defendant's automobile a rope knotted in same fashion as rope used in trussing robbed clerks was properly admitted. West's Ann.Pen.Code, § 211.

16. Criminal Law ⟹741(2)

In prosecution for robbery, wherein one of victims testified at first trial he could not identify voice of defendant but at second trial he stated that police officers had played a tape recording to him which sounded the same as the robber's voice, correctness of identification of defendant's voice was a question of fact primarily for jury's determination. West's Ann.Pen. Code, § 211.

17. Criminal Law ⚷1037(1)

In prosecution for robbery, defendant's failure to object to prosecution's closing argument that police and prosecutor believed the defendant was guilty was fatal. West's Ann.Pen.Code, § 211.

18. Criminal Law ⚷939(2)

In prosecution for robbery, wherein defendant's sister-in-law testified that she saw defendant win $500 in gambling, affidavits of three persons who would presumably testify that defendant had won at gambling tables without explaining why such witnesses were not produced earlier did not furnish a proper basis for a new trial on ground of newly discovered evidence. West's Ann.Pen.Code, § 211.

◆

Paul N. McCloskey, Jr., Palo Alto, for appellant.

Stanley Mosk, Atty. Gen., Clarence A. Linn, Chief Asst. Atty. Gen., John S. McInerny, Deputy Atty. Gen., for respondent.

TOBRINER, Justice.

Appellant contends in chief here that the prosecution engaged in misconduct by improperly trying to implant in the jury's mind the notion that appellant's wife secreted a witness who would testify as to appellant's attempt to concoct a false alibi. Such misconduct, according to appellant, caused a miscarriage of justice under article VI, section 4½, of the California Constitution requiring reversal of a conviction of Penal Code, section 211 (armed robbery). Although we appreciate both the gravity of the offense of the district attorney as well as the close balance of the evidence in this case, we cannot conclude that a verdict more favorable to appellant would have been reached in the absence of the error.

We set forth infra in detail our reasoning on this problem, as well as our bases for rejecting appellant's other grounds for reversible error, including his contention that his motion for new trial was improperly denied.

We begin with an analysis of the facts, which fall into the following categories:

The robbery. The robbery occurred at 7:20 the night of February 2, 1958, at the U. S. Market in San Jose. When Cicconetti, the head clerk, was in the process of closing the store, he saw a man standing in a darkened aisle. Cicconetti approached him. His face masked, this individual threatened Cicconetti with a gun, marched Cicconetti to the back room, and tied Cicconetti with a rope which he had obtained in the store. Proceeding to the front of the store, the robber returned with the other clerk, Phillips, whom the robber also trussed. Then, to facilitate Cicconetti's getting money from the safe, which was in the front part of the store, the robber untied him. Opening the safe, Cicconetti threw to the robber, hiding behind a partition and therefore invisible from the street, the following denominations: $500 in one-dollar bills, $1,000 in five-dollar bills and seven bags of change. The change bags contained $100 each composed of coins and currency from one cent to ten-dollar bills. Then, returning with Cicconetti to the vicinity of Phillips, the robber retied Cicconetti and looted the cash registers. These contained bills from one dollar to twenty dollars besides the usual coins.

The earnings, income and abode of appellant. On February 11, 1958, the police, possessed of a search warrant, checked appellant's living quarters. His abode turned out to be the home of Mrs. Childress, appellant's wife's sister, and her three children. Appellant had moved in either in October or November, 1957. Since that time until the robbery of February 2, 1958, appellant had worked three or four days. During that whole period the Ramseys and Mrs. Ramsey's three children by a former marriage had lived on Mrs. Ramsey's gross earnings as a waitress at a drive-in restaurant of $80 per week.

The findings of the police officers. The officers discovered in appellant's bedroom a metal box and in his wallet a key to the box. Within the box there were $785 in five-dollar bills, $465 in one-dollar bills, and a loaded .32 caliber revolver. The officers also found, next to this metal box, a cigar box which contained $215 in dimes, quarters and half dollars. The officers seized these articles but upon Mrs. Childress' insistence that it belonged to her children left a small cardboard box containing approximately 200 pennies and a few nickels. Appellant's wallet contained $126, plus receipts which indicated he had spent approximately $350 in the period between the robbery and this search a week later. Appellant stated that this money was his; that he need not account for it, and then called an attorney. Later appellant claimed he had won the money gambling in Reno.

The identification of appellant. At the trial Cicconetti stated that he could make no positive identification of appellant, but that his build, age and voice were similar to the robber's; that the gun found at appellant's home "looked like" that of the robber. On cross-examination Cicconetti admitted he had been unable to identify appellant's voice at police headquarters while listening to appellant from a concealed position, but that between the first trial and the instant one he had listened to appellant's voice on a tape recording and that it sounded the same as the robber's.

The identification of the gun. The gun, People's Exhibit No. 1, was identified by its owner, Mr. Caldeira, who discovered it missing January 31, 1958. Mrs. Caldeira testified she lent it to Mrs. Ramsey on January 31, 1958. Cicconetti testified that the gun found at appellant's home "looked like" that of the robber.

Appellant's alibi. Appellant's main alibi witness was Mrs. Childress, who testified she saw appellant at 7:15 the evening of February 2, 1958, at a motor movie nine miles from the U. S. Market. She also stated that she saw appellant win $500 in Reno the weekend of the 7th of February, 1958. The prosecution admits appellant was in Reno the weekend of the 7th since one of the receipts found in his wallet bears a Reno address and such a date.

As we have initially indicated, appellant's main contention is that the district attorney committed a series of acts of misconduct aimed to induce an improper misconception of the jury in the following manner: first, in her opening statement she asserted that she would "show * * * the day after the robbery * * * [Mr. Childress] was approached by Mr. Ramsey and Mr. Ramsey asked him, 'If anybody questions you about what I was doing Sunday evening, will you say that I was at the show with you and your family'" but she had not produced Childress as a witness; second, she persisted in asking a police officer who was a witness if he had attempted to serve a subpoena on Mr. Childress; third, she asked Mrs. Childress if she were in contact with him, following this question with an attempted impeachment of the witness; fourth and finally, she confronted appellant's wife with the improper question, "Where are you hiding your brother-in-law?" We consider the alleged misconduct and its effect separately and cumulatively.

[1, 2] First, we examine the opening statement. In such a statement "it is the duty of counsel to refrain from referring to facts which he cannot or will not be permitted to prove." People v. Chester, 1956, 142 Cal.App.2d 567, 574, 298 P.2d 695, 700. But the failure to produce proffered proof, "either on account of the rules of evidence or for any other reason, does not necessarily indicate prejudice." People v. Planagan, 1944, 65 Cal.App.2d 371, 407, 150 P.2d 927, 945. The statement, of course, does not constitute and cannot "be considered as evidence" and "binds no one by its recitals." People v. Stoll, 1904, 143 Cal. 689, 693, 694, 77 P. 818, 819. Because of the limitations upon the effect of the opening statement one who asserts it as misconduct must prove more than the mere failure to adduce the testimony described in it. In People v. Wong Hing, 1917, 176 Cal. 699, 169 P. 357, defendant assigned misconduct on the part of the district attorney in a prosecution for murder because in his opening statement he said, "'We expect to show that on [March 5, 1917] * * * [a] Chinese tong was begun in

this city,'" and "no evidence was offered in support of the statement * * * to the jury * * *." The court held, "there is nothing in the record tending to show that it [the statement] was made in bad faith or without intention of trying to support it by evidence. In the absence of such showing, it cannot be said the district attorney was guilty of misconduct because he failed to produce such evidence." 176 Cal. at page 703, 169 P. at page 358. To the same effect, People v. Berryman, 1936, 6 Cal.2d 331, 57 P.2d 136.

[3] In the instant case, we lack a showing of deliberative intent of the prosecutor not to produce and examine Childress. Admittedly the task of finding and subpenaing Childress might have been difficult; it had actually failed in the first trial. But the possibility of failure to produce a wanted witness and its later culmination into fact does not turn the prosecutor's stated purpose into a strategy of bad faith. The opening statement of the expected proof and its subsequent collapse cannot per se show an unfair intent; if it did, any bare failure of proof promised in an opening statement could be converted into grounds for reversal.

[4] A secondary reason for the failure of this assignment of error lies in the fact that appellant offered no objection to the statement. People v. Chester, 1956, supra, 142 Cal.App.2d 567, 298 P.2d 695, indicates that if appellant knew the prosecutrix could not prove the assertion as to Childress' testimony, appellant should have objected at the time instead of relying upon the possibility of a later reversal. On appeal the rule applicable to objections as to the form of a question is equally applicable to the composition of the opening statement. To the same effect, People v. Granados, 1957, 49 Cal.2d 490, 319 P.2d 346.

[5] For the above reasons the opening statement per se does not constitute prejudicial error.

[6, 7] Second, the district attorney's questioning of Office Petersen does not in itself constitute prejudicial error. The prosecution asked the officer if he had made any attempt to serve the subpena on Mr. Childress; the court immediately sustained appellant's objection. Reversible error does not flow from an irrelevant question nipped in the bud by a sustained objection.

[8, 9] Third, the prosecution's questioning of Mrs. Childress as to the location of her husband and the following attempt at impeachment, again, does not in itself constitute prejudicial error. If the attempt of the prosecution to explore the location of the missing witness may have been irrelevant, it surely was not prejudicial. People v. Kristy, 1952, 111 Cal.App.2d 695, 245 P.2d 547, holds that prejudicial misconduct does not result from an irrelevant question, to which objection is made, in the absence of a request to the court to admonish the jury to disregard the question "when such an admonition would, doubtless, have been sufficient to cure any effect the questions might have produced. * *" 111 Cal.App.2d at page 713, 245 P.2d at page 558. While the court allowed the first question as to where her husband was, the court blocked further exploration of this subject.

[10] As to the district attorney's attempt to impeach Mrs. Childress by questions as to her conversation with her husband in which he reputedly said he did not see appellant at the movie, the court refused to allow the question and it was withdrawn. The prejudice, if any, was cured. People v. Alcalde, 1944, 24 Cal.2d 177, 148 P.2d 627.

[11] Fourth, the prosecution's accusation that appellant's wife was hiding her brother-in-law constituted grave misconduct. Again the question in itself, considered in the light of the Kristy case, is not sufficient to constitute prejudicial error. However, as a culminating tactic of the district attorney, it leads us to the final and crucial question.

[12] Although the four instances of misconduct separately do not afford sufficient basis for reversal, their cumulative impact may compel a different conclusion.

The misconduct may have implanted in the jury's mind the notion that defendant's wife concealed a witness who would testify that defendant had attempted to establish a false alibi. But even if we make this assumption we must still weigh the effect of the prosecution's conduct in the scale described in People v. Watson, 1956, 46 Cal.2d 818, 299 P.2d 243, "That a 'miscarriage of justice' should be declared only when the court, 'after an examination of the entire cause, including the evidence' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." 46 Cal.2d at page 836, 299 P.2d at page 254.

[13] The application of this test is admittedly delicate. The consequence of breaches of behavior of counsel are not susceptible to examination under a legal microscope; it is impossible accurately to measure the shifting impact of misconduct in the swift ebb and flow of a trial. But our task must be to examine the entire record with care to determine if in our opinion "it is reasonably probable" that the omission of these misdirected questions of the district attorney would have resulted in a more favorable decision for the appealing party. We cannot reach such a conclusion.

The jury was confronted with such evidence as this: (1) the conformity of the denominations of money stolen and money found in appellant's possession; (2) the failure satisfactorily to account for its presence, appellant's expenditure of some $300 prior to the Reno trip, the disparate testimony of "winnings" at Reno but no showing that there were no losses, the strange explanation that the winnings were cashed into these denominations "to surprise Betty"; (3) the description of the robber's gun as a "short" or "snubnosed" gun of "steel grey" color without a hammer and the testimony at the trial that appellant's gun was the "same kind of gun," hammerless and found loaded in the same box as the money; (4) the testimony by Mrs. Caldeira of lending the gun to Mrs. Ramsey on January 31 and Mrs. Ramsey's apparent hurried attempt, on February 11, the date of appellant's arrest, to establish the date as February 7 (no such difficulty as to the date of the loan should have arisen had it been four days previous); (5) the fact that appellant fitted the general description of the size and build of the robber and the testimony of both clerks that appellant's voice sounded similar to that of the robber; (6) the difficulties in the alibi account of Mrs. Childress in her exactitude in identifying appellant and her coincident looking at her watch at 7:15 p. m. at the movie although she had previously told the police officer she did not see his face but only "thought it might have been" appellant.

The weight of such evidence as this is heavy as contrasted to the erroneous intimation of a possible concealment of a witness who would testify as to an attempted false alibi. While we deprecate the misconduct of the district attorney, there is too much else in the record upon which conviction could properly rest to rule that the exculpation of the offending questions could per se have led to a different result. It is simply not reasonably probable that the presence or absence of unanswered questions as to the absent witness could have made the difference between a verdict of guilt and innocence.

Finally, the court instructed the jury to disregard intimations raised by questions of any attorney "which the Court has not permitted to be answered that certain things are or are not true." The instruction sought to remove, and undoubtedly reduced, any adverse effect of the misconduct.

Appellant's citation of People v. Teixeira, 1955, 136 Cal.App.2d 136, 288 P.2d 535, does not change our conclusion because the misconduct there as contrasted with that here was so much more flagrant, and the allusion to the missing witness so much more related to the whole import of the case, even to the extent of inclusion in the closing argument of the prosecution.

We therefore turn to a consideration of the remaining contentions of appellant.

Appellant's claim of prejudicial error in the district attorney's intimation that prior to the crime appellant possessed certain "incriminating items" collapses in the face of the subsequent proof adduced by appellant himself of the identity of such items.

[14] The prosecution introduced the testimony of a police officer to show that on an occasion three months prior to the robbery he found in appellant's car a rope knotted in the same fashion as used in trussing the robbed clerks. After the court confined the officer's answers to the discovery of the rope, the prosecutrix intimated that appellant's attorney did not want the witness to tell "what else Ramsey had in his possession at that time." However, on cross-examination of the police officer, appellant's attorney adduced that appellant was "waiting for his wife * * * somebody in the drive-in [had been] bothering her * * * and that is the reason he had a weapon in the car * * *." The controverted "else" crystallized into the gun. The error, if any, flowing from the perhaps improper intimation of the prosecution was cured by the cross-examination. People v. Dye, 1947, 81 Cal.App.2d 952, 185 P.2d 624.

[15] Nor does it avail appellant to contend that the entire testimony of Officer Edwards should have been excluded as testimony relating to an irrelevant prior circumstance. Since the matter of the knotting of the rope bore upon the vital and disputed question of the identity of the robber, it did "'* * * tend logically, naturally, and by reasonable inference to establish * * * [a] fact material for the people * * *." People v. Sykes, 1955, 44 Cal.2d 166, 280 P.2d 769.

[16] Appellant's argument that the introduction of evidence of identification of appellant's voice through the use of a tape recorder constituted a violation of the principles of fair play involves, in final analysis, a matter for the jury's determination. Witness Cicconetti testified at the first trial he could not identify the voice; however, at the second trial he stated that the police officers had played a tape recording to him which "sounded the same" as the robber's voice. Appellant had the opportunity, which he utilized, to expose to the jury the inconsistency of the testimony. Hence as People v. Sica, 1952, 112 Cal.App.2d 574, 247 P.2d 72, states, "The correctness of the identification of his [appellant's] voice * * * was a question of fact primarily for the jury's determination * * *." 112 Cal.App.2d at page 583, 247 P.2d at page 77. The facts of People v. Evans, 1952, 39 Cal.2d 242, 246 P.2d 636, in which a witness "had been suggestively questioned and re-questioned as to the crime by the police" (39 Cal.2d at page 252, 246 P.2d at page 642) and the "exactitude" of the identification by a ten year old child of the defendant in that case, which raised "a doubt as to whether or not she had been coached in her lines" (39 Cal.2d at page 250, 246 P.2d at page 641), find no counterpart here.

[17] We cannot sustain appellant's objection to the impropriety of the prosecution's closing argument that the police and the prosecution believed the appellant guilty. The jury must necessarily know that the police would not arrest in the absence of belief of guilt; appellant's failure to object is fatal in so tenuous a circumstance (People v. Adamson, 1946, 27 Cal.2d 478, 494, 165 P.2d 3); the cited case of People v. Edgar, 1917, 34 Cal.App. 459, 167 P. 891, does not rest upon the lonely argument of the district attorney that he was convinced of defendant's guilt but upon an abundance of collateral error.

[18] Finally, we do not find that appellant's motion for a new trial on the basis of newly discovered evidence was improperly denied. Appellant relies on affidavits of three persons in Reno who would presumably have testified that appellant had won at the gambling tables. Applying the test of People v. Brown, 1958, 164 Cal.App.2d 790, 328 P.2d 775, that "defendant must show that the evidence * * * is

newly discovered * * *" and "could not with reasonable diligence have [been] discovered and produced * * * at the trial," appellant fails adequately to explain why such potential witnesses were not earlier produced. The same authority imposes upon defendant the further obligation of showing that "the evidence is not merely cumulative * * *." 164 Cal.App. 2d at page 792, 328 P.2d at page 776. Yet here Mrs. Childress testified that she saw appellant win $500 in gambling; the allegedly "new evidence" is indeed cumulative. People v. Goodwin, 1927, 202 Cal. 527, 261 P. 1009, cited by appellant, is not pertinent because there the defense had sought to obtain the witness at least prior to the termination of the trial; the effort here was belated.

We affirm the judgment and the denial of the motion for a new trial.

BRAY, P. J., and FRED B. WOOD, J., concur.

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172 Cal.App.2d 571

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Irene SCORZA and Martin Ramirez, Defendants.

Irene Scorza (True Name: Irene Rita Bailey), Defendant and Appellant.

Cr. 6586.

District Court of Appeal, Second District, Division 2, California.

Aug. 3, 1959.

Defendant was convicted of violating statute forbidding selling, furnishing or giving away of marijuana. The Superior Court, Los Angeles County, Albert E. Wheatcroft, J., rendered judgment and defendant appealed. The District Court of Appeal, Ashburn, J., held that evidence sustained conviction.

Affirmed.

1. Criminal Law 🔑747

If there is prosecution evidence which tends to disprove criminality and other prosecution evidence which tends to prove criminality, it is function of trier of fact to determine which version is to be believed.

2. Poisons 🔑9

Evidence sustained conviction for violation of statute forbidding selling, furnishing or giving away of marijuana. West's Ann.Health & Safety Code, § 11500; West's Ann.Pen.Code, § 31.

Martha Malone Jefferson, Los Angeles, for appellant.

Stanley Mosk, Atty. Gen., Jack E. Goertzen, Deputy Atty. Gen., for respondent.

ASHBURN, Justice.

Defendant was found guilty as charged by way of indictment filed by the Grand Jury accusing her and one Martin Ramirez of violation of § 11500 of the Health and Safety Code, to wit, selling, furnishing and giving away a narcotic, marijuana. It is claimed that the evidence is insufficient to sustain the judgment of conviction.

The witnesses before the Grand Jury were Officer Hassell and a forensic chemist. A jury trial was waived and it was stipulated that the trial court could read and consider the transcript of the testimony before the Grand Jury, also the transcript of a recorded conversation of appellant and certain police officers taken at the police building immediately following her arrest.

Officer Hassell testified that at 12:05 a. m. on March 8, 1958, he was at a place called Green's Gardens at 9716 South Broadway talking to a person known to him as Martin R. Ramirez about getting some marijuana. A man and his wife entered Green's Gardens. Officer Hassell had seen the couple before and they were known to him as Ben and Irene Scorza (appellant). They sat down at the table with the officer and Ramirez. The latter asked them if they could get Hassell "a can of tea," this term meaning marijuana in narcotic jargon. They replied that they could not. Hassell then asked, "Can you get me ten dollar's worth?" and the appellant answered "Yes." Officer Hassell gave Ramirez a ten dollar bill. Ramirez, Ben Scorza and appellant then left the place and told Hassell to wait for them there. Approximately thirty minutes later appellant returned and motioned to Hassell to go outside where Ramirez was waiting. Ramirez and Hassell got into the latter's car and Ramirez gave the officer a package containing 18 brown paper cigarettes.

Officer Jack Olin Carter, a duly qualified forensic chemist, anlayzed the contents of the package and identified the contents as marijuana.

Appellant "concedes that had the prosecution merely presented the evidence which was before the grand jury, the testimony of William Hassell would have been sufficient to sustain the finding of guilt." It is contended, however, that the transcript of appellant's conversation became a part of the prosecution's case and contradicts the testimony of Officer Hassell; that "[t]his is not a case therefore of conflict in the evidence between the prosecution's witness and appellant's witness, but is a conflict in the prosecution's own evidence. Under these circumstances, appellant submits that the evidence is insufficient to establish that appellant made an illegal sale of narcotics, as charged in the Indictment." Appellant cites no specific lack of evidence to support the verdict, her position apparently being that the court should have disbelieved the officer's testimony because of appellant's statements.

The record discloses that in appellant's statement made on April 19, 1958, she first said that she had not been into Green's Garden for about six months, but upon being confronted by Officer Hassell she remembered the events above set forth, but stated that it was Ramirez and not she who got the marijuana for Hassell. She said she wasn't going to get anything for Hassell because she didn't even know him. During the interrogation the following questions by Sergeant Fredrickson and answers by appellant occurred:

> "Q. Well, Irene, you know and I know that you were involved in a transaction with this officer? A. Yes.
>
> "Q. In the sale of marijuana—you had your hand in that. Martin wanted so you took Martin out to get it and you had Martin give it to Bill. A. But Martin got it. I didn't have Martin give it to him.
>
> "Q. You took Martin out to get it? A. We took him out to get it, yes.
>
> "Q. And then you got it for him? A. No, he got it.
>
> "Q. Well, then you took him where he could get it? A. Well, he was the one that told us to take him there. He told us to take him there so we said 'okay'.
>
> "Q. You took him to get the stuff? A. Yes."

[1] As stated in People v. Acosta, 45 Cal.2d 538, 542–543, 290 P.2d 1, 4: "* * if there is prosecution evidence which tends to disprove criminality and other prosecution evidence which tends to prove criminality, it is the function of the trier of fact to determine which version is to be believed. [Citations.] The courts may sometimes say that the prosecution is 'bound by' extrajudicial statements of defendant which are introduced by the prosecution and which are irreconcilable with guilt, but this concept is applicable only where there is no other competent and substantial evidence which could establish guilt. [Citations.]"

[2] Applying the above rule, and viewing the evidence in the light of the rules declared in People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778, there is ample evi-

dence to justify the verdict. A sale took place and under the evidence appellant was a principal in the commission of the crime. Pen.Code, § 31; see, People v. Taylor, 52 Cal.2d 91, 338 P.2d 377; People v. Bradford, 130 Cal.App.2d 606, 608, 279 P.2d 561; People v. Valencia, 156 Cal.App.2d 337, 340, 319 P.2d 377; People v. McNulty, 171 Cal.App.2d 86, 340 P.2d 340.

Judgment affirmed.

FOX, P. J., and HERNDON, J., concur.

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172 Cal.App.2d 260

Anthony N. BORG, Plaintiff and Appellant,
v.
Richard McDONNELL and Eugene R. McDonnell, Defendants and Respondents.
Civ. 18279.

District Court of Appeal, First District, Division 1, California.
July 23, 1959.
As Modified on Denial of Rehearing Aug. 14, 1959.
Hearing Denied Sept. 16, 1959.

Action for injuries sustained by pedestrian when struck by automobile of defendant traveling in the same direction. Judgment for the defendant in the Superior Court, County of San Mateo, Louis J. Dematteis, J., and the plaintiff appealed. The District Court of Appeal, Fred B. Wood, J., held that the giving of an instruction on unavoidable accident was prejudicial error.

Judgment reversed.

Appeal and Error 🔑1064(1)
Automobiles 🔑246(57)

In action for injuries sustained by pedestrian when hit by defendant's automobile traveling in the same direction, giving of an instruction on unavoidable accident was error under the evidence and was prejudicial under the circumstances.

◆

Saul N. Ross, San Bruno, Joseph A. Galligan, Burlingame, for appellant.

Pelton, Gunther, Durney & Gudmundson, San Francisco, for respondents.

FRED B. WOOD, Justice.

Plaintiff, walking along the Bayshore Highway in a northerly direction, was hit by defendant's automobile which was traveling in the same direction. Upon this appeal from an adverse judgment plaintiff assigns prejudicial error in the giving and refusing of instructions. Our examination of the record convinces us that the giving of an instruction on unavoidable accident * was prejudicially erroneous, under the holding in Butigan v. Yellow Cab Company, 49 Cal.2d 652, 320 P.2d 500, a decision filed on the next to the last day of the trial herein.

The Facts

The section of highway involved had four lanes divided into two southbound and two northbound lanes. The outer northbound lane had an asphalt surfaced shoulder about 6′ wide, bordered by an unimproved dirt shoulder about 25 feet wide. Plaintiff testified that he was walking north along the dirt shoulder about 4 feet east of the asphalt shoulder and that his friend Joseph Maltaman accompanied him on his left. Defendant testified that he was driving north and that the left side of his car was closer to the dividing line between the fast and slow northbound traffic lanes than to the right edge of the slow or outer lane, and that one of the pedestrians was directly ahead of the center of his car and the other pedestrian was directly in front of defendant's right headlight when he first saw them.

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* This instruction read the same as did the instruction in the Butigan case, except as follows:

It omitted the fourth sentence of the Butigan instruction and substituted therefor the following: "No one may be held liable for injury resulting from an unavoidable accident."

It used the last sentence of the Butigan instruction but changed "any defendant" to "either party" and at the end of that sentence changed "that defendant" to "the defendant."

It added the following at the end of the instruction: "Whether or not the accident in question in this case was unavoidable is, of course, a question of fact for you to determine, and in giving the foregoing instruction, I do not imply any opinion or suggestion as to what your findings should be."

The accident occurred on the 22nd of January, 1956. Maltaman testified it happened around 5:20 p. m. Plaintiff said it was "ten minutes, maybe five minutes, maybe close to 5:00." Defendant's witness Albert Martinez, who happened to be in the vicinity at the time, said he had been out there about 20 minutes, between 5:00 and 5:20 p. m. Defendant said it happened near 6:00 o'clock, 5 minutes to 6:00 approximately.

Maltaman said it was still light, approaching dusk. Plaintiff said he had just measured a building lot nearby. In doing so he located a surveyor's mark without the aid of artificial light. Defendant said it was very dark, pitch black. Martinez said he saw two pedestrians walking along. "It was getting dark. It wasn't exactly dark, where I couldn't see. Maybe I could, with the other cars' lights * * * Maybe it wasn't pitch dark." He did not actually see the persons themselves. He saw silhouettes. He "couldn't distinguish any part, you know, like what they were wearing anything like that. All I could see was the form of two persons walking." He was north of them, 70 or 100 feet distant. He saw headlights of cars coming. He thought these figures appeared in the headlights. When he saw them they were walking side by side on the roadway, the concrete strip. One was on the easterly edge of it. The other was two or three feet on the inside. He did not see them when they were hit. It was possible that at that time they were walking on the shoulder of the roadway. Plaintiff testified that he was wearing black jeans and a yellow and blue shirt. He thought he had a white cap on.

Defendant said it got dark about 5:30. It was cloudy. At 5:30 he was at St. Patrick's Seminary in Menlo Park and left there about 5:40 via Middlefield Road and Willow Avenue to Bayshore, thence north on Bayshore about 2,000 feet to the scene of the accident.

After going a short distance he turned into the slow lane. Visibility was not as good as it could be. He did not want to take too many chances going at a fast speed.

He was traveling 35 to 40 miles an hour, close to 40.

The pavement was wet but not "slick" wet. It started to rain just before the time of the accident, after he had pulled into the slow lane, a fine misty rain.

The mist had not clouded the windshield. He had perfect vision without using the windshield wipers.

There were no northbound cars ahead of him as far as he could see. He had his lights on, low beam. He did not notice taillights of any autos ahead of him. He did not know how far ahead his lights projected light. He did not know how far he could see ahead. He supposed he could see a red light one hundred feet in front of him, or 200 feet. Up until the moment he saw a pedestrian's face, he saw nothing in front of him. The road looked clear. There was a certain amount of disturbance to the vision because of oncoming headlights, a certain amount of glare. It did not blind him. He saw the pedestrians before he struck them, when they were about 30 feet in front of him. He saw one and had an impression the other one was there too.

As soon as he saw them he hit his brakes and pulled hard to the left. He was not sure if he could avoid them. He knew he could not stop in time. He thought he could make it around them. He hit his brakes hard; not enough to lock the wheels; not hard enough to skid; just hard enough to slow the car down, enough to pull around these men. He did not try to lock his wheels. He was afraid of putting the car into a skid and losing control of it, becasue of the wet pavement.

He did not sound his horn before the accident. He did not have time enough.

He was traveling about 40 miles an hour when he saw these men, and slowed down close to 35 by the time he hit them, and brought his car to a stop about 30 feet beyond the point of impact. That was on a fairly wet pavement. It was not "slick" wet.

Plaintiff heard no horn, nor did he see defendant's car, before he was hit. He heard nothing to warn him of an accident before he was hit. Plaintiff saw no lights of cars coming from behind him before the accident happened. He was not aware of the lights of the car. He did not at any time see the headlights of the automobile that struck him. He did not see any lights.

Maltaman said he had no opportunity to get out of the way and made no outcry.

Plaintiff said he landed on his head on the paved shoulder of the road. Defendant said that after the accident both pedestrians were on the shoulder of the highway; just off the road; not on the paved traveled portion of the highway.

From this evidence the jury could have found that the plaintiff or the defendant was negligent or that both were negligent, and that in any such case the negligence was a proximate cause of the accident. For example, if the jury found that plaintiff was walking on the traveled portion of the highway, paying no attention to the vehicular traffic, it could have found that he was, under the circumstances of the case, not exercising ordinary care. Similarly, the jury could have found that defendant was driving at too rapid a pace to make timely observation of obstacles in his path and to exercise proper control of his car under the conditions of low visibility and wetness of pavement described by him, or that he was driving off the roadway and on the shoulder (perhaps, on the dirt shoulder), and therefore was not exercising ordinary care. Also, there is a lack of evidence of unavoidability such as brakes that suddenly ceased to operate or the sudden intervention of another car crashing in from the side or the rear and rendering defendant's car impossible to control.

[1] Under these circumstances it was error to give the instruction on unavoidability as expounded by our Supreme Court in the Butigan case. It is unnecessary to repeat that exposition here. It appears in 49 Cal.2d at pages 658–660, 320 P.2d 500.

The question remains whether this error was prejudicial. We believe it was. Essentially the same factors obtain here that obtained in the Butigan case and rendered the error prejudicial in that case. See 49 Cal.2d at pages 660 and 661, 320 P.2d 500. There is a difference in the degree of care imposed upon the defendant (utmost care in the Butigan case; ordinary care in this case); but it is not a significant point of differentiation when the circumstances attending each, respectively, are taken into consideration.

Defendant mistakenly seeks to distinguish the instruction given in this case from that given in the Butigan case. For those differences, see the footnote on p. 1 above, and page 657 of 49 Cal.2d, 320 P.2d 500. For example, the last sentence of the instruction in this case, not included in the Butigan case instruction, appeared in the instruction considered in Martz v. Ruiz, 158 Cal.App.2d 590, 591, 322 P.2d 981, an instruction which was there disapproved, resulting in a judgment of reversal. A hearing by the Supreme Court was denied in the Martz case; at page 593 of 158 Cal.App.2d, 322 P.2d 981.

No extended analysis of cases involving this question, rendered since the decision in the Butigan case, seems necessary. In Halleck v. Brown, 164 Cal.App.2d 586, 589–590, 330 P.2d 852; Sims v. Phillips, 164 Cal.App.2d 793, 797, 331 P.2d 174, and McGuire v. Navarro, 165 Cal.App.2d 661, 667–668, 332 P.2d 361, the Butigan rule was applied, resulting in reversals. (In each of those cases a hearing by the Supreme Court was denied.)

Defendant invokes Alarid v. Vanier, 50 Cal.2d 617, 327 P.2d 897, in which the questioned instruction was used and yet the judgment was affirmed. In that case it appeared that plaintiff had stopped his car at a "stop" sign and that defendant's car hit plaintiff's in the rear. Defendant's brakes, for the first time, failed to function. He gave evidence indicating that he had exercised care in the maintenance of his car, including inspection of the brakes. The Supreme Court found there was no *prejudicial* error, saying in part: "No precise formula can be drawn for deciding whether there has been a miscarriage of justice. In each instance the determination whether the probable effect of an instruction has been to mislead the jury and whether the error has been prejudicial so as to require a reversal depends upon all the circumstances, including the evidence and the other instructions given. Here there were instructions that made it clear that under the admitted facts a prima facie case has been proved against defendant and that, in order to escape liability, he must exculpate himself by showing justification or excuse. As we have seen, the evidence on this issue was uncontradicted and amply sufficient to show that prior to the accident defendant took reasonable precautions to see that his brakes were in good working condition. Under the circumstances it does not appear that there has been a miscarriage of justice." 50 Cal.2d at page 625, 327 P.2d at page 901.

In view of our conclusion concerning the instruction on unavoidable accident, it is unnecessary to discuss the other points considered by the parties.

The judgment is reversed.

BRAY, P. J., and TOBRINER, J., concur.

Elizabeth C. DE WITT, Evelyn Flick and Alice L. Naidl, Petitioners and Respondents,

v.

BOARD OF SUPERVISORS OF the County of SAN DIEGO, State of California, Respondent and Appellant.*

Civ. 5893.

District Court of Appeal, Fourth District, California.

July 23, 1959.

Hearing Granted Sept. 16, 1959.

Proceeding for a peremptory writ of prohibition to the board of supervisors forbidding that body to proceed further in a proposed change of boundaries of a school district. From a judgment of the Superior Court of San Diego County, C. M. Monroe, J., the defendant board appeals. The District Court of Appeal, Shepard, J., held that where county board of supervisors after considering petition for change of boundaries of school districts and making its order that an election be held and thereby decided that the question of change should be passed upon by the vote of the electors of the area involved, it had no power arbitrarily to make a new order changing to the alternative procedure of a decision by the board on hearing before that body.

Judgment affirmed.

1. Counties ⚿47

The inherent right exercised by courts to correct mistakes caused by fraud or clerical error is extended to board of supervisors in proper cases when exercising any of its functions and more particularly in quasi-judicial functions.

2. Counties ⚿56

Governing board in exercise of its legislative functions may in proper case rescind any call for an election on matters in which the board has continuing jurisdiction.

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* Opinion vacated 2 Cal.Rptr. 1, 348 P.2d 567.

3. Counties ⚷47

The action of the board of supervisors in hearing facts upon which it must determine which of two alternative procedures to take is quasi-judicial in character.

4. Schools and School Districts ⚷38

County board of supervisors was directed by statute to perform the limited function of determining whether a petition for change of boundaries of school districts was sufficient and to then determine whether the ultimate decision on change of boundaries should be made by the electors of the territory involved or by the board of supervisors, and in so acting it was acting in a quasi-judicial capacity and when it made its formal decision and concluded that phase of its function, its power was exhausted. West's Ann.Education Code §§ 2502 et seq., 2502–2506.

5. Schools and School Districts ⚷38

Where county board of supervisors after considering petition for change of boundaries of school districts and making its order that an election be held and thereby deciding that the question of change should be passed upon by the vote of the electors of the area involved, it had no power arbitrarily to make a new order changing to the alternative procedure of a decision by the board on hearing before that body. West's Ann.Education Code, §§ 2502 et seq., 2502–2506.

◆

James Don Keller, Dist. Atty., Bertram McLees, Jr., Deputy Dist. Atty., San Diego, for appellant.

Raymond F. Feist, Oceanside, for respondents.

SHEPARD, Justice.

This is an appeal from a judgment granting a peremptory writ of prohibition directed by the superior court of San Diego County to the board of supervisors of San Diego County forbidding that body to proceed further in a proposed change of the boundaries of the Carlsbad Union School District and Oceanside-Libby School District, except to implement a certain election respecting such change as ordered by said body on November 19, 1957. For clarity and brevity's sake the petitioners for the writ, who are the respondents in this appeal, will hereinafter be referred to as DeWitt and the respondent to said writ who is the appellant in this appeal, will hereinafter be referred to as Board.

The facts are not in dispute. From the record it appears that a petition under the provisions of Article 5, Chapter 7, Division 2 of the Education Code was presented to the county superintendent of schools of San Diego County in the first part of November, 1957, in accordance with the provisions of section 2502 of the Education Code of the State of California, requesting a change of certain territory from Carlsbad Union School District to Oceanside-Libby Union School District. The superintendent of schools having found it sufficient and signed as required by law, did transmit a copy of the petition to the governing board of each district affected by the proposed change of boundaries and filed said petition with Board, accompanied by his recommendation. On November 19, 1957, Board, in accord with the provisions of section 2504 of the Education Code, made its order that an election be held within the area affected in order that the voters of said area might make their own determination of the question of change of boundaries, as set forth in said petition and as is provided by section 2506 of the Education Code. On November 20, 1957, Board adopted a new order rescinding its action of November 19, 1957, and ordering the petition to be heard before the board of supervisors for the determination by that body of the question of change of boundaries in accord with the provisions of section 2505 of the Education Code. No steps were taken by the county superintendent of schools as is provided by section 2506 under the order of November 19. Instead, he set the matter for hearing before the Board on January 14, 1958. DeWitt filed an action for a writ of prohibition and a peremptory writ ultimately ensued.

The primary question thus presented is, did the Board after considering the petition and making its order under said section 2504 that an election be held, thus having decided that the question of change of boundaries be passed upon by the vote of the electors of the area involved, have the power to arbitrarily make a new order changing to the alternative procedure of a decision by the Board on a hearing before that body.

The matters involved here are governed by the provisions of sections 2502 to 2506 of the Education Code. Section 2502 provides for the initiation of a proceeding for a change of boundaries by a petition of 25% of the registered electors residing in the territory proposed to be transferred. Section 2503 provides for an examination of the petition by the county superintendent of schools, the transmission of a copy of the petition to the governing board of each district affected, and the filing by him of the petition with the board of supervisors accompanied by his statement with respect thereto. Section 2504 provides for the determination by the board of supervisors as to which of two alternative procedures will be followed to determine the question of change of boundaries. Section 2505 provides the first alternative, being a hearing before the board of supervisors and a determination of the ultimate question by that board after notice, as is provided in said section. Section 2506 provides the second alternative, that is for submission to the electors of the area involved in the manner provided in said section.

[1, 2] We have no doubt that the inherent right exercised by the courts to correct mistakes caused by fraud or clerical error (Martin v. Ray, 74 Cal.App.2d 922, 926 [1], 170 P.2d 75; Peterson v. Peterson, 135 Cal.App.2d 812, 816 [6], 288 P.2d 171 is likewise extended to the board of supervisors in proper case when exercising any of its functions, and more particularly in quasi-judicial functions (Vernon v. Board of Supervisors, 142 Cal. 513, 76 P. 253), and that the governing board in the exercise of its legislative functions may in proper case rescind any call for an election on matters in which the board has continuing jurisdiction. In re Banta, 25 Cal.App.2d 622, 78 P.2d 243.

However, in the case at bar, no question as to the correction of a mistake caused by fraud or error in the facts presented to the Board nor of clerical error, is involved. It is purely a question of whether or not the Board, without any new hearing for cause, may arbitrarily rescind its former order and start off in a new direction.

[3–5] It has frequently been held that the action of the board of supervisors in hearing facts upon which it must determine which of two alternative procedures to take is quasi-judicial in character. Imperial Water Co. v. Board of Supervisors, 162 Cal. 14, 18, 120 P. 780; Anaheim Sugar Co. v. County of Orange, 181 Cal. 212, 221 [10], 183 P. 809; Crane v. Board of Supervisors, 17 Cal.App.2d 360, 366 [1], 62 P.2d 189; Firestone Tire etc. Co. v. Board of Supervisors, 166 Cal.App.2d 519, 333 P.2d 378. In the case at bar Board was directed by statute to perform the limited function in this instance of determining whether the petition was sufficient and to then determine whether or not the ultimate decision on change of boundaries should be made by the electors of the territory involved or by the board of supervisors. In so acting it was limited by statute to the particular purpose then involved, and was acting in a quasi-judicial capacity. When it made its formal decision and concluded that phase of its function its power was exhausted. Firestone Tire etc. Co. v. Board of Supervisors, supra; Heap v. City of Los Angeles, 6 Cal.2d 405, 407, 57 P.2d 1323. As was said in Lindell Co. v. Board of Permit Appeals, 23 Cal.2d 303, 323, 144 P.2d 4, 15: "The only question to be determined is when action becomes final. That is in every case a question dependent for its answer upon the scheme of the law by which power is conferred." In Olive Proration Program Committee v. Agricultural etc. Comm., 17

Cal.2d 204, 209 [2], 109 P.2d 918, 921 the court said:

> "Where orders which relate to what may be rather broadly defined as individual rights are concerned, the question whether the administrative agency may reverse a particular determination depends upon the kind of power exercised in making the order and the terms of the statute under which the power was exercised. * * * The determination depends upon the provisions of the particular statute."

In Peart v. Board of Supervisors, 145 Cal. App.2d 8, 10 [1], 301 P.2d 874, 875, the court said:

> "It is an oversimplification to group together all acts of a board of supervisors in the creation of a new city or district, and stamp all such acts, as a group, as either within or beyond the scope of court review. Rather, each statute authorizing such action places upon the subordinate legislative body some restrictions which are conditions for its exercise of jurisdiction, and which require finding of specified facts. Thus, a board's finding as to sufficiency of the notice of hearing [citations], or of the petition, Borchard v. Board of Supervisors, 144 Cal. 10, 77 P. 708, whether such findings be termed 'judicial,' 'quasi-judicial,' or otherwise, are clearly subject to some review by the courts under sufficient pleadings in a proper form of proceeding."

We do not have here a case of matters which lie within the continuing jurisdiction of the board of supervisors, such as is the subject of Lavine v. Jessup, 161 Cal.App.2d 59, 326 P.2d 238 (selection of a site for a court house) or Guy F. Atkinson Co. v. Offner, 86 Cal.App.2d 92, 194 P.2d 33 (contract let after rejection of old bids). The case of Vernon v. Board of Supervisors, supra, is cited in support of DeWitt's position. That case was one in which a fraud had been practiced on the board of supervisors and it undoubtedly had the power to correct a mistake resultant from fraud.

We think the trial court's decision is correct. The judgment is affirmed.

MUSSELL, Acting P. J., concurs.

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172 Cal.App.2d 781

PEOPLE of State of California, Plaintiff and Respondent,
v.
Paul PERKINS, Defendant and Appellant.
Cr. 6690.

District Court of Appeal, Second District, Division 3, California.
Aug. 10, 1959.

Defendant was convicted of selling and furnishing heroin. The Superior Court of Los Angeles County, Richard C. Fildew, J., rendered judgment and defendant appealed. The District Court of Appeal, Shinn, P. J., held that where trial court gave credence to officer's testimony establishing offense, reviewing court could not say as matter of law that conviction was without support in evidence.

Affirmed.

1. Criminal Law 🔑1158(1)

Where trial court gave credence to officer's testimony establishing offense, reviewing court could not say as matter of law that conviction was without support in evidence.

2. Criminal Law 🔑1088(1)

Record on appeal from conviction for selling and furnishing heroin failed to sustain defendant's contentions that he had been illegally held beyond the statutory period prior to arraignment, that he had been deprived of preliminary hearing, that he had been arrested without warrant, that identity of informer had not been disclosed or that co-defendant had been improperly released. West's Ann.Pen.Code, § 825.

◆

Paul Perkins, in pro. per., for appellant.

Stanley Mosk, Atty. Gen., for respondent.

SHINN, Presiding Justice.

Paul Perkins was indicted for and in a court trial convicted of selling and furnishing heroin. He appeals from the judgment.

The evidence at the trial consisted of evidence produced before the grand jury, received pursuant to stipulation, and some additional evidence.

There was testimony of the following facts. In the late afternoon of May 22, 1958, Officer Ruben Ortiz of the Los Angeles Police Department accompanied one Dan De Norber to the northeast corner of Fourth and Broadway, where they encountered appellant. The three men then walked north on Broadway. De Norber told Perkins that Ortiz wanted to buy some heroin; appellant agreed to obtain two capsules of heroin for $5; Ortiz handed Perkins a $5 bill; appellant told Ortiz and De Norber to follow him back to a candy store on the corner of Fourth and Broadway and then to wait. Perkins approached his co-defendant, Reataza, and the two men entered the candy store. Ortiz and De Norber waited outside. Through the open door Ortiz saw appellant hand a bill to Reataza and the latter hand appellant a piece of green balloon and two small capsules. Perkins then left the store and gave the capsules and the piece of balloon to De Norber who gave them to Ortiz. The capsules were analyzed by a police chemist and were shown to contain heroin.

Appellant testified in his own behalf that he met Ortiz and De Norber on May 22nd but he did not meet Reataza. He did not buy any narcotics from Reataza and no money was given him by Ortiz. De Norber asked him if he could find some narcotics but he did not know where narcotics could be obtained and he did not offer to find any. He witnessed some kind of transaction between De Norber and Ortiz.

Upon application of appellant for appointment of counsel the matter was referred to the Committee on Criminal Appeals of the Los Angeles Bar Association with a request for a report directing our attention to any point which might reasonably be urged in his favor. We received a report from a member of the committee made after a careful examination of the record. After reading the report and the record we determined that the filing of a brief would serve no useful purpose and we denied the appointment of counsel, notifying Perkins of our order and substantially extending his time to file a brief. No brief having been filed, we have re-examined the record and are disposing of the appeal on the merits.

At the outset of the trial the deputy district attorney offered to stipulate that the matter might be submitted upon the grand jury transcript, each side having the right to offer further evidence. Counsel for appellant said: "Yes, the defendant will want the officer here, I mean in the Grand Jury Indictment." Any doubt whether the rather vague language we have just quoted constituted an acceptance of the stipulation is resolved by the statement in the minutes that the stipulation was entered into and by appellant's failure to raise any objection when the court stated that it had read the transcript of the grand jury proceedings.

[1] The only factual question was whether the testimony of Officer Ortiz or of appellant was worthy of belief. The court having given credence to the former's testimony, we cannot say as a matter of law that the conviction was without support in the evidence. People v. Pastrana, 136 Cal.App.2d 358, 288 P.2d 568.

[2] In his notice of appeal Perkins specified a number of respects in which his constitutional rights were allegedly violated, namely, he was held more than 48 hours prior to his arraignment in con-

travention of Penal Code, section 825; he was unlawfully deprived of a preliminary hearing; he was arrested without a warrant; the identity of the informer was not disclosed; and Reataza was released. We need say only that we have examined these contentions and find them to be devoid of merit.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

172 Cal.App.2d 682

**PEOPLE of the State of California,
Plaintiff and Respondent,
v.
Melvin Joseph CONERLY, Defendant and
Appellant.
Cr. 6100.**

District Court of Appeal, Second District,
Division 1, California.
Aug. 7, 1959.
Rehearing Denied Aug. 28, 1959.
Hearing Denied Sept. 30, 1959.

Defendant was convicted of burglary. The Superior Court of Los Angeles County, Kenneth C. Newell, J., entered judgment and an order denying defendant's motion for new trial, and defendant appealed. The District Court of Appeal, Lillie, J., held that where men's clothing store was burglarized, and suits were taken therefrom, and thereafter defendant and his codefendant sold some suits, which were identified as having been stolen from the clothing store, to a dry cleaner, and there was nothing in evidence that even hinted that dry cleaner assisted in the burglary, helped in planning it, or had knowledge thereof before suits were offered for sale to him, dry cleaner was not an "accomplice" in the burglary, even assuming that dry cleaner knew or should have realized that the suits were stolen, and that defendant was not entitled to an instruction that dry cleaner, who testified as a prosecution witness, was an accomplice whose testimony was required to be corroborated.

Judgment affirmed.

See also 335 P.2d 518.

1. Burglary ⊂⇒42(1, 3)

Though mere possession of goods recently stolen is not sufficient to sustain conviction for theft or burglary, unexplained possession of stolen property is a circumstance strongly indicating guilt, and where such circumstance is found to exist, only slight other evidence is needed to support judgment of conviction. West's Ann.Pen.Code, § 459.

2. Burglary ⊂⇒45

In burglary prosecution, jury had duty to weigh the evidence, resolve all factual conflicts, and determine credibility of witnesses. West's Ann.Pen.Code, § 459.

3. Burglary ⊂⇒41(1)

Evidence sustained burglary conviction. West's Ann.Pen.Code, § 459.

4. Criminal Law ⊂⇒507(5), 780(2)

Where men's clothing store was burglarized and suits were taken therefrom, and thereafter defendant and his codefendant sold some suits, which were identified as having been stolen from the clothing store, to a dry cleaner, and there was nothing in evidence in burglary prosecution that even hinted that dry cleaner assisted in the burglary, helped in planning it, or had knowledge thereof before suits were offered for sale to him, dry cleaner was not an "accomplice" in the burglary, even assuming that dry cleaner knew or should have realized that the suits were stolen, and defendant was not entitled to an instruction in burglary prosecution that dry cleaner, who testified as a prosecution witness, was an accomplice whose testimony was required to be corroborated. West's Ann.Pen.Code, §§ 459, 1111.

See publication Words and Phrases, for other judicial constructions and definitions of "Accomplice".

Melvin Joseph Conerly, in pro. per.

Stanley Mosk, Atty. Gen., and Lynn Henry Johnson, Deputy Atty. Gen., for respondent.

LILLIE, Justice.

Appellant Conerly and codefendant, George Henry Hilton, were jointly charged by amended information with burglary in violation of Section 459, Penal Code, in that on or about May 2, 1957, they entered the Ewart Clothing Store with intent to commit theft. In addition, it alleged two prior felony convictions, to wit, burglary, which he admitted to be true. A jury found them guilty of burglary and fixed the crime in the first degree. Appellant's motion for new trial was denied, the offense was reduced to second degree and he was sentenced to the state prison. He appeals from the judgment and order denying his motion for a new trial.

The evidence viewed most favorably in support of the verdict of guilt discloses that the Ewart Clothing Store in Pomona, securely locked on the evening of May 1, 1957, was broken into and robbed of men's suits valued at $10,572.43, wholesale. The next morning, May 2nd, about 8 a. m. the back door of the store was found unfastened, the bar of the lock having been chipped in two, and 400 suits from the racks and two stacks placed near the back door were missing. A hole had been chopped through the roof making an opening into the storage room.

In the early morning of May 2, 1957, Officers Julian and Burke, patrolling an alley in the rear of Ewart's store, observed a 1947 Chevrolet two-door sedan turn into it, proceed past Ewart's and turn north. They stopped it and found appellant driving the car with Hilton as his passenger. Appellant was wearing a light brown checked sports jacket and sport trousers. Officer Julian requested his operator's license and asked him why he was in the alley, to which appellant replied they were looking for a friend but had apparently gotten lost. The officer noted the rear seat had been removed from the car, and asked him if he would open the trunk which he observed to be quite clean. Officer Burke asked codefendant Hilton where they were going, to which he responded that they were looking for a place called "Cookie's." The officers directed them to "Cookie's," drove behind them, waited, and later followed them until they left town.

About 2 p. m. on May 3, Harvey D. King, operating a dry cleaning business in Los Angeles under the name of Kay Dry Cleaners, had a conversation with Hilton at the shop regarding the purchase of suits. Hilton told him he had a "bunch" of suits, and King promised he would look at them that night. Thereafter, between 10 and 11 p. m. on the same day, appellant and Hilton, accompanied by a woman who remained in the car, brought the suits into the shop an arm load at a time. King checked the suits and found "they had Ewart's label, Ewarts, Pomona." The next morning appellant and Hilton returned to the shop and King paid them $2,550, which they both accepted and counted out together.

On the morning of May 2, Officer Whitehead, investigating the burglary, found certain clothing fibers clinging to portions of the wood at the point of entry into Ewart's store. On May 6, he called at appellant's home and in his closet found a jacket similar to the one he had worn when apprehended by police in Pomona on May 2, from which he took certain fibers. A laboratory test showed that the fibers found adhering to the point of entry were quite similar in color and characteristics to the fibers in the coat removed from appellant's home.

On May 7, at King's dry cleaning establishment and at two other places to which King directed him, Officer Whitehead recovered 158 or 159 suits, which were identified as belonging to and having been taken from Ewart's in Pomona.

In their defense, appellant and Hilton denied all knowledge of the burglary or that they sold any suits to King. They admitted they were in Pomona as testified to by the officers, but declared they were only looking for a "gambling joint."

As an alibi for May 3, Hilton testified that he, appellant, Mattie Bruce and one Bluford had been at a store in Colton around 8 p. m. and went from there to Riverside, arriving about 9 p. m. Appellant said he had been with Hilton but parted from him at 9:30 p. m. when he went home, staying there the rest of the night; and from 8 a. m. to 11 a. m. the next day he had been with his mother in downtown San Bernardino. A shoe salesman testified he had sold appellant shoes at Colton around 8 p. m. Appellant's mother said that he had come home about 10 p. m. on May 3, stayed there the rest of that night and had been in town with her the next morning between 8 and 11 a. m.

The evidence further discloses that codefendant Hilton owned a 1950 Chevrolet convertible coupe, green with a black top, which he had not loaned to anyone on May 2, 3, 4 or 5. Appellant denied he told Officer Whitehead he had been to Kay's Dry Cleaners on May 3 in the 1950 Chevrolet convertible, but the officer testified he had asked him if he had, and appellant said "he had been there." Mrs. King testified that on May 3 around noon Hilton came to talk with her husband and she noticed a man seated in the car Hilton got out of, which was a beige or yellow convertible with no top, license number HPA 263. An automobile salesman testified that in March of 1957 he had sold to Hilton a green 1950 Chevrolet convertible with license number HPA 263.

Appellant claims that there was insufficient evidence to sustain the judgment of conviction and that the trial court erred in failing to instruct the jury that the testimony of an accomplice must be corroborated.

In advancing his first contention, appellant argues that King's testimony, at best, establishes only that appellant had possession of recently stolen property, which alone is insufficient to connect him with the commission of the crime of burglary (People v. Howell, 126 Cal.App.2d 780, 273 P.2d 79); that there was no showing when the burglary was committed in relation to the time the officers observed appellant and Hilton in Pomona during the early morning hours of May 2, and mere presence in the vicinity on the same day a burglary has been committed does not constitute sufficient corroborative evidence of guilt; and that King was an accomplice and no conviction may be had upon his uncorroborated testimony.

[1] Without here repeating the pertinent evidence, it is obvious from the record that, if believed by the trier of fact, there was ample substantial evidence to sustain the finding of the jury that there had been a burglary of Ewart's store on or about May 2, and appellant and codefendant Hilton had committed it. Although, as argued by appellant, it is true that mere possession of goods recently stolen is not sufficient to sustain a conviction of theft or burglary, it is also the rule that unexplained possession of stolen property is a circumstance strongly indicating guilt (People v. Jackson, 146 Cal.App.2d 553, 303 P.2d 767) and where this circumstance is found to exist, only slight other evidence is needed to support a judgment of conviction (People v. Wiley, 8 Cal.App.2d 135, 46 P.2d 817). Appellant not only failed to explain his possession of the suits belonging to Ewart's but denied he had ever had them. However, the jury clearly believed the testimony of King that appellant and Hilton brought the suits to him shortly after the burglary and received money for them. Other incriminating evidence tending to show appellant's participation in the burglary relates to a jacket found in his home which yielded fibers similar in color and characteristics to those found adhering to the point of entry into Ewart's store and which jacket was similar to the one worn by him when observed by police in the vicinity of Ewart's on May 2; his presence in the near vicinity of the burglary driving a car in which the rear seat had been removed and the trunk was quite clean; the removal and transportation from the clothing store of a substantial number of suits; acceptance by appellant and Hilton of an inadequate price ($2,550) for the

stolen goods valued at $10,572.43 wholesale (People v. Buratti, 96 Cal.App.2d 417, 215 P.2d 500; People v. Conrad, 125 Cal.App. 2d 184, 270 P.2d 31); appellant's admission to officers he had been to Kay Dry Cleaners on May 3 in a 1950 Chevrolet convertible, together with proof that codefendant Hilton was there then and had gotten out of a 1950 Chevrolet convertible, license number HPA 263 which had previously been sold to him and in which was seated another man; and the testimony of a shoe salesman that he saw appellant in Colton at 8 p. m. on May 3 in the company of a man and woman, and that of King that two hours later he saw appellant in Los Angeles accompanied by a man (Hilton) and woman.

[2, 3] That the jury rejected as untrue the testimony of appellant, his codefendant and the defense witnesses, is clear from its verdict. It had the duty to weigh the evidence, resolve all factual conflicts and determine the credibility of witnesses; and apart from having observed them and listened to their testimony, the jury in evaluating the evidence without doubt considered other factors such as possible bias and relationship of their witnesses to appellant and codefendant Hilton. The trier of fact accepted the testimony of the prosecuting witnesses as true, which evidence more than sustains the verdict, and rejected the defense version of what occurred. This court will not disturb the jury's implied findings of fact.

[4] We likewise find to be without merit appellant's claim that the trial court erred in failing to instruct the jury that the testimony of an accomplice must be corroborated. Harvey D. King testified as a prosecution witness and appellant argues since he was an accomplice the jury should have been instructed "on the law governing testimony of accomplices." The record before us does not disclose, in compliance with Rule 33 (b) (1) (b), Rules on Appeal, what instructions were or were not given by the trial court. We can only assume, therefore, that appellant complains that the jury was not instructed in accordance with Section 1111, Penal Code, that a conviction cannot be had upon the testimony of an accomplice unless it is corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. We find no error of the trial court in failing to give such an instruction, for it is obvious from the record that King was not appellant's accomplice in the crime with which he was charged and of which he was convicted—burglary. Nothing in the evidence even hints to King's assistance in the burglary, help in planning it, or knowledge thereof before appellant and Hilton called at his shop between 2 and 3 p. m. on May 3 offering to sell him a "bunch" of suits. Even assuming King knew or should have realized they were stolen at the time he received the suits, this still would not constitute him an accomplice. A similar contention was made and rejected by the Supreme Court in People v. Raven, 44 Cal.2d 523, 282 P.2d 866, 868, pointing out that Section 1111 of the Penal Code defines an accomplice as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given. The court stated at page 526 of 44 Cal.2d, at page 868 of 282 P.2d: "It is settled that the thief and the one knowingly receiving stolen property from him are guilty of distinct and separate substantive offenses and are not accomplices of each other. (Citing cases.) An exception to the rule is recognized when the thief and the receiver conspire together in a prearranged plan whereby one is to steal and the other is to buy. (Citing cases.)" The record before us does not justify the conclusion that appellant and King entered into such a conspiracy, and accordingly no corroboration of the testimony of King was required (People v. Hamilton, 143 Cal.App.2d 305, 299 P.2d 716; People v. Conrad, 125 Cal.App.2d 184, 270 P.2d 31), and even assuming he

received the suits knowing they had been stolen, he could not, under the rule in the Raven case, supra, be classed as an accomplice of appellant in the burglary. Thus no instruction regarding corroboration of the testimony of an accomplice was required.

For the foregoing reasons, the judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.

Hearing denied; WHITE, J., not participating.

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172 Cal.App.2d 747

PEOPLE of State of California, Plaintiff and Respondent,

v.

George FERNANDEZ, Defendant and Appellant.

Cr. 3543.

District Court of Appeal, First District, Division 1, California.

Aug. 10, 1959.

Hearing Denied Oct. 7, 1959.

Prosecution for violation of narcotics laws. The Superior Court, City and County of San Francisco, Raymond J. Arata, J., entered judgment of conviction and defendant appealed. The District Court of Appeal, Bray, P. J., held that order denying motion to dismiss indictment was not reviewable on appeal from judgment of conviction and evidence was sufficient to sustain conviction on one of the counts for sale of heroin and possession of narcotics.

Affirmed as to one count and reversed as to other count.

1. Criminal Law 🔑1023(8)

Order denying motion to dismiss indictment is not directly appealable. West's Ann.Health & Safety Code, §§ 11500, 11557; West's Ann.Pen.Code, § 995.

2. Criminal Law 🔑1134(10)

An order denying motion to dismiss indictment was not reviewable on appeal from judgment of conviction. West's Ann. Pen.Code, § 995.

3. Grand Jury 🔑36

Informant need not be produced before grand jury returning indictment against defendant.

4. Grand Jury 🔑36

Defendant has no right to cross-examine a witness before grand jury.

5. Indictment and Information 🔑10.2(1)

Question on grand jury indictment is whether evidence there presented, taken together, if unexplained or uncontradicted would in the grand jury's judgment warrant conviction by trial court. West's Ann.Pen. Code, § 921.

6. Poisons 🔑9

Evidence was sufficient to sustain conviction for sale of heroin. West's Ann. Health & Safety Code, §§ 11500, 11557; West's Ann.Pen.Code, § 995.

7. Poisons 🔑9

In a prosecution for unlawful possession of narcotics, People must prove that narcotic was under defendant's dominion and control, that defendant was aware of its presence and knew it to be a narcotic and these elements may be established by circumstantial evidence. West's Ann.Health & Safety Code, § 11500.

8. Poisons 🔑9

Evidence was insufficient to sustain conviction for possession of narcotic. West's Ann.Health & Safety Code, § 11500.

9. Poisons 🔑9

Burden was upon People to establish defendant's knowledge of presence of narcotic when he is charged with unlawful possession of a narcotic. West's Ann.Health & Safety Code, § 11500.

Willard P. Norberg, San Francisco, for appellant.

Stanley Mosk, Atty. Gen., Clarence A. Linn, Chief Asst. Atty. Gen., Peter T. Kennedy, Deputy Atty. Gen., for respondent.

BRAY, Presiding Justice.

Defendant was charged by indictment with four counts of felony: (1) violation of Health and Safety Code section 11500 (sale of heroin on January 30, 1958); (2) violation of same section (sale of heroin on January 31); (3) violation of same section (possession of narcotic on February 4); (4) violation of Health and Safety Code section 11557 (maintenance of a place for sale and use of narcotics). Defendant admitted a prior conviction of violation of section 11500. Defendant's motion under section 995, Penal Code, to dismiss the indictment was denied. A jury found defendant not guilty of count 2 and guilty of the other three counts. Judgment was thereupon entered upon counts 1, 3 and 4, and defendant was sentenced to concurrent terms. Motion for new trial was denied as to counts 1 and 3, but granted as to count 4, which was thereupon dismissed. Defendant appeals from the judgment on counts 1 and 3 and from the denial of a new trial thereon.

Questions Presented.

1. Is an order denying motion to dismiss indictment reviewable on appeal from judgment of conviction?

2. Must informant be produced at grand jury hearing?

3. Sufficiency of evidence: (a) count 1; (b) count 3.

Evidence.

Officer McKinley testified that on January 30 one Garcia, an informant, was searched, found free of narcotics, and given $20. Officer Cruz and Garcia then went to a street corner where they met Officers McKinley and Getchell. The latter left and stationed themselves in a building from which McKinley watched Garcia cross the street and enter the Garden City Cleaners, owned and operated by defendant. The witness saw Garcia speak briefly with Marin, a presser in the shop. Garcia then left and walked towards Cruz' automobile. He was out of sight for a few moments of McKinley and Getchell. Officer Cruz testified that Garcia was in his sight at all times, including these moments, except when inside the cleaning shop, and that Garcia did not have contact with any other person. He then reentered their sight, walking towards the cleaners. Approaching the shop he turned and went back to the street corner where he remained for two or three minutes. Defendant drove up and entered the shop. Garcia followed him in and spoke to him. Their hands met and Garcia appeared to put something into the left cuff of his jacket as he turned. Garcia then returned to Cruz' automobile where Garcia gave Cruz a bindle of heroin. Cruz and Garcia then met the other officers, and went to the police station where a search of Garcia revealed no money in his possession.

Testimony was given of a somewhat similar series of events on January 31 watched by the officers with telephoto camera and binoculars and in which Garcia carried on his person a concealed transmitter. This related to count 2 of which the jury acquitted defendant. The occurrences on February 4 (count 3) will be discussed later.

1. Denial of Motion to Dismiss Indictment Is Reviewable.

[1] Plaintiff contends that such denial is not reviewable on appeal from the judgment of conviction, relying upon its construction of section 1259, Penal Code. People v. Simmons, 1897, 119 Cal. 1, 50 P. 844, held that an appeal would lie from such an order under section 1259, Penal Code. People v. Dewson, 1957, 150 Cal.App.2d 119, 310 P.2d 162, dealing with an *information,* incorrectly construed the Simmons case as interpreting section 1237, Penal Code (providing appeal from judgment and orders after judgment) and held the reviewability was under that section. Simmons actually found reviewability under section 1259, setting forth what is reviewable on appeal. However, it is clear that an order denying motion to dismiss indictment is not directly appealable. People v. Simmons, supra, 119

Cal. 1, 50 P. 844; People v. Hernandez, 1957, 150 Cal.App.2d 398, 400, 309 P.2d 969.[1]

In People v. Egan, 1946, 73 Cal.App. 2d 894, 897, 167 P.2d 766, 768, the court, by way of dicta, said of an order denying a motion to set aside an indictment: "The order would be reviewable only on appeal from the judgment itself." A series of cases hold that an order denying a motion to dismiss an *information* may be reviewable upon appeal from judgment of conviction. People v. Dewson, supra, 150 Cal. App.2d 119, 310 P.2d 162; People v. Rebolledo, 1949, 93 Cal.App.2d 261, 264, 209 P.2d 16; Nelson v. Superior Court, 1947, 77 Cal.App.2d 783, 785, 176 P.2d 390. We see no difference between the reviewability of an *information* and an *indictment* in respect to reviewability.

[2] Plaintiff points out that in 1897 when People v. Simmons, supra, 119 Cal. 1, 50 P. 844, held such an order reviewable under section 1259, Penal Code, that section provided review on appeal from judgment of "any intermediate order." In 1909 the section was amended restricting the review to things done "at the trial or prior to or after judgment * * *." "Trial" begins when the jury is impaneled and hence does not include rulings on motions made prior thereto. Plaintiff contends that the effect of this amendment was to overturn the Simmons decision.[2] Apparently this contention has never been passed upon. However, the theory of the Simmons case and the other cases above mentioned upholding the right of review upon appeal from judgment is that for purposes of review, such an order was "said or done at the trial or prior to or after judgment."

Defendant further contends that the testimony of the police officers before the grand jury did not cover the entire actions of the informant from the time he left the officers until he returned with the heroin, and therefore it was necessary in order to show probable cause that the informant be produced to account for the time he was out of the sight of the officers. He also contends that there was the same "gap" in the evidence at the trial. As will hereinafter be shown, there was no such "gap."

2. Must Informant Be Produced Before Grand Jury?

[3–5] The answer is "No." As said in the dissenting opinion of Mr. Justice Spence in Priestly v. Superior Court, 1958, 50 Cal. 2d 812, 824, 330 P.2d 39, which case dealt with the question of disclosure of the name of an informant at the preliminary examination (no indictment was involved), there is no necessity of producing the informant before the grand jury since the accused would have no opportunity to cross-examine him nor even to demand disclosure of an informant's name. The theory of the Priestly case is that the identity of an informer whose communications are relied on to establish probable cause to make a search must be disclosed when requested at the preliminary hearing, in order that the defendant may have an opportunity to produce him if the defendant so desires, and examine him in possible rebuttal of the police officer's testimony concerning him. (The case does not hold that the prosecution must *produce* the informant at the preliminary examination.) A defendant has no right to cross-examine a witness before the grand jury. The question on a grand jury indictment is whether the evidence there presented, taken together, if unexplained or uncontradicted, would in the grand jury's judgment warrant a conviction by a trial jury. Pen.Code § 921. Here the testimony before the grand jury was that of Officers Getchell and Cruz, substantially the same as given at the trial. It was amply sufficient to show probable cause without the testimony of Garcia. " 'If there is some evidence to support the indictment the courts will not inquire into its sufficiency. * * *' " Lorenson v. Superior Court, 1950, 35 Cal.2d 49, 55, 216 P.2d 859, 863; Greenberg v. Superior Court, 1942, 19 Cal.2d 319, 322, 121 P.2d 713; People v. Flanders, 1956, 140 Cal. App.2d 765, 768, 296 P.2d 13.

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[1] Defendant purported to appeal from such order here. His appeal will have to be dismissed.

[2] Plaintiff contends that defendant's remedy was either prohibition under section 999a, Penal Code, habeas corpus under section 1487, Penal Code, or mandamus. However, see Nelson v. Superior Court, supra, 77 Cal.App.2d 783, 785, 176 P.2d 390, and People v. Duncan, 1942, 50 Cal. App.2d 184, 188, 122 P.2d 587, holding mandamus not a proper remedy. Without considering the applicability of prohibition or habeas corpus, it is clear that they would not be exclusive remedies. In Nelson v. Superior Court, supra, 77 Cal.App.2d 783, 176 P.2d 390, the court stated that remedy by appeal from the judgment was not inadequate merely because less expeditious than an extraordinary writ.

3. Sufficiency of Evidence.

(a) *Count 1.*

[6] The conviction on this count is well supported. People v. Barnett, 1953, 118 Cal.App.2d 336, 257 P.2d 1041, held that if complete observation of the informant participant is not had from departure from police custody to return, the mere fact that he returns with narcotics and without money will not support a conviction of the alleged seller. But this is not that kind of a case. Here the testimony of Officers McKinley and Cruz was that Garcia was continually in the sight of one or the other at all times, and that Garcia did not come in contact with any person other than defendant.

Defendant's contention that there was a "gap" in the evidence as to the movements of Garcia, is based primarily upon his interpretation of the testimony of Officer McKinley, who testified that through binoculars he saw Garcia and defendant touch hands in the shop and then saw Garcia putting something in the left cuff of his jacket. On cross-examination McKinley said that Garcia as he turned "was doing this to his cuff (indicating) * * * I couldn't see what he was doing, just turning his cuff, was placing something into the cuff." He was then asked "* * * when you say 'placing something into the cuff,' you are assuming, are you not? A. I am assuming." He then said that he didn't see anything placed in the cuff. Taking the testimony of all the officers together, one or more had Garcia under surveillance at all times and at no time did Garcia have contact with any person other than defendant. Although McKinley did not see Garcia after shaking hands with defendant place anything in his cuff, he did see him make a movement as if doing so, and the jury could very well under the evidence reasonably infer that Garcia did receive the narcotic from defendant at that time. There was no "gap" in the "line of sight" testimony.

Defendant contends that defendant's employee Marin could have furnished the heroin. (He was later booked on a narcotics charge.) To have found that Marin gave the heroin to Garcia the jury would have had to disregard McKinley's testimony. This the jury did not do. The fact that the evidence fails to show what became of the money given Garcia except that he no longer had it, was a circumstance for the jury to consider. We have no right to interfere with its determination. See People v. Daugherty, 1953, 40 Cal.2d 876, 885, 256 P.2d 911; People v. Newland, 1940, 15 Cal.2d 678, 681, 104 P.2d 778. In People v. Richardson, 1957, 152 Cal.App.2d 310, 313 P.2d 651; People v. Barnett, supra, 118 Cal.App.2d 336, 257 P.2d 1041, and People v. Lawrence, 1959, 168 Cal.App.2d 510, 336 P.2d 189, the informant participant was out of sight of the officers for considerable periods of time and there were sources other than the defendant from which the narcotics could have been obtained. That is not true in our case. The situation in our case is more like the situations in People v. Holland, 1958, 158 Cal.App.2d 583, 322 P.2d 983; People v. Alvidrez, 1958, 158 Cal.App.2d 299, 322 P.2d 557, and People v. Hawkins, 1958, 164 Cal.App.2d 824, 331 P.2d 171.

(b) *Count 3.*

[7, 8] In a prosecution for unlawful possession of narcotics the People must prove that the narcotic was under defendant's dominion and control, that defendant was aware of its presence and knew it to be a narcotic. These elements may be established by circumstantial evidence. People v. Lopez, 1959, 169 Cal.App.2d 344, 337 P.2d 570; People v. Tabizon, 1958, 166 Cal.App.2d 271, 332 P.2d 697. On February 4, five police officers and two undercover men entered defendant's shop. Marin was the only person on the premises. In a few moments Garcia was brought in by one or two of the officers who apparently had left the shop to get him. Marin and Garcia were taken into the back of the shop. Al Gloria then was on the premises also. The only testimony as to the search of the premises is that given by Garcia. He stated that the officers searched among other things the clothing on the racks; that defendant entered the shop and was placed under arrest. About 20 minutes after his arrival the officers found a bindle of narcotics in the pocket of a suit which had been cleaned and was hanging on the rack waiting to be pressed. The suit did not belong to defendant. When asked to whom it belonged defendant said he would have to look at his records. Apparently he was not permitted to do so. The narcotic was dry. Plaintiff contends that this evidence justifies the inference that defendant after he entered the shop placed the narcotic in the suit. At the trial its theory apparently was that because of his ownership of the shop defendant was chargeable with possession of the narcotic found on the premises. No police officer testified to the search prior to defendant's entry, nor was there any testimony that that search did not discover narcotics. Evidence of the prior search was not given in plaintiff's case. Defendant called Garcia, brother of the informant, who said he saw the officers making the search. He did not and possibly from his vantage point could not, say that no narcotic was discovered in that preliminary search. It seems hard to believe that with at least five officers present, defendant could have placed the narcotic without some one of them seeing him do so. No evidence was offered as to whether defendant at any time approached the suit. He was arrested shortly after he entered the store near the front counter, the racks being toward the rear. Thus, it could not reasonably be inferred that defendant dropped the narcotic after his arrival.

[9] As to constructive possession because of the ownership of the store, the evidence is not sufficient to justify a conviction. Marin who had charge of the shop during defendant's absence may have placed the narcotics in the suit. Marin was subsequently booked for a narcotics violation. There was no evidence that from the time the suit was cleaned no one else had access to the racks. Both Garcia and Gloria were also in the shop, although while the officers were there they were not near where the suit hung. The fact that defendant had sold narcotics there a few days before was not sufficient evidence that he knew that a narcotic was in the suit on this day. The situation was somewhat similar to that in People v. Savage, 1954, 128 Cal.App.2d 123, 274 P.2d 905, where narcotics were found in the defendant's room. The court held that it was just as reasonable to assume that guests of defendant, the landlady, or cleaning woman, hid the narcotics as to assume that the defendant did so. There was no evidence of knowledge by the defendant and his guilt could not be inferred merely because he paid the rent for the room. So here, defendant's ownership of the shop is not sufficient to justify an inference that he knew the narcotic was in the suit. In People v. Antista, 1954, 129 Cal.App.2d 47, 276 P.2d 177, the evidence was held insufficient, where the defendant did not have exclusive use of the apartment in which the narcotic was found. The burden is on the People to establish knowledge of the presence of the narcotic. People v. Winston, 1956, 46

Cal.2d 151, 293 P.2d 40. The People did not meet that burden in this case.

The purported appeal from the order denying motion to dismiss indictment is dismissed. The judgment and order on count 1 are affirmed, and on count 3 the judgment and order are reversed.

FRED B. WOOD and TOBRINER, JJ., concur.

172 Cal.App.2d 692

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Chester Williams BEST, Defendant and Appellant.

Cr. 1430.

District Court of Appeal, Fourth District, California.

Aug. 7, 1959.

Prosecution for embezzlement of public moneys by a public officer. The Superior Court, Imperial County, L. J. Mouser, J., entered judgment of conviction and denied defendant's motion for new trial and defendant appealed. The District Court of Appeal, Shepard, J., held that trial court did not err in failing to give certain instructions dealing with simple embezzlement, in view of fact evidence was uncontradicted that defendant's actions were those of a public officer receiving public moneys in his official capacity, and he was either guilty of offense charged, or not guilty.

Judgment and order affirmed.

1. Embezzlement 🔑21

Statute dealing with misappropriation of accounts by public officers was intended by the legislature to provide a broad salutary means of punishing public officers who betray their public trust by taking for their own use public money being handled by them in their official capacity. West's Ann. Pen.Code, § 424.

2. Embezzlement 🔑10

A police officer assigned to the duty of receiving and transmitting bail money, who unlawfully took certain bail money and used it for his own private purposes, received "public money" within statute proscribing misappropriation of accounts by public officers, notwithstanding the fact that such officer accidently or purposefully failed to book the prisoner for whom the bail was posted. West's Ann.Pen.Code, § 424.

See publication Words and Phrases, for other judicial constructions and definitions of "Public Money".

3. Statutes 🔑184, 188

Statutes must be construed according to the tenor and intent shown by their terms and purpose.

4. Bail 🔑73

Even though defendant, a public officer who received certain bail money, did not book arrested person, and did not have him placed in jail, in view of fact arrested person was within the confines of the building housing the city police quarters and the jail, defendant, who allegedly put bail money posted for arrested person to his own use, would be deemed the officer in charge of the jail in which arrested person was detained, under statute dealing with deposit of bail with the officer in charge of a jail. West's Ann.Pen.Code, §§ 424–426, 1295.

5. Embezzlement 🔑10

The official character in which money is received is the true criterion of whether or not it is public money. West's Ann.Pen. Code, § 424.

6. Criminal Law 🔑795(2)

In prosecution for embezzlement of public funds by public officer, trial court did not err in failing to give certain instructions dealing with simple embezzlement, in view of fact evidence was uncontradicted that defendant's actions were those of a public officer receiving public moneys in his official capacity, and he was either guilty of offense charged, or not guilty. West's Ann.Pen.Code, § 424.

7. Criminal Law ⟹814(3)

Abstract instructions where there is no evidence to support such instructions are properly refused.

8. Criminal Law ⟹806(1)

Repetitious instructions are properly refused.

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Jack Boggust, Brawley, for appellant.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., David B. Allen, Deputy Atty. Gen., for respondent.

SHEPARD, Justice.

Defendant was charged, tried and convicted of a violation of Penal Code, Section 424, Subdivision 1 (embezzlement by a public officer). He appeals from the judgment of conviction and from the order denying a motion for a new trial.

Defendant did not take the witness stand in his own behalf and no factual material was presented by him to contradict any part of the material prosecution evidence. That evidence thus standing entirely without contradiction shows: that at the time the offense is alleged to have been committed a bench warrant had been issued by the justice's court of Calexico in the county of Imperial, State of California, against Paul Ray Russell on account of the failure of said Russell to pay a fine levied by said justice's court pursuant to a judgment of conviction of said Russell for the misdemeanor of drunk driving (violation of Vehicle Code, Sec. 502); that said warrant was transmitted to the police department of El Centro of the same county and state; that upon receipt thereof by said police department a police officer of said department did arrest said Russell under authority of said warrant; that said Russell was thereupon taken to police headquarters of El Centro; that the city jail of El Centro was then located at the same address as the city police headquarters; that the chief of police of El Centro was in charge of all city police activities, including the city jail; that defendant, as a police officer of said city of El Centro, was then and there under assignment of duty from said chief of police to act as desk sergeant in charge of the main office at police headquarters and his duties, among other things, required him to dispatch cars by radio, receive telephone calls, give information, handle court records, bring prisoners to court, keep track of court records, act as court clerk, book prisoners, accept bail money and parking meter fines that came in over the front counter; that in receipt of bail it was his duty to issue a receipt, and when bail was received on a warrant from a court outside El Centro to turn the money and warrant over to a "warrant officer" for logging and transmission to the issuing court; that at the time said Russell was brought in under arrest on said bench warrant said Russell remained in the main office for a time until Russell's partner went to another place to obtain cash for Russell to post the $150 bail required by said warrant; that such money was obtained, was handed to Russell and by him to this defendant as bail, this defendant receipted therefor and said Russell was thereupon released from custody; that by accident or design Russell was never "booked" as a prisoner; that defendant pocketed the money and spent it for his own private use; that the money was never reported or transmitted to the Calexico or any other court; that the defalcation was ultimately discovered and defendant was arrested, tried and convicted as aforesaid.

Defendant first asserts that simple embezzlement was necessarily included in the charge of a violation of Penal Code, Section 424, subdivision 1 (embezzlement by a public officer) and that, therefore, the trial court committed prejudicial error in refusing to instruct the jury on the included offense of simple embezzlement. As a part of this contention defendant further asserts that the bail money received by the defendant was not "public money" and was not received or held by the defendant in an "official capacity".

First we will deal with the question of whether or not any bail money was public money. Penal Code, Section 426 provides that the phrase "public moneys", as used in the two preceding sections, includes all money received or held by a state, county, district, city or town officer in his official capacity. It will be seen from the uncontradicted facts shown by the evidence in this case that the defendant was "in charge of" and assigned to the "duty of" receiving and transmitting bail money, and that he was a police officer of the city of El Centro. Penal Code, Section 1295, as it read at the time this offense was committed, provides that whenever a defendant has been arrested and booked on a misdemeanor and the amount of the bail does not exceed $1000, the defendant may deposit with the officer in charge of the jail in which defendant is detained cash in the amount of the bail and be thereupon discharged from custody.

[1-4] Section 424 was clearly intended by the legislature to provide a broad salutary means of punishing public officers who betray their public trust by taking for their own use public money being handled by them in their official capacity. To say that a police officer, assigned to the duty of receiving and transmitting bail money who unlawfully takes that money and uses it for his own private purposes, might avoid the consequences of his act by the technical expedient of accidently or purposefully failing to "book" the prisoner would defeat the whole purpose of the legislative intent so clearly shown by the wording of sections 424, 425 and 426. Without suggesting what the failure to "book" a prisoner might have under some other kinds of situation, we think that under the particular situation here present it was a mere directory incident for the bringing of the prisoner under the control of the central police headquarters, and that defendant was in truth and in fact acting in his "official capacity" as an officer of the city of El Centro when he received and receipted for the bail money. Each statute must be construed according to the tenor and intent shown by its terms and purpose. While the term "jail" may well be construed for certain other purposes to refer only to that barred and walled space usually found in or near city police headquarters for the more or less lengthy detention of prisoners while awaiting hearing or serving of sentence, we think the broader meaning of a place of confinement of persons held in lawful custody (Webster's International Dictionary) is intended. Here Russell was within the confines of the building housing the city police headquarters and jail, and defendant was "in charge", assigned *inter alia* to the specific duty of receiving bail. To ascribe a more technical meaning is to make a mockery of legislative intent.

[5] It has been repeatedly held that the official character in which the money is received is the true criterion of whether or not it is public money. People v. Dillon, 199 Cal. 1, 248 P. 230; People v. Moulton, 116 Cal.App. 552, 2 P.2d 1009; People v. Crosby, 141 Cal.App.2d 172, 175 [1], 296 P.2d 438; People v. Griffin, 170 Cal.App. 2d 358, 338 P.2d 949. The case of Rodman v. Superior Court, 13 Cal.2d 262, 89 P.2d 109, cited by defendant is not helpful in this respect for it merely holds that bail money deposited in defendant's behalf by a third person may not be applied in satisfaction of defendant's fine. Other cases cited by the defendant are even less analogous.

[6, 7] Next defendant contends that the trial court was in error in failing to give certain instructions under the direction of which defendant might have been found guilty of simple embezzlement, which he contends was an included offense. The evidence was clear and uncontradicted that defendant's actions were those of a public officer receiving public monies in his official capacity, and that he unlawfully appropriated the same to his own use. Nothing was left open to factual interpretation by the jury. He was either guilty of the offense charged or not guilty.

Thus, as was said in People v. Carmen, 36 Cal.2d 768, 772 [1], 228 P.2d 281, 284:

> "It is a settled rule that jury instructions must be responsive to the issues. The issues in a criminal case are determined by the evidence."

In People v. Cota, 53 Cal.App.2d 455, 456 [1], 127 P.2d 1010, 1011, this court said:

> "It is well established in this state that it is proper to refuse an instruction as to a lesser offense or degree included in the offense charged where the evidence warrants a conviction, if at all, only for the higher offense or degree."

Abstract instructions, where there is no evidence to support such instructions, are properly refused. People v. Jackson, 106 Cal.App.2d 114, 124 [12], 234 P.2d 766. Refusing a defense instruction is proper where the evidence, if believed at all, could lead to no other rational conclusion than guilt of the higher offense. People v. Madison, 3 Cal.2d 668, 676 [4], 46 P.2d 159; People v. McCoy, 25 Cal.2d 177, 188 [9], 153 P.2d 315; People v. Dorman, 28 Cal.2d 846, 853 [3], 172 P.2d 686; People v. Wolfe, 42 Cal.2d 663, 673 [5], 268 P.2d 475; People v. Dukes, 16 Cal.App.2d 105, 110 [5], 60 P.2d 197; People v. Lionberger, 19 Cal.App.2d 284, 288 [4], 65 P.2d 99.

[8] Defendant complains that certain other instructions requested by him were refused. An examination and comparison of these instructions shows that they were merely repetitive in different language of the law already conveyed by the court to the jury in other instructions. Repetitious instructions are properly refused. People v. Geibel, 93 Cal.App.2d 147, 176 [21], 208 P.2d 743.

From a careful examination of the entire record it appears that the cause was fairly tried and the jury adequately instructed.

The judgment and order appealed from are affirmed.

MUSSELL, Acting P. J., concurs.

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172 Cal.App.2d 623

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Alex RIOS, Defendant and Appellant.

Cr. 1520.

District Court of Appeal, Fourth District, California.

Aug. 5, 1959.

Prosecution for sale of marijuana and for furnishing such narcotic to others. The Superior Court of San Bernardino County, Joseph T. Ciano, J., entered judgment of conviction and defendant appealed. The District Court of Appeal held that there was substantial evidence to support conviction, and where there was not only an absence of evidence that defendant had used due diligence to obtain desired witnesses confined in state penal institutions but also affirmative proof of lack of due diligence on defendant's part to co-operate with his counsel, it was within the court's discretion to refuse plaintiff's application for continuance in order to allow such supposed witnesses to testify on his behalf.

Affirmed.

1. Criminal Law ⚿641(1)

Where record disclosed that defendant was present in court on 12 occasions before trial for sale of marijuana and for furnishing such narcotic to others and on 7 of these occasions was represented by counsel and finally court appointed an attorney who represented defendant at all of the subsequent proceedings, defendant could not complain that he had no counsel when in fact he was represented by counsel.

2. Criminal Law ⚿1035(3)

Defendant who made no complaint in trial court of actions of court appointed counsel could not raise for the first time on appeal adequacy of defense presented.

3. Criminal Law ⚿1144

Since affidavit asking several prisoners to be brought from state prisons to testify on behalf of defendants was not a part ot record on appeal from judgment of conviction, trial court's decision that affidavit was insufficient must be presumed to have been correct.

4. Criminal Law ⚷594(1), 603(11)

Request for continuance to obtain presence of a witness is addressed to the sound discretion of trial court and must be supported by showing of due diligence to obtain attendance of witness.

5. Criminal Law ⚷603(11)

In prosecution for sale of marijuana and for furnishing of narcotic to others, where there was not only an absence of evidence that due diligence was used by defendant to obtain desired witnesses incarcerated at various state penal institutions to testify, but there was also affirmative proof of lack of due diligence on defendant's part to cooperate with his counsel, court was well within its discretion in refusing defendant's application for a continuance in order to obtain testimony of such witnesses. West's Ann.Pen.Code, § 2621.

6. Poisons ⚷9

Evidence was sufficient to sustain convictions of sale of marijuana and of furnishing such narcotic to others. West's Ann.Health and Safety Code, § 11500.

◆

Alex Rios, in pro. per.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., and Jack K. Weber, Deputy Atty. Gen., for respondent.

PER CURIAM.

After a trial before a jury defendant was convicted of five violations of Health and Safety Code, Section 11500. Four of the counts charged sale of marijuana and the remaining count charged defendant with furnishing the same narcotic to others.

Defendant declined to testify in his own behalf and offered no defense. The sufficiency of the evidence to support the verdict is not questioned. We will not detail the entire evidence presented.

Special Deputy Sheriff Joaquin Acosta testified that he was trained as an undercover narcotics investigator by the San Bernardino Police Department and functioned in that capacity. His special training included practice in simulating smoking of marijuana and feigning the reactions of a narcotics user as well as instruction in the jargon of narcotics users and peddlers. Acosta was physically examined before and after each contact with suspects and he turned purchased marijuana over to members of the vice squad of the San Bernardino Police Department who worked closely with him.

Deputy Acosta testified that he met defendant on November 5, 1957, at Eddy's Cafe in San Bernardino. Defendant approached the police officer and asked him to go for a ride to another place to "get some marijuana because that was the only way he could enjoy himself in a bar if he could smoke a marijuana cigarette". Then they went to Mona's Cafe where they met one Gabriel Galvan, also known as the "Penguin", who was supposed to have some marijuana. Defendant conferred privately with Galvan and then told the officer that he had made a deal. Deputy Acosta said that he too wanted some marijuana and then gave defendant $2. They left and went to an empty lot where Galvan got out and took a package from a fig tree and came back handing it to the defendant. A few minutes later defendant gave the officer three cigarettes. They drove away and one of the group lighted a brown hand-rolled cigarette which was passed around among the persons in the car. The officer had it handed to him several times and he simulated smoking the cigarette knowing that he was being tested and watched.

On November 26, 1957, Deputy Acosta again saw the defendant at Eddy's Cafe. Defendant asked the officer if he wanted some marijuana and upon receiving an affirmative reply they left going to a spot on Fourth and Mount Vernon Street where defendant left the car, returning with the package. Then the defendant gave the officer one brown hand-rolled cigarette.

On December 31, 1957, Deputy Sheriff Acosta met defendant at his home in San Bernardino. There he saw defendant and three other persons sitting around a table rolling cigarettes from a green leafy substance contained in a shoe box. After this task was finished the officer and the others went to a location on Tijuana Street where defendant left the car to dig holes to bury the cigarettes that had been rolled, but the ground was too hard so they abandoned this attempt and drove around the corner where defendant hid the package between a fence and a palm tree. Later the party returned to this location and the package was picked up. Defendant requested that he be taken home and before leaving the car he sold the officer ten marijuana cigarettes for $7.

On January 4, 1958, Deputy Acosta gave the appellant $15 for an amount of marijuana in a newspaper package. On January 11, 1958, the police officer purchased three cigarettes from the defendant for $1.50. On each of the occasions described the remaining cigarettes, or substance involved, were turned in to Deputy Acosta's associate officers. Subsequently they were examined by an expert forensic chemist who formed the opinion that the substances involved were marijuana.

On April 29, 1959, defendant requested that an attorney be appointed to represent him on this appeal. This court immediately began an independent examination of the record and sent communications to defendant and his trial counsel requesting them to inform this court of any substantial grounds of appeal which would justify a reversal in this case.

Defendant replied that he seeks a reversal on three grounds: (1) that he was deprived of his right to counsel; (2) that the court improperly declined to continue the trial to enable defendant to obtain certain witnesses confined in state prisons; and (3) that certain testimony given by witnesses for the People was conflicting. The reply of defendant's trial counsel cites the court's refusal to continue the trial to enable the witnesses to be brought in from their places of confinement as the only point on which there might exist some uncertainty, but goes on to point out that, as the trial record indicates, this ruling of the court was based on the defendant's lack of diligence in communicating the names of the witnesses and their expected testimony to his attorney so the necessary affidavits could be filed until shortly before the trial began. Furthermore, there was a question as to the admissibility of some of the evidence to which these witnesses were expected to testify. This court then completed its examination of the record and determined that it would not be helpful to the defendant or to the court to have counsel appointed on this appeal, and denied appellant's application for counsel. People v. Hyde, 51 Cal.2d 152, 331 P.2d 42; People v. Marsh, 170 Cal.App.2d 284, 338 P.2d 495.

In considering defendant's contention that he was prejudiced by the court's refusal to appoint an attorney for him, the following facts should be considered. At defendant's arraignment on February 28, 1958, the court appointed Mr. Geram to represent him. A week later defendant appeared in court with counsel of his own choosing, Mr. Katz. Mr. Katz continued as defendant's attorney until May 26, 1958, the day set for trial, at which time Mr. Katz moved the court to release him as defendant's counsel because defendant refused to cooperate with him in his defense. Defendant admitted that he had refused to cooperate with Mr. Katz and consented to the latter's release as his counsel.

[1] The court allowed defendant a continuance to procure new counsel. When the continuance expired, defendant told the court that he did not have financial means to employ counsel and requested the court to appoint counsel at public expense. After discovering that defendant had been released from jail on a $5,000 bail, was drawing unemployment payments and was able-bodied and looking for work, the court refused to appoint an attorney to represent him at public expense but granted another continuance to enable him to employ an attorney. The court set the case for trial on July 15, 1958, at which time the case was

called and the jury box filled with twelve prospective jurors. At that time the court discovered that defendant was still without an attorney and wanted one. The court continued the case and Mr. Rosso was appointed as defendant's attorney but he was replaced on July 21, 1958, by M. Saevig, who also served under court appointment. On September 29, 1958, Mr. Saevig moved the trial court to relieve him as counsel upon the grounds of defendant's non-cooperation, but the request was denied and Mr. Saevig represented the defendant throughout the subsequent proceedings in the trial court. In summary then, defendant was present in court on twelve occasions before trial; on seven of these occasions he was represented by counsel; of the remaining five occasions, two involved appointment of counsel, and twice the court granted continuances to enable defendant to employ counsel privately. On July 15, 1958, as soon as the defendant indicated that he desired counsel, the court requested an attorney present in court to represent defendant, but this attorney declined the case. The court then continued the case and appointed an attorney who represented defendant at all the following proceedings. Therefore at all significant proceedings defendant was represented by counsel, and he cannot complain that he had no counsel when he did have counsel. People v. Brookins, 133 Cal.App. 2d 688, 690, 284 P.2d 959.

[2] According to all appearances this attorney ably defended defendant who made no complaint in the trial court of his counsel's actions. He cannot now raise for the first time the adequacy of the defense presented. People v. Hartridge, 134 Cal.App. 2d 659, 667 [10–11], 286 P.2d 72; People v. Garrow, 130 Cal.App.2d 75, 78, 278 P.2d 475.

[3] The defendant asserts that it was error for the court to refuse to grant a continuance on October 14, 1958, after the first full day's testimony was taken, so that defendant could bring in witneses confined at San Quentin and Soledad. To view this contention in its true light we must recite preceding events which have a bearing on the matter. Previously on May 26, 1958, and September 29, 1958, defendant's attorneys had moved the court to relieve them because defendant refused to cooperate in his defense. On October 2, 1958, the jury which heard the case was selected and the trial was continued until October 14, 1958. On this same day the defendant filed an affidavit under Penal Code, Section 2621 asking that several prisoners be brought from state prisons to testify in his defense. The court deemed the allegations in the affidavit to be insufficient and denied the request without prejudice. The affidavit is not part of the record on appeal, and the trial court's decision must be presumed to have been correct. People v. Walker, 170 Cal.App.2d 159, 338 P.2d 536. Arrangements were made for a judge to rule on another affidavit on Monday, October 6, but the affidavit was not filed until Friday, October 10 and was not presented to the court until October 14, the morning the trial was resumed. The district attorney objected to the relevancy of the facts which the affidavits alleged would be the expected testimony of the confined witnesses. The court ordered that those witnesses supposedly at Chino be brought to testify but as to the witnesses confined at more distant points the "defendant slept on his rights" and it declined to order these witnesses brought in. At the close of the day the court was informed that the witnesses supposedly at Chino were no longer there and had been transferred from that place of confinement to Soledad and San Quentin upwards of four weeks previously. That morning defendant's counsel had indicated that the defendant had informed him that he had talked to one of the witnesses, Gabriel Galvan, at Chino over the week-end. The court then vacated its order that the witnesses supposedly at Chino be brought to court. The court noted that there had been no showing that defendant exercised due diligence to determine the whereabouts and expected testimony of the witnesses he desired and that because the prisoners were confined at

places distant from the trial a further continuance would be necessary to enable them to be brought to the trial.

[4, 5] A request for a continuance to obtain the presence of a witness is addressed to the sound discretion of the trial court and must be supported by a showing of due diligence to obtain the attendance of the witness. People v. Lamb, 133 Cal.App.2d 179, 283 P.2d 727; People v. Carroll, 160 Cal.App.2d 6, 9, 324 P.2d 713. The Supreme Court said in People v. Collins, 195 Cal. 325, 333, 233 P. 97, 100:

> "The absence of a witness is no cause for a continuance, unless due diligence has been used by the party to procure his attendance at the trial, and due diligence imports that proper legal means must have been resorted to for the purpose of compelling the attendance of the witness."

In the instant case there is not only an absence of evidence that due diligence was used to obtain the desired witnesses but there is affirmative proof of a lack of due diligence on defendant's part to cooperate with his counsel. In this factual context the court was well within its discretion in refusing defendant's application for a continuance. People v. Beard, 36 Cal.App.2d 35, 39, 96 P.2d 961.

[6] Defendant's remaining contention that the testimony of the prosecution witnesses was conflicting is similarly without merit. The only conflict we have found in the testimony of the officers concerns the events of the evening of December 31, 1957. Deputies Acosta and Alter said defendant and Deputy Acosta met at Union Street near Mt. Vernon. Deputy Adamson, who observed the meetings through binoculars in Deputy Alter's company, testified that he "believed" the meeting was at Vine Street near Mt. Vernon. This minor inconsistency does not render the testimony of the prosecuting witnesses inherently improbable and defendant's contention cannot be sustained. People v. Lyons, 47 Cal.2d 311, 303 P.2d 329. Minor inconsistencies and conflicts in testimony are common to almost every case. People v. Carr, 170 Cal.App.2d 181, 338 P.2d 479. In this case there was substantial evidence to support the verdict of the jury and the conflict was too insubstantial to be grounds for reversal. People v. Baserto, 162 Cal.App.2d 123, 327 P.2d 558.

Judgment affirmed

A. M. ADAMS, William J. Coulson, Vern L. Finch, Harry Gorman, Elmer Horan, Erle E. Larson, John P. Meier, Robert H. Morton, Leland Murphy, W. Faye Pittman, John W. Smith, Norman Sturm, Joe Woods, Leon Livingston, and U. H. Pickering, Plaintiffs and Appellants,

v.

CITY OF MODESTO, a Municipal Corporation, Defendant and Respondent.*

Civ. 9631.

District Court of Appeal, Third District, California.

July 29, 1959.

Action by police officers and former police officers to recover compensation. The Superior Court, Stanislaus County, H. L. Chamberlain, J., sustained a demurrer to amended complaint without further leave to amend, and an appeal was taken. The District Court of Appeal, Warne, J. pro tem., held that Modesto resolutions, providing that city employees should be free from their regular duties on specified holidays and for two weeks during each year of their employment without suffering loss of compensation, evinced intent that salaries should not be considered as compensating for any work that might be done on order from superiors during holidays and vacation periods; and held that under those resolutions city was obligated to either (1) grant employees lieu time off to compensate for time off granted by resolution but not received or (2) pay for such extra work.

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* Opinion vacated 344 P.2d 409.

Affirmed as to those plaintiffs still employed by city and reversed as to remaining plaintiffs.

1. Municipal Corporations ⚿220(2)

Modesto resolutions, providing that city employees should be free from their regular duties on specified holidays and for two weeks during each year of their employment without suffering loss of compensation, evinced intent that salaries should not be considered as compensating for any work that might be done on order from superiors during holidays and vacation periods; and, under those resolutions, city was obligated to either (1) grant employees lieu time off to compensate for time off granted by resolution but not received or (2) pay for such extra work.

2. Limitation of Actions ⚿58(2)
Municipal Corporations ⚿220(8)

Where Modesto resolutions afforded city alternative of granting employees lieu time off instead of compensating them for holiday or vacation work, cause of action for compensation for such work would not accrue until separation of employee from service; but cause of action therefor would not be subject to equitable defense of laches, and claims filed within 60 days after separation and sued on within three years would not be barred by statute of limitations. West's Ann.Code Civ.Proc. § 338, subd. 1.

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Robert R. Elledge, Modesto, for appellants.

Allen Grimes, City Atty., Modesto, and Robert T. Anderson, Oakland, for respondent.

WARNE, Justice pro tem.

This is an appeal from a judgment entered after sustaining a demurrer to appellants' first amended complaint without further leave to amend. It appears from the memorandum opinion filed by the trial court that the demurrer was sustained on the grounds "(1) that the Complaint does not state facts sufficient to constitute a cause of action against the Defendant, (2) that the Statute of Limitations has barred all claims excepting *possibly* of those claimants still in the City's employ, and (3) that said claims are barred by failure to file proper claims within the time required as to those Plaintiffs who have left the service."

All of the appellants are police officers or former police officers of the City of Modesto. Between March 1, 1944 and July 1, 1951, they worked on certain holidays without receiving compensation therefor. Also, during some of those years, two of the appellants did not take the annual two weeks' vacation to which they were entitled pursuant to Resolution No. 6135–N.S., which the City Council of respondent city enacted on March 1, 1944. The resolution provided that: "Every employee of the City of Modesto shall be granted two (2) weeks vacation each year without loss of compensation." Resolution No. 6133–N.S. also enacted by the City Council on March 1, 1944, provided that: "* * * every employee of the City of Modesto, * * * shall be granted holidays without loss of compensation * * *." The resolution sets forth the days of the year which are declared to be holidays. Resolution No. 6135–N.S. provides that payment for vacation and allowed periods of absence shall be made from certain specific funds. Neither resolution expressly provides for compensating time off nor for payments in the event that the employee works on the named holidays or fails to take the vacation provided for.

[1] Appellants contend that by virtue of the resolutions above mentioned they have a claim for compensation. They concede that their only basis for recovery is under these resolutions, although they have also attempted to base their action on contract. On the other hand, it is the contention of the respondent city that there is no statutory basis for appellants' claim

since the resolutions do not expressly provide for compensatory time off nor for payment in the event that the employee works on the named holidays or fails to take the vacation provided for. We do not agree with respondents. We feel that the resolutions may not reasonably be so interpreted. The express intent of the resolutions is that the salaries paid for the performance of the duties of Modesto City employees do not compensate, and shall not be considered as compensating, for any work that may be done on order from superiors during holidays and the granted two weeks' vacation each year. Thus the Modesto City employees are taken out from under the common-law rule stated in Pootel v. City and County of San Francisco, 125 Cal.App.2d 378, 270 P.2d 553, and the cases cited therein to the effect that in the absence of either a valid authorizing contract or statute that there is no basis for a recovery by a public employee for overtime work; that his annual salary is payment in full for all his services without regard to the number of extra hours or days which he has worked. The rule is stated in Jarvis v. Henderson, 40 Cal.2d 600, at page 606, 255 P.2d 426, at page 430, as follows:

> "* * * In the absence of a statute specifically authorizing compensation in addition to a fixed monthly salary, there is no right to payment for overtime. * * * When the salary is fixed by time, as by the day or month, the employee is bound, in the absence of statute, to render services without regard to the number of hours worked. * * * The rule is equally applicable to work performed upon what otherwise would have been days off or holidays. If time off is not granted by statute * * *, it is then included within the period for which the employee is being paid his salary and is time when he may be required to perform services."

We feel that the reasonable interpretation to be given the resolutions in question is that when Modesto City employees were required to work on the holidays granted to them and were not given their granted vacation time each year, the city became obligated under the resolutions themselves to grant the employee lieu time off to compensate for time off granted by resolution but not received, or to pay extra money for the extra time worked and not paid for by salary. The superiors of all the employees could require them to work on holidays if the need of the service required such work. For instance, it could not have been intended that the ordinance granting time off for specified holidays would place it beyond the power of such superiors to order employees to work on such holidays. A contrary instruction would mean, with regard to police officers, that on the 12 holidays granted during each year there would be no police officers on duty in the City of Modesto. The same power of determining when, during a year, vacation time granted could be taken was likewise left to the judgment of the superiors. The resolutions did not purport to fix any special time when such vacations were to be taken and if the need of the service required that an employee work the full year without receiving the granted two weeks' vacation it would be competent for his superiors to so order; but such extra work could not result in loss of compensation. Such loss certainly would result unless compensating time was given during the employee's service to the city or money was paid in lieu of time off granted and not received when the employee separated from service. Before separation from service the city would have the right through its superior officers to grant compensating time off, but if this was not done the time off granted and not received would have to be paid for on separation from service to prevent a violation of the plain language of the resolutions.

The situation created by the resolutions was one where twelve specific holidays and two weeks' vacation each year, without loss of pay, was a matter of statutory right. Just as in Pohle v. Christian, 21 Cal.2d 83, 90, 130 P.2d 417, 421, the resolution did "not expressly or otherwise provide that an employee having the right to a vacation loses his right to compensation for that time upon being separated from the service." There the court held that in such a situation separation from service should in no way affect the employee's right to receive pay for accrued vacation rights. And in Tevis v. City and County of San Francisco, 43 Cal.2d 190, 195–196, 272 P.2d 757, 761, the court said:

> "Section 375 [of the San Francisco Charter] does not concern the length of, or payment of compensation for, annual vacations, but merely defines the employee's right to receive them. The limitation as to the time of employment serves two purposes. It insures to an employee that his right to an annual vacation will continue throughout his service with the city and county; it also prevents him from claiming the right to such a vacation for any year after the termination of his service. But separation from service should in no way affect his right to receive pay for accrued vacation rights. In an analogous situation, it has been held that, in the absence of a clear indication of a contrary statutory intent, an employee's separation from governmental service should not prevent him from receiving the cash equivalent of vacation rights accrued to him for services rendered prior to his separation." Citing Pohl v. Christian, supra.

The complaint here alleges that the granted time off was not compensated for during service by lieu time. Where separation has occurred it can only be compensated for by money and that must be done. As said in Martin v. Henderson, 40 Cal. 2d 583, 592, 255 P.2d 416, 422:

> "No cause of action to compel the payment of overtime claims accrued * * * prior to * * * separation from service. Until that date, they might have been given compensating time off whenever their departmental superiors deemed it convenient to the service. The petitioners had no legal remedy to compel their superiors to give them time off at any specific time, or at all. Only in the event uncompensated overtime remained upon their separation from service did a right accrue to them to compel action by the department."

It is only equitable that the appellants here, whose right of action has accrued by separation from service, should be compensated for work performed on holidays and during vacation periods unless they have waived such compensation by refusing to take the earned time prior to separation from service. Their monthly salaries did not include payment for such work since the resolutions provided that they should be free from their regular duties on the specified days and for two weeks during each year of their employment but should not suffer a loss of compensation for such time off granted to them.

[2] Nor are such claims barred by the statute of limitations. Each of the appellants filed a claim with respondent city for the amount sought to be recovered therein. Those appellants who have left the employ of respondent so filed their claims within 60 days thereafter and less than three years therefrom joined in this action. The action is timely (sec. 338, subd. 1, C.C.P.), as prior to the termination of their employment they had no cause of action. As hereinabove stated, "Until that date, they might have been given compensating time off whenever their departmental superiors deemed it convenient to the service. The petitioners had no legal remedy to compel their superiors to give them time off at any specific time, or at all. Only in the event uncompensated overtime remained upon their separation from service did a right accrue to them to compel action by the department." Martin v. Henderson, supra. Consequently, those appellants who are still employed by the respondent city have no cause of action at this time. As to the other appellants, their causes of action for money judgments are not subject to the equitable defense of

laches. Abbott v. City of Los Angeles, 50 Cal.2d 438, 461–462, 326 P.2d 484. We conclude that as to those employees who have separated from service the amended complaint stated a cause of action.

It is ordered that the judgment be affirmed without prejudice as to those appellants who are still employed by respondent, and it is further ordered that said judgment be reversed as to the remaining appellants.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

172 Cal.App.2d 517

STATE MARKET OF AVENAL, INC., a corporation, Petitioner,

v.

SUPERIOR COURT of the State of California, IN AND FOR COUNTY OF KINGS, Respondent,

Retail Clerks International Association, AFL–CIO, Local 1288; George Kisling; Amalgamated Meat Cutters and Butcher Workmen of North America, AFL–CIO, Local 126; and Gene Brower, Real Parties in Interest and Defendants.

Civ. 6045.

District Court of Appeal, Fourth District, California.

July 30, 1959.

Rehearing Denied Aug. 28, 1959.

Hearing Denied Sept. 22, 1959.

Original proceeding for writ of mandate seeking to compel Superior Court of Kings County to vacate order of dismissal and to proceed to hear action for injunction on merits. The District Court of Appeal, Shepard, J., held that where complaint in action for injunction against labor organizations and others averred that plaintiff whose business was being illegally picketed by defendants was engaged exclusively in intrastate commerce and nowhere in plaintiff's pleadings or in affidavits was there allegation that plaintiff was engaged in interstate commerce, it was error for trial court to dismiss action, on holding that plaintiff was engaged in interstate commerce, on motion of defendants which filed no answer and which did not make their motion under Code provisions relating to summary judgment, sham or irrelevant matter, or dismissal with prejudice upon consent or abandonment of actions.

Writ granted.

1. Motions ⇨1

A "speaking motion" is not a part of California practice. West's Ann.Code Civ. Proc. § 437c.

2. Dismissal and Nonsuit ⇨80

A judgment of dismissal, on sole ground of lack of jurisdiction, is not a decision on the merits. West's Ann.Code Civ. Proc. § 532.

3. Labor Relations ⇨764

Complaint, filed against labor organizations and others, averring that plaintiff was engaged in retail business, solely in intrastate commerce, that defendants picketed plaintiff's place of business because of controversy between labor organizations as to which organization had right to have its members perform work for plaintiff, that plaintiff's employees were represented by union other than defendants and that defendants sought to prevent plaintiff from doing business with others with whom defendants had no labor dispute, and praying for injunction was sufficient to confer jurisdiction on Superior Court.

4. Labor Relations ⇨947

Where complaint in action for injunction against labor organizations and others averred that plaintiff whose business was being illegally picketed by defendants was engaged exclusively in intrastate commerce and nowhere in plaintiff's pleadings or in affidavits was there allegation that plaintiff was engaged in interstate commerce, it was error for trial court to dismiss action, on holding that plaintiff was engaged in interstate commerce, on motion of defendants which filed no answer and which did not make their motion under Code provisions relating to summary judgment, sham or irrelevant matter, or dismissal with prejudice upon consent or abandonment of action. West's Ann.Code Civ. Proc. §§ 437c, 453, 532, 581.

◆

Ted R. Frame, Coalinga, for petitioner.

Carroll, Davis, Burdick & McDonough, San Francisco, for Retail Clerks International Ass'n, AFL-CIO, Local 1288 and George Kisling, defendants.

Charles P. Scully, Victor Van Bourg, San Francisco, for Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, Local 126 and Gene Brower, defendants.

SHEPARD, Justice.

This is a petition for writ of mandamus seeking a direction to the superior court of the County of Kings to hear and determine an action, in which action plaintiff (petitioner herein) seeks injunctive and other relief against allegedly unlawful picketing activity of defendants (the respondent herein).

[1–3] The record of the trial court brought to us by the parties herein shows that plaintiff therein filed a complaint alleging inter alia that plaintiff is engaged in a retail grocery business at Avenal, California; that it is not engaged in interstate commerce; that it purchases and sells all of its merchandise in intrastate commerce; that defendants are labor unions or officers thereof; that defendants combined to and did picket plaintiff's place of business; that there is no labor dispute between plaintiff and defendants; that plaintiff's employees are exclusively represented by a labor organization other than defendants; that defendants' activities arise out of a controversy between two or more labor organizations as to which organization is entitled to represent said employees in bargaining, or which organization has the right to have its members perform work of plaintiff; that plaintiff has suffered damage; and that it has no plain, speedy or adequate remedy at law. In a third cause of action plaintiff additionally alleges that defendants by their activity seek to prevent plaintiff from dealing with certain other grocery stores not owned or operated by plaintiff, and with respect to which other stores the defendants do have a labor dispute. Defendants filed their general and special demurrer to said complaint but filed no answer. They moved to dismiss the action and to vacate the injunction on the ground that the court has no jurisdiction of the subject matter of said action in that the exclusive jurisdiction thereof lies with the judicial and administrative agencies of the United States. Nowhere in the pleading or affidavits is there any allegation that plaintiff in the action was engaged in interstate commerce, and the trial court's finding that the plaintiff was engaged in interstate commerce is completely and entirely without any support in the record before us. The demurrer was never ruled on. No motion was made for dismissal under Code of Civil Procedure sections 437c, 453 or 581. Defendants have not pointed to any authority presently recognizing the procedure here followed. Since the decision in Pianka v. State of California, 46 Cal.2d 208, 211, 293 P.2d 458, and the so-called "speaking motion" which was recognized by our courts, in some instances, prior to the more recent amendments to Code of Civil Procedure, section 437c is no longer a part of California practice. Fidelity and Deposit Co. v. Claude Fisher Co., 161 Cal.App.2d 431 434(2), 327 P.2d 78. It is well settled that a judgment of dismissal on the sole ground of lack of jurisdiction is not a decision on the merits, and as was said in Robinson v. Superior Court, 35 Cal.2d 379, 385, 218 P. 2d 10, 15:

> "One of the fundamental aims of the law is to secure to a litigant a judgment on the merits of a matter properly brought before the court, and one of the ancient offices of the writ of mandate was to compel a court to hear and decide the merits of a matter within its jurisdiction."

One of the subjects which was before the court was a motion to vacate the preliminary restraining order, and the power of the court to make an order vacating such preliminary restraining order is clear. Code of Civil Procedure, section 532. In our opinion, the amended complaint was sufficient to confer jurisdiction of the subject matter. Retail Clerks' Union v. Superior Court, 52 Cal.2d 222, 339 P.2d 839; Chavez v. Sargent, 1959, 52 Cal.2d 162, 339 P.2d 801. The cases of San Diego Building Trades v. Garmon, 1957, 353 U.S. 26, 77 S.Ct. 607, 1 L.Ed.2d 618; Guss v. Utah Labor Relations Board, 1957, 353 U.S. 1, 77 S.Ct. 598, 1 L.Ed.2d 601; Amalgamated Meat Cutters etc. v. Fairlawn Meats, Inc., 1957, 353 U.S. 20, 77 S.Ct. 604, 1 L.Ed.2d 613; San Diego Building Trades Council, Millmen's Union, Local 2020, etc. v. Garmon, 1959, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775, express no contrary view.

[4] The sole question before us then at this time is whether or not the respondent court had the power to make an order of dismissal under the procedure presented by the record. Since the motion in no way complied with the provisions of section 437c, nor with any other statutory procedure, we are bound to and do hold that the trial court did not have such power.

It is ordered that a peremptory writ of mandate issue to the superior court, County of Kings, directing that court to vacate the order of dismissal heretofore made, and to proceed to hear such matter by demurrer, summary judgment procedure, trial on the merits or such other mode under the law as the facts appearing before it may justify.

MUSSELL, Acting P. J., concurs.

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173 Cal.App.2d 55

Karl SCHRAMKO, Plaintiff and Appellant,
v.
W. Thomas SAULTER, Defendant and Respondent.
Civ. 9488.

District Court of Appeal, Third District, California.
Aug. 12, 1959.

Action by purchaser of lumber against owner and operator of truck for injuries sustained when truck rolled over on a steep grade while lumber was being hauled to purchaser's residence. From adverse judgment of the Superior Court, Mendocino County, Lilburn Gibson, J., the purchaser appealed. The District Court of Appeal, Van Dyke, P. J., held that where owner and operator of truck was experienced in operation of hauling lumber and purchaser of lumber had no such experience and no knowledge as to safe and proper methods of loading lumber upon trucks to be operated over mountain grades and addition of a fourth bundle of lumber to load made load top-heavy and truck owner only remarked that he thought it would make the load a little high, purchaser of lumber, who was injured when truck rolled over on a steep grade, did not assume risk of riding on an improperly loaded truck and it was error to instruct on assumption of the risk.

Judgment reversed.

1. Automobiles ⟹224(2), 246(36)

Where owner and operator of truck was experienced in operation of hauling lumber and purchaser of lumber had no such experience and no knowledge as to safe and proper methods of loading lumber upon trucks to be operated over mountain grades, and addition of fourth bundle of lumber to load made load top-heavy and truck owner only remarked that he thought it would make load a little high, purchaser of lumber, who was injured when truck rolled over on a steep grade, did not assume risk of riding on an improperly loaded truck, and it was error to instruct on assumption of risk.

2. Automobiles ⚷**224(2), 246(36)**

Where purchaser of lumber had nothing to do with operation of truck which was hauling lumber and only expressed a wish to take additional bundle of lumber if it could be done, he did not act carelessly in doing so since he could assume that if added weight would be beyond truck's capacity or that if loading of extra bundle would be dangerous, truck owner, who was experienced in such matters, would warn him that it was negligent to add such bundle, and purchaser of lumber was not contributorily negligent with respect to injuries he sustained when truck rolled over on a steep grade, and it was error to give an instruction on contributory negligence.

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Barnett & Robertson, San Francisco, for appellant.

Geary, Spridgen & Moskowitz, Santa Rosa, for respondent.

VAN DYKE, Presiding Justice.

Plaintiff has appealed from a judgment for defendant based upon the verdict of a jury in a personal injury action. Plaintiff was riding on a truck being operated by defendant. The accident occurred on a narrow, curving highway in Mendocino County on a clear, dry afternoon. Respondent was driving his loaded truck up a steep grade at a speed of approximately six miles an hour, when the vehicle suddenly jumped out of gear. Respondent immediately applied both the tractor and trailer brakes in an effort to come to a complete stop. Upon such application of the brakes the truck tilted and rolled. The load consisted of lumber which appellant had purchased at a lumber yard and which respondent was hauling to appellant's residence. One of the issues was as to whether or not appellant was a guest of respondent. Upon this issue, which was submitted to the jury under appropriate instructions, the evidence was conflicting, but the jury were told that if they found appellant was respondent's guest then their verdict should be for respondent, it not being contended that there was evidence of such conduct as would warrant recovery by a guest. Respondent had pleaded the affirmative defense of contributory negligence on the part of appellant and had also requested an instruction on the doctrine of assumption of risk. The jury were instructed that if appellant had been guilty of contributory negligence as defined, or had assumed the risk of injury as defined, the verdict must be for respondent.

In support of his appeal the appellant charges irregularity in the proceedings of the jury, insufficiency of evidence to justify the verdict, error in law in the receipt of evidence over objection and error in instructions. We find it unnecessary to discuss all assignments.

[1] When appellant and respondent arrived at the lumber yard appellant selected lumber fitted for his purpose and the lumber was loaded on the truck by a forklift operator. Three bundles were loaded and at that time conversation occurred between the lift operator, the respondent and appellant. Two bundles had been placed on the bed of the trailer and a third had been put on top of the two. Respondent remarked he thought that enough lumber had been loaded as any more would make the load "a little high". The lift operator replied "they go out of here all the time with four units on". Appellant said he wanted respondent to take all he could. Thereupon the top bundle was moved and a fourth added to the load. There were then two bundles on the bottom and two on the top. It is admitted that the load was then no higher than it had been, although it was, of course, heavier and differently positioned. Respondent testified that so far as the added weight was concerned that factor was immaterial as the truck had sufficient capacity to carry the added load. He argues, however, that the different disposition of the lumber and the added weight together made the load "topheavy

and out of balance." The record does not disclose however that appellant was informed of this. He was only told that putting on the additional bundle would make the load a little high. He was not told that being a little high or that putting on the fourth bundle made the load top-heavy and out of balance or that in any way the addition of the extra bundle created a condition which made it dangerous to drive the truck over the road. Respondent was the owner and operator of the truck and experienced in the operation of hauling lumber. Appellant had no such experience and no such knowledge as to safe and proper methods of loading lumber upon trucks to be operated over mountain grades. Although the court correctly defined assumption of risk to the jury, nevertheless it was error to instruct them at all upon the subject because, as a matter of law, appellant had not assumed the risk of riding on an improperly loaded truck. The record does not show that he either knew or was charged with knowledge of the specific risk which he incurred by riding with the respondent.

[2] It was likewise error for the court to instruct the jury upon the matter of contributory negligence since the record does not disclose any negligent conduct on the part of appellant. He had nothing to do with the operation of the truck and although he expressed a wish to take the additional bundle of lumber if it could be done he did not thereby act carelessly since he could assume that if the added weight would be beyond the truck's capacity or that if the loading of the extra bundle would be dangerous respondent, charged with the operation of the truck, and experienced in such matters, would have at least warned him that it was negligent to add the fourth bundle. We are unable to find any negligent conduct on the part of the appellant. It was error, therefore, to instruct upon the issue of contributory negligence.

It is unnecessary to discuss any further assignments of error since it is obvious that for the giving of instructions upon assumption of risk and contributory negligence the judgment appealed from must be reversed and it is so ordered.

PEEK and SCHOTTKY, JJ., concur.

172 Cal.App.2d 508

Paul W. NEILSEN, dba Neilsen Trucking Company, Plaintiff and Respondent,

v.

Joe UYECHI, Defendant and Appellant.

Joe UYECHI, Cross-Complainant and Appellant,

v.

Paul W. NEILSEN, dba Neilsen Trucking Company, and J. Clair Veater, Cross-Defendants and Respondents.

J. Claire VEATER and L. Douglas Veater, Plaintiffs and Respondents,

v.

Joe UYECHI, Defendant and Appellant.

Civ. 9567.

District Court of Appeal, Third District, California.

July 30, 1959.

Hearing Denied Sept. 22, 1959.

Action and cross action arising out of collision occurring when defendant's truck collided with plaintiffs' parked truck. The Superior Court, Merced County, Gregory P. Maushart, J., entered judgment on jury verdicts in favor of the plaintiffs and cross-defendants, and the defendant and cross-complainant appealed. The District Court of Appeal, Van Dyke, P. J., held that refusal to give defendant's requested instruction that disputable presumptions that law has been obeyed and that a person takes ordinary care of his own concerns could be considered in determining whether defendant's driver was negligent was error where defendant's driver was dead and defendant's evidence concerning his driver's conduct was not irreconcilable with presumption of due care, and such error was prejudicial where it was reasonably probable that a result more favorable to defendant would have been reached if instruction had been given.

Reversed.

1. Appeal and Error ⚷1067
Automobiles ⚷246(60)

In action and cross action arising out of collision occurring when defendant's truck collided with plaintiffs' parked truck, refusal to give defendant's requested instruction that disputable presumptions that law has been obeyed and that a person takes ordinary care of his own concerns could be considered in determining whether defendant's driver was negligent was error where defendant's driver was dead and defendant's evidence concerning his driver's conduct was not irreconcilable with presumption of due care, and such error was prejudicial where it was reasonably probable that a result more favorable to defendant would have been reached if instruction had been given.

2. Negligence ⚷121(1)

If a person is deceased or unable to testify by reason of loss of memory, fact that other witnesses for parties testify fully as to acts and conduct of allegedly negligent person does not deprive party relying on presumption of due care of benefit thereof unless testimony which he himself produces is wholly irreconcilable with presumption sought to be invoked and affords no indication that testimony is product of mistake or inadvertence.

3. Appeal and Error ⚷1064(1)
Automobiles ⚷246(27)

In action and cross action arising out of collision occurring when defendant's truck collided with plaintiffs' parked truck, where defendant's principal contention, supported by evidence, was that plaintiffs' truck had been unlawfully stopped so that a part of it projected onto defendant's travel lane and that it was entirely feasible to have parked the truck completely off the travel lane, and defendant requested instruction that statute forbids the stopping or parking of vehicle which is not disabled on main travel portion of highway when it is practicable to stop or park the vehicle off the highway, it was error to eliminate from such instruction a statement of the legal effect of a violation of the statute, and the error was prejudicial where it was reasonably probable that a result more favorable to defendant would have been reached if instruction had been given. West's Ann.Vehicle Code, § 582.

4. Appeal and Error ⚷176

Where motor vehicle collision case was tried on the assumption that there was no issue as to the fact that defendant's driver had died and proof of death could have been readily afforded had anyone considered that it was necessary, plaintiffs could not raise the argument on appeal that there was no direct proof that defendant's driver had died.

5. Damages ⚷130(1)

Record failed to show that the damages given for personal injuries, as reduced by the trial court on new trial proceedings, were excessive.

6. Appeal and Error ⚷1170(1)

Under constitutional provision providing for reversal where error results in miscarriage of justice, a miscarriage of justice should be declared only when the court, after examination of the entire cause, including the evidence, is of the opinion that it is reasonably probable that a result more favorable to appealing party would have been reached in absence of the error.

◆

Hansen, McCormick, Barstow & Sheppard, Fresno, C. Ray Robinson, A. B. Canelo, Merced, for appellant.

Forrest M. Greenberg, Kroloff, Brown & Belcher, Stockton, for respondents.

VAN DYKE, Presiding Justice.

This is an appeal by the defendant and cross-complainant, Joe Uyechi, from a judgment on jury verdicts in favor of the plaintiffs and cross-defendants in personal injury and property damage actions which were consolidated for trial.

The actions arose out of a collision wherein appellant's truck driven by one Valenzuela collided with the parked truck of plaintiff-respondent Neilsen, which was being operated by plaintiffs J. Clair and L. Douglas Veater, who are brothers and who were working for Neilsen as a driving team. Valenzuela died intermediate the filing of the actions against appellant and the trial.

No issue is raised as to the sufficiency of the evidence to support the verdicts on the issue of liability. Appellant's contentions are that the trial court erred in its refusal to give certain instructions and that the damages awarded were excessive. In order to discuss these contentions, we will summarize the evidence.

The accident occurred about 3:30 a.m. on U. S. Highway 99 in Merced County. Valenzuela had been driving northerly in the outside lane of a four-lane highway. His equipment consisted of a truck-tractor pulling a set of trailers. It is undisputed that he was driving for appellant and that his negligence, if any, was to be imputed to appellant. The front right end of his tractor struck the hind left corner of the equipment being driven for Neilsen by Clair Veater. At that moment his brother, Douglas, was asleep in a space provided for that purpose. The Neilsen equipment was parked along the right side of the highway, and whether it was parked lawfully off the travel lane or unlawfully and partly on the right side of the travel lane was in issue. The evidence on that issue was conflicting. For some time one Zeering had been driving a car following appellant's rig, and, as a witness for respondents, he testified in substance as follows: Zeering was driving an empty truck and trailer north. He had been following appellant's rig for several miles. Both were going from 40 to 45 miles per hour and were in the outside lane. Zeering noticed the lights of Neilsen's rig while a considerable distance away. It appeared to be off the shoulder. As he got close, Zeering could see that the front end of the Neilsen rig was off the travel lane, but appellant's rig blocked his view of the rear of Neilsen's rig, and he could not say whether or not that part of Neilsen's rig was on the roadway. It could have been. Appellant's truck had been traveling straight without weaving, and it never left the main-traveled portion of the highway. (It was undisputed that at the place of the accident there was a paved or oiled shoulder which was approximately seven feet wide, and beyond that was a dirt shoulder two or three feet wide which was fairly level; that Neilsen's rig was not over eight feet wide and could have been parked completely off the travel lane; that when parked by Neilsen's driver it was not disabled so far as movement was concerned.) Zeering further testified that as he approached the point of the accident an automobile passed him on the inner lane and was abreast of appellant's rig at the time of the collision. It was crowding the white line between the two travel lanes. It had passed very close to Zeering's truck—so close that it bothered him. It was being driven just as close as that to appellant's rig, if not closer. After the collision Valenzuela had a large knot on his head, appeared a little dazed, told Zeering he had been knocked out. He was "teetering a little bit." He said: "I must have went to sleep," and immediately thereafter said: "I couldn't have went to sleep" and also said: "I must have not went to sleep."

Autry, an investigating patrol officer, testified that he went to the scene of the accident with his fellow officer Puckett. He asked Valenzuela what happened, and the latter said: "I don't know, I must have gone to sleep." Officer Puckett testified that he took a statement from Valenzuela. He was a witness for appellant. Under direct examination there was read into evidence Puckett's written report of his conversation with Valenzuela. It follows: Mr. Valenzuela stated he was northbound on 99 at a speed of 40 to 45 miles per hour; "there was a car passing me and I pulled over to the right as this car was too close.

I did not pull far enough to the right to get on the shoulder. I saw a truck parked on the shoulder and this truck had his blinkers on. Just as I approached the truck that was parked on the shoulder and at the same time the vehicle that was passing was about even with the cab of my truck, it appeared that the truck that was parked was about a foot onto the roadway. I did not have a chance to apply the brakes, and I couldn't pull to the left due to a car that was passing." Valenzuela made no statement to Puckett about having gone to sleep. Puckett, while stating that it was difficult when he examined the scene of the collision to accurately place the point where the impact occurred, nevertheless fixed that point approximately as having been 14 inches inside the travel lane on which appellant's rig was being driven.

Clair Veater, Neilsen's driver, started driving at Fresno, and his brother, Douglas, went to sleep in the sleeping compartment. He testified that the weather was clear and dry; that he had driven to the point where the collision ultimately occurred when he noticed his clearance lights flicker and go out. He immediately flipped his turn indicators so that they would all flash and pulled over to the side. He turned on his backing lights, rear blinkers and left headlights and set his brake, which last action turned on the brake lights. He checked his lights. He found all were working and on except for the clearance lights. He then checked his brakes and tires. Various trucks and cars passed him meanwhile, including two large diesels going side by side up the highway. All the right wheels of his equipment were on the dirt shoulder. His left wheels were off the concrete portion of the roadway. While working on his clearance lights he saw the defendants' truck swerve toward him, and the collision occurred. When he saw the truck swerve toward him he was "petrified."

[1, 2] Appellant requested and the court refused to give the following instruction:

"In passing upon whether or not the deceased, Leo Valenzuela, was guilty of negligence, you are instructed that the California Code of Civil Procedure sets forth certain presumptions which are denominated disputable presumptions, which may be controverted by other evidence, but which are satisfactory if uncontradicted. Among those presumptions are the following:

"That the law has been obeyed.

"That a person takes ordinary care of his own concerns."

The requested instruction ought to have been given. In Gigliotti v. Nunes, 45 Cal. 2d 85, 93, 286 P.2d 809, 814, it is stated:

"Although there is no room for the presumption where the driver or other person whose claimed negligence is at issue himself testifies to his actions at the time involved (Speck v. Sarber (1942), 20 Cal.2d 585, 587–588, 128 P.2d 16), the rule is established that if such person be deceased or unable to testify by reason of loss of memory, the fact that other witnesses for the parties testify fully as to the acts and conduct of the allegedly negligent person does not deprive the party relying on the presumption of the benefit thereof unless the testimony which he himself produces 'under circumstances which afford no indication that the testimony is the product of mistake or inadvertence * * * is wholly irreconcilable with the presumption sought to be invoked.'"

All of the conditions justifying the giving of the requested instruction are present in this record. The negligence of Valenzuela was at issue. Appellant's liability depended upon respondents' ability to prove that Valenzuela had been negligent since his employer could only be held on the basis of imputing Valenzuela's negligence to his employer. He was dead. The evidence introduced by appellant concerning his conduct was not irreconcilable with the presumption of due care. The only evidence of Valenzuela's conduct placed in the record by appellant was the statement he made to Officer Puckett, which we have quoted, including some references to statements made to Officer Autry, and by him repeated to

Officer Puckett, that Valenzuela had said he must have gone to sleeep. Valenzuela's reported statement to Puckett is obviously not irreconcilable with due care. A mere reading of that statement establishes this. His related statement to Autry is conclusionary in nature. He did not say he did go to sleep, and his statement made at the scene of the accident to Officer Puckett indicates that he had not gone to sleep since he described the occurrence up to and after the actual collision.

[3] The principal contention of appellant at the trial was that the Neilsen rig had been unlawfully stopped so that a part of it projected onto the travel lane. Appellant requested the following instruction:

"Section 582 of the Vehicle Code of California provides as follows:

" 'Upon any highway in unincorporated areas no person shall stop, park or leave standing any vehicle, whether attended or unattended, upon the main traveled portion of the highway when it is practicable to stop, park or so leave such vehicle off such part or portion of said highway * * *.

" 'This section shall not apply to the driver of any vehicle which is disabled in such a manner and to such extent that it is impossible to avoid stopping and temporarily leaving such disabled vehicle on the main traveled portion of a highway.'

"A violation of this provision of the Vehicle Code is presumptively an act of negligence, and in the absence of legal excuse or justification, constitutes negligence as a matter of law."

The trial court eliminated from the instruction as given the last sentence of the instruction stating the legal effect of a violation of the section. Since there was no other equivalent instruction given to the jury, informing the jury of the legal effect of the violation of a statute which sets up a statutory standard of conduct, it was error to omit from the instruction the last sentence. By other instructions the court gave to the jury the standard of the ordinarily prudent person. Appellant was entitled to have the statutory standard given. As has been related, there was testimony that Neilsen's rig had been unnecessarily parked so that it projected into the travel lane and that this had been done at a point where it was entirely feasible to park completely off the travel lane so that any vehicle being driven along that lane could not have collided with Neilsen's rig. In fact the record discloses that if Neilsen's rig was thus unlawfully parked, there could have been no showing of legal excuse or justification for the statutory violation.

[4] Respondents advance an argument that there was no direct proof that Valenzuela had died. Technically that is correct in the sense that no witness so testified However, no one can read the record without being convinced that there was in fact no issue upon the point. Appellant's counsel, in his opening statement at the beginning of the trial, after the statement of respondents' counsel had been made, referred to the death of Valenzuela. Before evidence taking began, the trial court called a conference in chambers with counsel and a full discussion was there had as to the propriety of an instruction on the presumption of care in view of the death of Valenzuela. The matter was fully discussed. Various statements were made, including some by counsel for respondents, which statements were never controverted that Valenzuela had died. The same condition of the record appears on the proceedings for new trial, where at various times in the arguments of both sides, during discussions as to the claimed error in failing to give an instruction concerning the presumption of due care on the part of Valenzuela, references were made to the fact of his death. Not until the filing of respondents' brief herein has the point been raised of the technical lack of proof that Valenzuela had died. The objection comes too late. Clearly this case was tried upon the assumption that there was no issue as to the fact of death, nor is there now any contention but that the proof could have been readily afforded had anyone considered that it was necessary. Under such circumstances it would be grossly unjust for this court on appeal to do

otherwise than to hold as we do that the technical lack of proof here asserted is unavailable to respondents.

[5] It is unnecessary to discuss appellant's contentions as to the damages being excessive other than to say that we could not from this record sustain that contention, particularly in view of the fact that the same contention was presented to the trial court on new trial proceedings and that court, in the exercise of its discretion, substantially reduced the verdicts save as to the property damage verdict, the proper amount of which had been stipulated. In view of this action of the trial court, we are satisfied that it could not be said that the damages given as reduced were excessive.

[6] It remains to consider the question of whether or not the errors hereinbefore discussed were such as to justify reversal. Respondents contend that they are not, and appellants argue to the contrary. We need only refer, without quoting, to the constitutional directive upon the subject. In People v. Watson, 46 Cal.2d 818, as pages 836–837, 299 P.2d 243, 254, the Supreme Court stated the test to be applied in the following language:

"Giving due consideration to the varying language heretofore employed in relating the constitutional amendment to the particular situations involved, it appears that the test generally applicable may be stated as follows: That a 'miscarriage of justice' should be declared only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error. Phrasing the test in this language avoids any complexity which may be said to result from the language employed in the double negative approach, and such phrasing seems to coincide with the affirmative language used in the constitutional provision. We are of the view, however, that the test as above stated does not constitute a departure from the tests heretofore applied, but is merely a crystallization in affirmative form of the guiding principle which the courts have sought to enunciate in phrasing the test in other language. For example, the application of the double negative approach, as stated in some of the recent decisions, presupposes that a reversal will result only when there exists, in the opinion of the court, at least such an equal balance of reasonable probabilities as to leave the court in serious doubt as to whether the error has affected the result. But the fact that there exists at least such an equal balance of reasonable probabilities necessarily means that the court is of the opinion 'that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.' Thus, it appears that the tests, as variously stated, are not fundamentally different but, on the contrary, are essentially the same. Nevertheless, the test, as stated in any of the several ways, must necessarily be based upon reasonable probabilities rather than upon mere possibilities; otherwise the entire purpose of the constitutional provision would be defeated."

Applying the test as above stated to the record before us, we are of the opinion that it is reasonably probable that a result more favorable to appellant would have been reached in the absence of the errors.

The judgment appealed from is reversed.

SCHOTTKY, J., concurs.

Hearing denied; TRAYNOR, J., dissenting.

172 Cal.App.2d 311

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Francine DALEY, Defendant and Appellant.

Cr. 6518.

District Court of Appeal, Second District, Division 3, California.

July 24, 1959.

Prosecution for possession of marijuana. The Superior Court of Los Angeles County, William E. Fox, J., entered judgment of conviction and order denying motion for new trial and defendant appealed. The District Court of Appeal, Shinn, P. J., held that where defendant did not move to strike testimony of police officer as to information he had received from anonymous informants, defendant could not argue that court had committed error in refusing to order disclosure of their identity, and evidence of fact that police officer listening at apartment window heard third person state over telephone that defendant had marijuana cigarettes in her possession was properly admitted since what officer overheard while listening at window was not product of an unlawful search.

Affirmed.

1. Witnesses 🔑216

Where prosecution seeks to show probable cause for an arrest and search by testimony as to communication from an informer, identity of informer must be disclosed when defendant seeks disclosure or such testimony must be stricken on proper motion of defense.

2. Witnesses 🔑216

Where probable cause for an arrest and search of defendant exists apart from communications to police officer from informer, disclosure of informer's identity is not required.

3. Criminal Law 🔑1044

Where defendant did not move to strike testimony of police officer as to information he had received from anonymous informants, defendant could not argue that trial court had committed error in refusing to order disclosure of informants' identity.

4. Criminal Law 🔑394.4(2)

In prosecution for possession of marijuana, testimony of police officer that while listening at apartment window he overheard telephone conversation in which a third party stated that defendant had marijuana cigarettes in her purse and would be soon returning to apartment was properly received, since what officer overheard while listening at window was not product of an unlawful search.

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Umann & Marks, Burton Marks, Los Angeles, for appellant.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., for respondent.

SHINN, Presiding Justice.

In a court trial, Francine Daley was found guilty of possessing marijuana and probation was granted on condition that she serve six months in the county jail. She appeals from the judgment and the denial of her motion for new trial.

The evidence consisted of that received at the preliminary hearing and additional evidence introduced at the trial. R. R. Fusilier, a police officer for the City of Los Angeles attached to the vice squad, received information from three confidential informants that a "redhead" called Fran and a "brunette" called Wendy or Wanda were engaging in prostitution and holding marijuana parties in a second-story apartment at 1035 South Cloverdale. Officer Fusilier telephoned the apartment three or four times and talked to Wendy (Shielah Hally) about "prostitution deals". He also went to the premises and spoke to her about prostitution. On that occasion, he saw appellant leaving the apartment; appellant had red hair; he had previously seen her enter and leave about ten times.

On the afternoon of February 28, 1958, Fusilier and another officer went to the premises and placed a ladder against the side of the building. Fusilier climbed up the ladder, looked through the bathroom window and observed Shielah Hally walking around the apartment. He saw no one else. The telephone rang. Miss Hally answered it and he heard her say: "I got scared, and flushed three cans of marijuana down the toilet yesterday. Somebody was going to fink on us. I had about 13 marijuana cigarettes in my purse in a cigarette package, and my friend Fran took them with her, and she will be back later." She also said that Fran was carrying the cigarettes in her purse and had taken them with her to a dentist's office.

A few minutes later, Fusilier heard a car drive up. He testified at the preliminary hearing that he saw appellant enter the apartment in the company of two men but he testified at the trial that although he saw someone entering the apartment he did not recall seeing her enter. Fusilier and his fellow officer walked up to the front door, which was opened by Shielah Hally. There were four persons in the apartment. Fusilier identified himself, seized appellant's purse and emptied its contents onto the floor; a cigarette package fell out; appellant was placed under arrest for possessing narcotics. Inside the package were three cigarettes which were proved to contain marijuana. When questioned by the officers, appellant admitted that the contraband was hers.

On cross-examination, Fusilier admitted that he had neither a warrant for the search of the premises nor a warrant for appellant's arrest. When asked to disclose the names of his three informants, he refused to answer upon the ground of privilege and his objection was sustained by the court. No motion was made to strike his testimony regarding communications from the informants. The marijuana was received in evidence over an objection that it had been obtained by means of an unlawful search and seizure.

Appellant did not testify. Shielah Hally testified on behalf of appellant that she had a telephone conversation on the afternoon of the arrest but she denied making the statements which Fusilier testified he had overheard. She also denied having had any marijuana in her possession.

It is not contended on the appeal that the evidence was insufficient to support the conviction. Appellant argues that the court should have ordered disclosure of the names of Fusilier's informants and that the marijuana was obtained through an unlawful search and seizure. The arguments cannot be maintained.

[1, 2] Where the prosecution seeks to show probable cause for an arrest and search by testimony as to communications from an informer, the identity of the informer must be disclosed when the defendant seeks disclosure or such testimony must be stricken on proper motion of the defense. Priestly v. Superior Court, 50 Cal. 2d 812, 819, 330 P.2d 39. But disclosure may not be required where there was probable cause apart from the informer's communications. People v. Williams, 51 Cal. 2d 355, 333 P.2d 19.

[3, 4] As we have said, appellant did not move to strike the testimony of Officer Fusilier as to the information he received from the anonymous informants. And in the absence of such a motion, she may not be heard to argue that the court committed error in refusing to order disclosure of their identity. Coy v. Superior Court, 51 Cal.2d 471, 334 P.2d 569. Furthermore, probable cause was established by evidence apart from the informants' communications. Fusilier overheard Shielah Hally say that Fran had marijuana cigarettes in her purse and would soon be returning to the apartment. Evidence of the telephone conversation was properly received, as it could not be contended that what the officer overheard while listening at the window was the product of an unlawful search. People v. Hen Chin, 145 Cal.App.2d 583, 303 P.2d 18. The question was whether Fusilier had reason to believe that appellant and Fran were one and the same person. Two women were living in the apart-

ment; one was Miss Hally and the other was appellant, whom he had seen entering and leaving on numerous occasions. Although Fusilier admitted in his testimony that he did not know that appellant's name was Fran, it was a reasonable inference that she was the person to whom Miss Hally had referred in her telephone conversation. It was also a reasonable inference that she was one of the persons who entered the apartment just before the officers gained admittance. The investigation conducted by Fusilier warranted him in a reasonable belief that appellant was in possession of marijuana.

The judgment and order appealed from are affirmed.

PARKER WOOD and VALLEÉ, JJ., concur.

172 Cal.App.2d 184

Ray Wesley JACKSON, Plaintiff and Appellant,

v.

ATCHISON, TOPEKA & SANTA FE RAILWAY CO., a corporation, and E. W. Richards, Defendants and Respondents.

Civ. 9566.

District Court of Appeal, Third District, California.

July 20, 1959.

Hearing Denied Sept. 16, 1959.

Action against railroad by trucker for personal injuries and damage to truck on clear moonlight night when he attempted to cross extremely rough railroad crossing but hit big bump, applied brakes, and his motor died, and approaching train struck truck. The Superior Court, Merced County, Thomas Coakley, J., granted motion of railroad for directed verdict at conclusion of entire case, and trucker appealed. The Third District Court of Appeal, Warne, J., pro tem, held that where there was testimony that when trucker saw train, which was traveling at least 82 miles per hour, coming about ¼th mile away, he made last attempt to start truck, and then tried to jump but had trouble with door, and did jump to place of safety off right of way but was found unconscious on ground, jury could have found that trucker jumped and was struck by flying debris, and question whether he was contributorily negligent in not getting out sooner and getting further away was for jury.

Reversed.

1. Trial 🔑171

Power of trial court to direct verdict is subject to same limitations as its power to grant nonsuit.

2. Trial 🔑139(1)

Motion for directed verdict is properly granted only when, disregarding conflicting evidence and giving to plaintiff's evidence all value to which it is legally entitled, and indulging in every legitimate inference, there is no evidence of sufficient substantiality to support verdict for plaintiff.

3. Railroads 🔑303(3, 7)

Where railroad crossing had been extremely rough, with holes extending in depth down to ties, for three years immediately preceding collision between train and truck which had stalled when driver hit big bump, applied brakes, and motor died, and railroad had had knowledge of that condition for six months before collision, railroad was negligent in manner in which it maintained crossing.

4. Railroads 🔑350(31)

In action against railroad by trucker for personal injuries and damage to truck on clear moonlight night when he attempted to cross extremely rough railroad crossing but hit big bump, applied brakes, and his motor died, wherein there was testimony that when trucker saw train, which was traveling at least 82 miles per hour, coming about ¼th mile away, he made one last attempt to start truck, then tried to jump but had trouble with door, and did jump to place of safety off right of way but was found unconscious on ground, jury could have found that trucker jumped and was struck by flying debris, and question whether he was contributorily negligent in not getting out sooner and getting further away was for jury.

5. Railroads ⚿350(19)

In action against railroad by trucker for personal injuries and damage to truck on clear moonlight night when he attempted to cross extremely rough railroad crossing but hit big bump, applied brakes, and his motor died, wherein there was testimony that when trucker drove on tracks, down which there was unobstructed view for two miles, there was no train in view, and that he had been stalled for two minutes when he first saw train, which was traveling at least 82 miles per hour, ¼th mile away, question whether trucker violated stop, look, and listen rule by proceeding onto tracks was for jury.

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T. N. Petersen, and Samuel K. Brantley, Jr., Merced, and Hansen, McCormick, Barstow & Sheppard, Fresno, for appellant.

Robert W. Walker, Henry M. Moffat, and Louis M. Welsh, Los Angeles, Green, Green & Bartow, Madera, for respondents.

WARNE, Justice pro tem.

This is an action by plaintiff and appellant to recover damages for personal injuries and property damage sustained as the result of a collision of plaintiff's truck with a train operated by the defendant and respondent Atchison, Topeka and Santa Fe Railway Company (hereinafter referred to as the Santa Fe), occurring where the main line of the Santa Fe crosses Franklin Road in Merced County.

At the conclusion of the plaintiff's case defendants' motion for a nonsuit was denied. However, at the conclusion of the entire case, the trial court granted defendants' motion for a directed verdict. On granting this motion the trial court ruled that, while there was ample evidence of defendants' negligence to go to the jury, the evidence also showed, as a matter of law, that the plaintiff was guilty of contributory negligence either by proceeding onto the tracks in the path of the oncoming train or by failing to leave the truck which had stalled between the rails of the Sante Fe track and remove himself from the area of danger.

Thus the question before us is whether there is any substantial evidence to support a verdict in favor of plaintiff, and if so whether there was a failure of plaintiff to exercise the care required of a reasonably prudent man which was a proximate cause of the accident.

[1, 2] The power of the court to direct a verdict is subject to the same limitations as its power to grant a nonsuit. Pellett v. Sonotone Corp., 26 Cal.2d 705, 708, 160 P. 2d 783, 160 A.L.R. 863; Reynolds v. Willson, 51 Cal.2d 94, 331 P.2d 48. And as stated in Ross v. Atchison, T. & S. F. Ry. Co., 141 Cal.App.2d 178, 296 P.2d 372, 373:

> "* * * A motion made under section 630, supra [Code of Civil Procedure], is properly granted only when, disregarding conflicting evidence and giving to the plaintiff's evidence all the value to which it is legally entitled, and indulging in every legitimate inference, there is no evidence of sufficient substantiality to support a verdict for plaintiff. If the evidence is such that fair-minded men might honestly draw different conclusions as to the existence of negligence on the part of defendants and of contributory negligence on the part of plaintiff, the question is not one of law but one of fact. * * *"

Applying these rules of law to the facts most favorable to the plaintiff in the instant case we feel that the judgment must be reversed.

[3] The accident occurred on the evening of October 18, 1956. It was a clear moonlight night. Plaintiff testified that before he drove on the tracks he looked down

the tracks and that there was no train then in sight. The undisputed evidence shows that there was an unobstructed view for two miles down the railroad tracks from the road crossing. Plaintiff testified that he was unfamiliar with the crossing; that he had never been over it before. He also testified that "When I got on the crossing, I would say with my front wheels, they were, I don't know just where, some place between the rails; well, I hit just a big bump, like maybe a wheel fell off or it had dropped in a terrible hole and I just automatically hit my brakes . . . and my motor died." The testimony shows that the railroad crossing had been maintained in a poor condition. One witness testified that, to his knowledge, from 1953 until the collision in 1956 the roadbed between the rails, at the crossing in question, was extremely rough with holes extending in depth "clear down to the ties"; another witness testified that from 1952 until the collision in 1956 the portion of the road that lies between the rails was much narrower laterally than the county road approaching the crossing, and that portions of this part of the roadbed were eroded out clear down to the ties, particularly on the western edge of this road—which was the portion traversed by the plaintiff's truck—and that this portion (as well as other portions) was "eaten out" and "pretty rough". It was stipulated that the defendants had been fully aware of this exact condition of the crossing for a period of at least six months prior to the collision. It is obvious that the Santa Fe was negligent in the manner in which they maintained this crossing.

At the time appellant drove his truck up and onto the crossing of the Santa Fe railroad tracks he was accompanied by a soldier. The identity of the soldier was unknown to plaintiff and he was unable to produce him at the trial.

[4] After the motor died plaintiff remained in the cab of the truck trying to start the motor, but was unable to get it started. He put it in gear and pulled it with the starter while the soldier pushed from the front but was unable to roll the truck back out of a hole between the railroad tracks. Plaintiff testified that prior to the time he noticed the approaching train he had been on the tracks not more than three minutes, "and I think not less than two". It was not until the train was approximately one-quarter of a mile distant from the crossing that plaintiff first saw it. Likewise, the engineer of the train did not see the truck until he was one-quarter of a mile distant therefrom. The train was traveling at a rate of speed of at least 82 miles per hour. The plaintiff testified that after he saw the train he made one last attempt to start the engine before trying to get out of the truck. He had some difficulty in getting the door open and he did not know whether he was in the truck or out of it when the impact occurred. However, several eyewitnesses, including the engineer of the train, testified that prior to the impact a man jumped from the truck to a place of safety off the right of way. If plaintiff did jump from the truck, it could be found that he was struck by a piece of flying debris since after the collision he was found lying on the ground adjoining the right of way in an unconscious state. Consequently, it should have been left to the jury to determine whether appellant did so jump from the truck. If they found that he did, then it would be for them to determine if he was negligent in not getting out sooner and going to a place of safety further distant from the scene. Such evidence presented a factual question upon which fair-minded men might honestly draw different conclusions as to whether there was contributory negligence on the part of the plaintiff. Hence it was not one of law but one of fact. In view of these facts it cannot be held, as a matter of law, that appellant's efforts to start the truck and remove it from the tracks rather than immediately abandoning it and going to a place of safety constituted contributory negligence as a matter of law.

[5] Nor can it be held, as a matter of law, that plaintiff violated the "Stop, Look and Listen rule" by proceeding onto the

tracks in the path of the approaching train. At the time plaintiff drove onto the tracks the train was not in view. He had been stalled at least two minutes when he first saw the train one quarter of a mile away. Further, the train traveling at a speed of 82 miles per hour moved a distance of two miles in approximately 86 seconds, which is less than one and a half minutes. Therefore, it could be concluded that the plaintiff could not have seen the train at the time he entered the crossing.

The judgment is reversed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

Betty Lou JACOBS and Gerald Albert Jacobs, by Joe L. WOLF, their Guardian ad litem, Joe L. Wolf and Anna Wolf, Petitioners,

v.

SUPERIOR COURT of the State of California in and for the COUNTY OF LOS ANGELES, Respondent.

Victor Bernard Jacobs, Real Party in Interest.*

Civ. 23947.

District Court of Appeal, Second District, Division 1, California.

July 31, 1959.

Hearing Granted Sept. 22, 1959.

Proceeding by maternal grandparents for writ of prohibition to restrain Superior Court judge from proceeding with trial of supplemental petition by grandparents to be appointed guardians of minor grandchildren and with trial of motion by grandparents to modify judgment which awarded father sole custody of son, and which awarded father and grandparents joint custody of daughter, but which provided that at any time after certain date court might on application award father sole custody of daughter, wherein grandparents further sought writ of mandate to compel the judge to transfer the matters to another judge for further proceedings. The District Court of Appeal, Nourse, J. pro tem., held that judgment denying original petition of grandparents for letters of guardianship of grandchildren was final as to any matters litigated therein, but was not res judicata to extent of precluding consideration of supplemental petition in light of such circumstances as might have occurred subsequent to first judgment, but second guardianship proceeding was new and separate and not continuation of first proceeding, and motion, made before hearing on supplemental petition was set, to disqualify judge was timely and disqualified judge.

Peremptory writ of prohibition issued, peremptory writ of mandate issued.

1. Guardian and Ward 🔑13(8)
Judgment 🔑739

Judgment denying original petition of maternal grandparents for letters of guardianship of minor grandchildren was appealable and, not having been appealed from, was final as to any matters litigated therein, but was not res judicata to extent of precluding consideration of grandparents' second petition, denominated as supplemental petition for appointment of guardianship, in light of such circumstances as might have occurred subsequent to first judgment.

2. Judges 🔑51(2)

Where motion to disqualify judge from hearing supplemental petition by grandparents to be appointed guardians of minor children was made before hearing on the petition was set, motion to disqualify was timely and disqualified the judge. West's Ann.Code Civ.Proc. § 170.6.

3. Motions 🔑64

Ex parte order modifying decree, in habeas corpus proceeding by father against maternal grandparents for custody of minor children, was not and did not purport to be final order and could not operate as res judicata.

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* Opinion vacated 1 Cal.Rptr. 9, 347 P.2d 9.

4. Judges ⚷51(2)

Regardless of whether court, in original habeas corpus proceeding by father for custody of minor son and daughter, who had been in custody of maternal grandparents, had power to render conditional judgment and retain jurisdiction to modify it, motion, made before hearing on grandparents' motion for modification was set, to disqualify judge from hearing motion for modification was timely and disqualified judge. West's Ann.Code Civ. Proc. § 170.6.

5. Habeas Corpus ⚷112

Motion to modify decree in habeas corpus proceeding by father against maternal grandparents for custody of minor children could have been heard by any judge.

6. Habeas Corpus ⚷117(1)

In habeas corpus, judgment awarding custody of minor children only determines immediate legal right to custody and is not res judicata in guardianship proceedings involving right of permanent custody.

7. Habeas Corpus ⚷99(1)

Where immediate welfare of minor is not involved, decision in habeas corpus proceeding should not be made pending final determination of guardianship contest.

Pacht, Ross, Warne & Bernhard, and Isaac Pacht, Leo Altshuler and Harvey M. Grossman, Los Angeles, for petitioners.

Harold W. Kennedy, County Counsel, Wm. E. Lamoreaux, Asst. County Counsel and Edward A. Nugent, Deputy County Counsel, Los Angeles, for respondents.

Gilbert, Thompson & Kelly, Los Angeles, for real party in interest.

NOURSE, Justice pro tem.

Petitioners seek a writ of prohibition to restrain the respondent judge from proceeding with the trial of two matters each involving the custody of the minor petitioners Betty Lou Jacobs and Gerald Albert Jacobs, hereinafter called "Betty" and "Gerald." They further seek a writ of mandate to compel the respondent judge to transfer said matters to another judge of the respondent court for further proceedings. The parties to this proceeding, other than the respondent judge and respondent court, are the minors Betty and Gerald who are the children of the respondent real party in interest, Victor Bernard Jacobs, hereinafter called "Jacobs" and the petitioners Joe L. Wolf and Anna Wolf, hereinafter designated as the "Wolfs" who are the maternal grandparents of Betty and Gerald.

The relevant facts: Gwendolyn Jacobs, the mother of Betty and Gerald and the wife of Jacobs died in March of 1947. Since her death Betty has remained in the custody of the Wolfs and Gerald has remained either in the physical custody of the Wolfs or his maternal uncle, one Frank Wolf.

On January 20, 1956, Jacobs filed a petition for writ of habeas corpus in the superior court by which he sought custody of both minors. The Wolfs filed a return to this petition and on April 20, 1956, filed a petition to be appointed guardians of the person of both minors. The habeas corpus and guardianship proceedings were consolidated for trial. Both matters came on to be heard on May 4, 1956, before the Honorable Orlando H. Rhodes and on May 7, 1956, Judge Rhodes made an order pursuant to stipulation under which the children were permitted to remain with the Wolfs. On January 31, 1958, Jacobs renewed his petition for habeas corpus and the Wolfs renewed their petition for guardianship. At that time both children had attained the age of 14 and each filed a nomination of the Wolfs as his or her coguardians. (Betty is now 17 years of age and Gerald is approaching 15 years.)

After trial and on November 25, 1958, Judge Rhodes rendered judgment in the habeas corpus proceeding awarding Jacobs sole custody of Gerald but permitting Jacobs to allow Gerald to reside with his maternal uncle, Frank Wolf. He awarded Jacobs and the Wolfs the joint custody of Betty but provided that at any time on or after April 1, 1959, the court might, upon the application of Jacobs, award him sole custody of Betty; Betty to remain in the physical custody of the Wolfs until an order for sole custody by Jacobs might be made. On the same date Judge Rhodes rendered judgment denying the petition of the Wolfs to be appointed guardians of the minors.

On May 29, 1959, Jacobs filed an ex parte application to be awarded sole custody of Betty. Upon the filing of this application the court entered an ex parte order and decree awarding Jacobs the sole care, custody and control of Betty and ordered the Wolfs to deliver said children into the custody of Jacobs on June 19th and further ordered that if they failed so to do that the sheriff of the county of Los Angeles take said minors into custody and produce them before the court on June 22, 1959. This order and decree were served upon the Wolfs on June 11, 1959, and on June 19, 1959, Judge Rhodes having denied the motion of the Wolfs to vacate his order of May 29th, this court issued an alternative writ of prohibition against the enforcement of said order. This alternative writ is hereinafter designated the first writ.

On June 17, 1959, petitioners Wolf filed in the respondent court a notice of motion to modify the judgment as to custody rendered in the habeas corpus matter, made on November 25, 1958, and on June 22, 1959, petitioners Wolf filed what they denominated a supplemental petition for appointment of guardianship over the persons of both Betty and Gerald. This was supported and accompanied by the nomination by the minors of the Wolfs as their guardians.

On June 23, 1959, petitioners Wolf pursuant to the provisions of section 170.6 of the Code of Civil Procedure filed their motion supported by proper affidavit of Joe L. Wolf for the disqualification of Judge Rhodes to hear and try their motion of modification of the custody order and judgment and their petition for guardianship. Judge Rhodes denied both of the motions for disqualification and set both matters for hearing before himself. Thereafter on July 6, 1959, we issued the alternative writ to him and which is first herein mentioned and which is hereinafter designated as the second writ.

It is petitioners' contention that the provisions of section 170.6 of the Code of Civil Procedure are mandatory and that Judge Rhodes had no discretion in the matter but was bound to disqualify himself and transfer both causes to another judge of the court. Respondents do not dispute the fact that the statute is mandatory but assert that both proceedings were but a continuation of the habeas corpus proceeding and the guardianship proceeding commenced in 1958 and that therefore the challenge of the judge was made too late.

If respondents are correct in their contention that these proceedings are but a continuation of the former ones, their assertion that the motion to disqualify came too late must be sustained. Under the provisions of paragraph (2) of section 170.6 it was necessary under the circumstances of this case that the challenge[1] be made before the commencement of the hearings or at the latest before the first witness was called. Therefore, if these proceedings were but a continuation of the original proceedings, that time had long past when the challenge to Judge Rhodes was filed.

[1, 2] The so-called supplemental petition for appointment of guardians filed by petitioners Wolf was not in fact a supplementary petition but a new application for guardianship based upon a change of circumstances. The judgment denying the original petition for letters of guardianship was appealable and not having been appealed from, was final as to any matters

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[1] Whenever the word "challenge" is used we refer to the motion to disqualify.

litigated in the first proceeding, but was not res adjudicata to the extent of precluding the court from a consideration of the second petition in the light of such circumstances as might have occurred subsequent to the first judgment. In re Guardianship of Leach, 30 Cal.2d 297, at page 310, 182 P.2d 529, at page 536. It necessarily follows that the present guardianship proceedings are new and separate proceedings and not in any sense a continuation of the first proceedings and the challenge to Judge Rhodes having been timely made, he was thereby disqualified.

If we assume that the court in the original habeas corpus proceedings had the power to render a conditional judgment and to retain jurisdiction to modify its judgment, then its judgment had the same effect as the child custody provisions in a decree of divorce and the proceedings to modify it was a separate proceeding after judgment and not a mere continuation of the original hearing. Cooney v. Cooney, 25 Cal.2d 202, at pages 206–208, 153 P.2d 334, at page 336.

[3] Respondent court asserts, however, that in a habeas corpus proceeding the court cannot retain jurisdiction to modify its judgment and then makes the anomalous claim that the ex parte order entered by the court on May 29 and by which it purports to modify its decree by granting the sole care and custody of the minors to Jacobs, forecloses a similar motion by the Wolfs based upon a change of circumstances occurring between the date of the original judgment and the order of May 29th.[2]

[4, 5] We do not reach the question as to whether a court in granting a writ of habeas corpus may retain jurisdiction to modify its judgment. If it can, then the motion to modify presented a new and independent issue of fact. If it cannot, then the motion presented that fact as an independent question of law, and in either event petitioners had the right to challenge the judge and the challenge having been timely, he was disqualified.[3]

[6] We may further point out that in view of our holding as to the guardianship proceeding it, from the practical standpoint, can make very little difference to the parties whether Judge Rhodes is disqualified to hear the motion to modify the custody order made in the habeas corpus proceeding for in habeas corpus the judgment only determines the immediate legal right to custody and is not res adjudicata in the guardianship proceedings involving the right of permanent custody, (Guardianship of De Brath, 18 Cal.App.2d 697, at page 708, 64 P.2d 968, at page 974) and the result is that should Judge Rhodes retain jurisdiction and deny the motion to modify his original custody order, neither that order nor the original judgment would have any effect upon the judge trying the question as to permanent custody in the present guardianship proceedings.

[7] We may further point out that the Supreme Court has clearly indicated that where the immediate welfare of a minor is not involved, a decision in a habeas corpus proceeding should not be made pending the final determination of a guardianship contest. In re Mathews, 176 Cal. 156, at page 157, 167 P. 873, at page 874.

It having been stipulated at oral argument that the proceedings to which the first alternative writ of prohibition issued by this court were directed are no longer pending and that that writ might be discharged and the peremptory writ denied. it is so ordered. It is further ordered that a peremptory writ of prohibition issue restraining the Honorable Orlando H. Rhodes from trying any issue of law or fact presented by the motion to modify the decree of the respondent court made and entered on the 25th of November, 1958, in proceeding No. HC 50211 in the respondent court or in the proceedings for the appointment of guardians over the persons of Betty Lou Jacobs and Gerald A. Jacobs under the petition therefor filed on the 22nd of June, 1959, in proceeding No. SMP 8162 in the respondent court and that a peremptory writ of mandate issue to the Honorable Orlando H. Rhodes commanding him to cause the transfer of both proceedings above mentioned to another judge of the respondent court for further proceedings.

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[2] The order of May 29th having been made ex parte and without notice was not and did not purport to be a final order and could not operate as res adjudicata.

[3] The motion to modify could have been heard by any judge and therefore differs from a motion for new trial which must, with certain exceptions, be heard and determined by the judge before whom the case was tried.

WHITE, P. J., and LILLIE, J., concur.

Hearing granted; WHITE, J., not participating.

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172 Cal.App.2d 201

Ruth E. FEIDER, Appellant,

v.

H. Jack HANNA, Director Department of Professional and Vocational Standards; State Personnel Board of the State of California; and Harry Finks, Ford A. Chatters, Glenn R. Baker, Robert D. Gray, and Emery E. Olson, members thereof, Respondents.

Civ. 9611.

District Court of Appeal, Third District, California.

July 21, 1959.

Hearing Denied Sept. 16, 1959.

Proceeding for writ of mandate to compel State Personnel Board to reinstate petitioner to her civil service position as executive secretary to Board of Nurse Examiners. The Superior Court, Sacramento County, Albert H. Mundt, J., sustained demurrer to petition and petitioner appealed from judgment rendered thereafter. The District Court of Appeal, Schottky, J., held that executive secretary of Board of Nurse Examiners with duties of planning, organizing and directing examination and registration of graduate nurses, inspection and accrediting of nursing schools, approving applications for registration and supervising and conducting examinations in accordance with policies established by board, and preparing recommendations to board regarding proposed changes in policy for registration of nurses, represented board in matters requiring skill, integrity and judgment and position was a confidential position within statute exempting from state civil service one position to any board or commission composed in whole or in part of officers appointed by Governor and removal of executive secretary who had civil service status was not improper.

Affirmed.

1. Officers ⚷11.1

Question of whether a position is confidential within section of constitution providing that there shall be one confidential position in a board or commission composed in whole or in part of officers appointed by Governor is a question of law. West's Ann.Const. art. 24, § 4(a).

2. Officers ⚷11.1

A "confidential position" is one which involves duties that are not merely clerical, which are such as especially devolved upon office head who, by reason of his numerous duties, was compelled to delegate to others, and the performance of which requires skill, trust, judgment and confidence and responsibility of officer or municipality which holder of position represents.

See publication Words and Phrases, for other judicial constructions and definitions of "Confidential Position".

3. Officers ⚷69.4

Executive Secretary of Board of Nurse Examiners with duties of directing examination of graduate nurses, accrediting of nursing schools, and supervising examinations in accordance with policies established by board, represented board in matters requiring skill, integrity and judgment and position was a "confidential position" within statute exempting from state civil service one position to any board or commission composed in whole or in part of officers appointed by Governor and removal of executive secretary who had civil service status was not improper. West's Ann.Const. art. 24, § 4(a) (5); West's Ann.Bus. & Prof.Code, §§ 2701–2703, 2708.

4. Officers ⚿69.7

Fact that Board of Nurse Examiners appointed woman to job of executive secretary in a civil service status, although she was originally an exempt employee in the same job, did not thereby bind all future boards to keep her as executive secretary, even though they might desire to have a confidential appointee hold that job, and subsequent board properly transferred her duties to a person already holding an exempt appointment and properly removed woman. West's Ann.Const. art. 24, § 4(a) (5); West's Ann.Bus. & Prof.Code, §§ 2701–2703, 2708.

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James H. Phillips, Sacramento, for appellant.

Stanley Mosk, Atty. Gen., by Willard A. Shank, Deputy Atty. Gen., for respondents.

SCHOTTKY, Justice.

This is an appeal from the judgment of the superior court which was entered after respondents' demurrer to appellant's petition for a writ of mandate which was sought to compel the State Personnel Board to reinstate petitioner to her civil service position as executive secretary to the Board of Nurse Examiners was sustained without leave to amend.

Article XXIV, section 4(a), of the California Constitution provides that the state civil service includes every officer of this state, except (2) State Officers directly appointed by the Governor * * * (5) One person holding a confidential position to any officer mentioned in paragraph (1), (2) or (4) hereof except that there shall be but one such position to any board or commission composed in whole or in part of officers mentioned in said paragraphs, each such person to be selected by the * * * board * * * to be served.

The Board of Nurse Examiners consists of five members who are appointed by the governor. (Bus. & Prof.Code, secs. 2701–2703.)

On May 1, 1947, appellant, Ruth Esther Feider, was appointed to an exempt position as executive secretary of the Board of Nurse Examiners. This position is provided for by statute. (Bus. & Prof.Code, sec. 2708.) The statute provides that the executive secretary shall perform the duties delegated by the board and shall be responsible to it for the accomplishment of such duties. The statute also sets forth the qualifications for the position.

Miss Feider held this position under exempt status until September 1, 1948, at which time she was appointed to the same position in a civil service status. On September 3, 1957, a Miss Gertrude Baker was appointed to serve the Board of Nurse Examiners as administrative assistant, which position was classified as exempt. Thereafter the position of executive secretary was declared to be exempt and at the same time the position of administrative assistant was abolished. Miss Baker was appointed to the position of executive secretary. Miss Feider's duties were then transferred to Miss Baker, and Miss Feider was thereafter laid off. Miss Feider appealed the action to the State Personnel Board which, after a hearing, refused to order her reinstated to her position. A writ of review was sought in the superior court, and after respondents' demurrer was sustained without leave to amend and judgment entered an appeal was taken to this court.

Appellant's first contention is that the position and duties of executive secretary of the Board of Nurse Examiners are not confidential within the meaning and intent of section 4(a), subdivision (5), of article XXIV of the state Constitution. As hereinbefore set forth said section 4(a), subdivision (5), permits the board to appoint one exempt employee to a confidential position.

The term "confidential" as used in section 4(a), subdivision (5), of article XXIV of the Constitution has not been construed or interpreted by the courts in California, but it has received consideration within the same legal context in other jurisdictions.

[1] The question of whether the position is confidential is a question of law. In this connection the case of Klatt v. Akers, 232 Iowa 1312, 5 N.W.2d 605, 611, 146 A.L.R. 808, involving the problem of exemption of confidential positions from the operation of a veterans preference law, states as follows: "A confidential relationship is a legal status. It is a conclusion of law, rather than a finding of fact. A matter for judicial construction and determination."

[2] A confidential position has been defined as one "where the duties of the position were not merely clerical, and were such as especially devolved upon the head of the office, which, by reason of his numerous duties, he was compelled to delegate to others, the performance of which required skill, judgment, trust, and confidence, and involved the responsibility of the officer or the municipality which he represents, * * *." Chittenden v. Wurster, 152 N.Y. 345, 46 N.E. 857, 861, 37 L.R.A. 809.

In Davies v. City of Pittsburgh, 252 Pa. 251, 97 A. 413, 415, the court said:

> "* * * The term 'confidential' is not necessarily limited to such position as involved matters of secrecy, but includes those which involve trust and confidence in the person occupying the particular employment. Any relation in which one person represents another in the performance of duties involving skill, integrity, and trust is a confidential one within the general legal acceptation of the meaning of that term. People ex rel. Crummey v. Palmer, 152 N.Y. 217, 46 N.E. 328 * * *. The duties of a chief clerk in each department were such as to fully meet the description of confidential clerk used in the act. He had full charge of the records in the office of his department; attended to all the details of the office; acted in a confidential capacity to the director and accompanied him to council meetings for the purpose of aiding him in matters requiring attention; interviewed people who called to see the director; attended to the details of advertising for and procuring bids for contracts; had charge of the pay roll of the chief bureaus under his department; countersigned all bills, including pay rolls; attended to the matter of procuring appropriations for various purposes connected with the department; received and examined all reports from the various heads of the bureaus under his department; attended to other affairs of the head of his department as they arose; and had general charge of the office. These various and important duties are such as would naturally come within the scope of the employment of a confidential clerk. The close association between the chief clerk and the head of the department makes it highly desirable for the latter to be free to choose for the position one in whom he has personal confidence and trust. * * *"

Section 2708 of the Business and Professions Code provides: "The board shall appoint an executive secretary who shall perform the duties delegated by the board and who shall be responsible to it for the accomplishment of such duties." Among the duties which the executive secretary performs are to plan, organize, and direct the examination and registration of graduate nurses, and the inspection and accrediting of nursing schools. In accordance with the policies established by the Board of Nurse Examiners, she approves applications for registration and supervises and conducts examinations; prepares recommendations to the board regarding proposed changes in policy for registration of nurses; conducts and directs the inspection of nurses' training schools, and approves applications for the accreditation of nursing schools; prepares and issues recommendations to officials of nursing schools regarding curricula and other problems.

[3] We think it is clear that the executive secretary represents the board in matters requiring skill, integrity, and judgment and that such a position is a confidential position within the legal definition of the term.

Appellant contends further that the Board of Nurse Examiners could not assign the duties of the executive secretary of the Board of Nurse Examiners to an assistant exempt from the provisions of civil service since this amounted to an usurpation of the functions of the State Personnel Board in classifying positions granted by article XXIV of the Constitution.

It is the position of the respondents that the Board of Nurse Examiners has the discretion under section 4(a), subdivision (5), of article XXIV of the Constitution to assign the duties and responsibilities of any position within their agency having a confidential relationship to the board, irrespective of whether such duties and responsibilities are presently being performed by a civil service employee.

Appellant argues that once a job has been classified by the State Personnel Board and a position established in the class set up by the State Personnel Board the appointing power loses the discretion under the Constitution to select an exempt employee for that position if it is occupied by a civil service employee. Under appellant's argument, since there are only as many positions as it takes to do the job, the State Personnel Board by classifying all of the positions within the agency and by filling all such jobs under civil service would deprive itself of the discretion to appoint an exempt employee. Thus, the Board of Nurse Examiners appointing the appellant to the job of executive secretary in a civil service status, although she originally was an exempt employee in the same job, thereby bound all future boards to keep her as the executive secretary, even though they might desire to have a confidential appointee hold that job.

[4] The gist of appellant's argument is that any administration in state government by requesting the State Personnel Board to classify the positions presently held by its exempt appointees and permitting the current administration to make appointments thereto can deprive future administrations, possibly of different political representation, of any right to make appointments of confidential employees. This result would render ineffective the provisions of section 4(a), subdivision (5), of article XXIV of the Constitution for the period of tenure of the civil service incumbents.

We do not agree with this contention of appellant. Section 4(a), subdivision (5), of article XXIV was placed in the Constitution for the very purpose of permitting governor's appointees to make at least one appointment to positions significant because of their close relationship to the appointing power.

If section 4(a), subdivision (5), of article XXIV of the Constitution is to be of any value at all, the appointing power must be able to assign the duties and responsibilities of the position which he chooses to an employee of his own selection.

The position of executive secretary, Board of Nurse Examiners, is established by the Legislature in section 2708 of the Business and Professions Code quoted above. The position of executive secretary as described by the Legislature requires that the person appointed shall perform all duties delegated by the Board of Nurse Examiners and be responsible to the board for the performance of such duties. As hereinbefore pointed out, this position is one of trust and confidence and is one imposing a confidential relationship upon the appointee with the board. The executive secretary is responsible for the operation of the agency and performs under the policies established by the board and the nursing practice act. The executive secretary is the alter ego of the nurse board, and, except when the board is in actual meeting assembled, is the board for all intents and purposes. We believe that section 4(a), subdivision (5), of article XXIV of the Constitution was adopted by the people with just such positions in view, where a responsiveness not possible under tenure laws is necessary.

Appellant contends also that her layoff was not made in good faith, as the transfer of appellant's duties to a person already holding an exempt appointment was for the sole purpose of circumventing the civil service law and was therefore illegal.

We believe that the answer to this is that the Board of Nurse Examiners has the authority under section 4(a), subdivision (5), of article XXIV of the Constitution to select a person for the position of executive secretary of the Board of Nurse Examiners because it is a position having a confidential relationship to the board. If the board has such authority, it is in good faith when it selects such a person for that position. The discretion placed in the Board of Nurse Examiners by the Constitution is for the purpose of allowing the board to make a selection; and if the employee performing the duties is not acceptable, the board is deliberately empowered to select a different person in whom they can repose their trust and confidence. It then becomes immaterial in what manner the incumbent is removed. Because the civil service laws are explicit, however, in the manner in which civil servants may be removed, it was necessary in the instant case to follow the layoff provisions of section 19541 of the Government Code. This was not a circumvention of the civil service laws but an exact compliance therewith.

Our conclusion is the authority exercised by the Board of Nurse Examiners in assigning the duties of the executive secretary to a person selected by the board outside the "state civil service" is found in section 4(a), subdivision (5), of article XXIV of the Constitution. We are convinced that this provision allows a governor's appointees one employee for a position having a confidential relationship to the appointing power and that to hold that civil service requirements would protect an incumbent from removal so that such an appointment could not be made would be contrary to the discretion conferred by the Constitution itself.

We conclude that the trial court correctly sustained respondents' demurrer to the complaint without leave to amend. No cause of action was stated, nor could one be stated, on the facts presented. The judgment of the trial court is affirmed.

VAN DYKE, P. J., and WARNE, J. pro tem., concur.

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172 Cal.App.2d 619

PEOPLE of the State of California,
Plaintiff and Respondent,
v.
Robert James MIDDLEWORTH,
Defendant and Appellant.
Cr. 1518.

District Court of Appeal, Fourth District,
California.
Aug. 5, 1959.

Proceeding upon application by state prisoner for writ of error coram nobis. The Superior Court, San Bernardino County, Carl B. Hilliard, J., entered order denying application, and state prisoner appealed. The District Court of Appeal held, inter alia, that claim that, in prosecution for issuing checks without sufficient funds, defendant had been denied effective aid of counsel, could not be raised upon the application for the writ.

Order affirmed and motion to dismiss appeal denied.

1. Criminal Law ⚷997(12)

In application for writ of error coram nobis, applicant must make an affirmative showing of due diligence to discover facts relied upon and to present his application to court after discovery of the facts or he will not have stated a ground for relief.

2. Criminal Law ⚷997(6)

Where facts urged in support of application for writ of error coram nobis are known to applicant at time of his trial, writ will not lie.

3. Criminal Law ⚷997(2)

Writ of error coram nobis cannot be used in place of an appeal, and, if remedy of motion for new trial or appeal existed but was lost through failure to invoke it in time, writ of error coram nobis is not available.

4. Criminal Law ⚷997(2)

Claims that evidence had been improperly admitted in criminal prosecution against applicant for writ of error coram nobis and that evidence was insufficient to support findings that applicant was guilty should have been raised by appeal and did not constitute grounds for issuance of the writ.

5. Criminal Law ⚷997(5)

Claim that, in prosecution for issuing checks without sufficient funds, defendant had been denied effective aid of counsel could not be subsequently raised by defendant upon application for writ of error coram nobis. West's Ann.Pen.Code, § 476a.

6. Criminal Law ⚷997(2)

Court reporter's alleged failure to record certain portions of arguments and instructions related to regularity of proceedings at trial of applicant and could have been raised on motion for new trial or on appeal, and, therefore, writ of error coram nobis was not available to review such matters.

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Robert James Middleworth in pro. per.

Stanley Mosk, Atty. Gen., and William E. James, Asst. Atty. Gen., for respondent.

PER CURIAM.

Defendant was found guilty by a jury of seven counts of an information charging violation of Penal Code, section 476a, issuing checks without sufficient funds. Allegations that he had previously been convicted of felonies were also found by the jury to be true and the jury found against defendant on his plea of "not guilty by reason of insanity". Judgment was pronounced on October 10, 1956, and the defendant was sentenced to terms in the state prison. No appeal was taken from this judgment. More than two years later, about December 16, 1958, the defendant filed in the Superior Court a document titled "Motion and Application for the Writ of Error Coram Nobis" in which he requested a new trial because of alleged errors in admission of evidence, failure to report arguments and in reading of instructions at his trial. His application was denied by the Superior Court on December 29, 1958, and from this order defendant appeals.

On March 19, 1959, defendant requested this court to appoint an attorney to represent him on this appeal. Notice to defendant's counsel, who represented him at the trial, was sent informing him of defendant's request to appoint counsel to represent him on appeal and inviting his views as to any possible reversible error in the record. No such error was indicated by him. This court then made an independent examination of the record and determined that it would be of no value to the defendant or helpful to the court to have a counsel appointed. People v. Hyde, 51 Cal.2d 152, 331 P.2d 42; People v. Marsh, 170 Cal.App.2d 284, 338 P.2d 495. Appellant was notified that his request for counsel had been denied and was requested to file an opening brief or make such other showing as he might desire. Defendant subsequently sent several letters to this court in which he attacks the sufficiency of the evidence to support his conviction. He has also furnished us with affidavits from his mother and wife in which they dispute the adequacy of the defense counsel's efforts on defendant's behalf and the sufficiency of the evidence to support his conviction. Nowhere is it contended that these asserted facts were unknown to defendant or his wife and mother at the time of his trial.

[1–3] It has been often stated that the writ of *coram nobis* has a narrow scope and will not lie to correct errors of law made at the trial. People v. Ayala, 138 Cal.App.2d 243, 291 P.2d 517, "Its purpose is to secure relief, where no other remedy exists, from a judgment rendered while there existed some fact which would have prevented its rendition if the trial court had known it and which, through no negligence or fault of the defendant, was not then known to the court." People v. Adamson, 34 Cal.2d 320, 210 P.2d 13, 15. The applicant must make an affirmative showing of due diligence to discover the facts relied upon and to present his application to the court after discovery of the facts; otherwise he has stated no grounds for relief. People v. Shorts, 1948, 32 Cal.2d 502, 513, 197 P.2d 330. Where the facts urged in support of the writ were known to defendant at the time of his trial the writ will not lie. People v. Schuman, 1950, 98 Cal.App.2d 140, 219 P.2d 36. Where the remedy of the motion for a new trial or appeal existed and was lost through failure to invoke it in time the writ is not available and cannot be used in place of an appeal. People v. Mooney, 178 Cal. 525, 529, 174 P. 325; People v. Gamboa, 144 Cal.App.2d 588, 590, 301 P.2d 390.

[4] Tested in the light of these rules defendant's appeal must be denied. The claims that evidence was improperly admitted (although the record reveals that no such objection was made at the trial) and that the evidence was insufficient to support the findings of guilty state no grounds for issuance of the writ. These matters should be raised by appeal. People v. Parseghian, 152 Cal.App.2d 1, 3, 312 P.2d 81; People v. Gamboa, supra.

[5, 6] Nor can the claim that defendant was denied effective aid of counsel at his trial be raised by *coram nobis*. People v. Ayala, supra; People v. Martinelli, 118 Cal.App.2d 94, 98, 257 P.2d 37. Similarly the alleged errors in the court reporter's failure to record certain portions of the arguments and instructions relate to the regularity of the proceedings at the trial and may be raised on a motion for new trial or on appeal; the writ of error *coram nobis* is not available to review such matters. People v. Martinez, 88 Cal.App.2d 767, 771, 199 P.2d 375; People v. Gamboa, supra.

The errors urged by defendant must inevitably have been known to him at the time of his trial because they concern the trial itself. Defendant attempts to explain his long delay on applying for this writ and his failure to appeal from the judgment of the court by intimating that he was drugged or insane at the time of his trial. The issue of defendant's sanity was decided by the jury after hearing testimony of two qualified psychiatrists who testified that he was sane. Defendant testified on his own behalf and his answers indicate that he was alert and aware of the proceedings being held. The judge who presided at the trial also ruled on the application for the writ of *coram nobis*. Appeals from orders denying petitions for writs of *coram nobis* more supportable than the instant writ have been dismissed as not presenting an appellate objective. People v. Shorts, supra; see also People v. Mattson, 51 Cal.2d 777, 336 P.2d 937 (Footnote 8).

On July 14, 1959, at the time set for oral argument, respondent made a motion to dismiss the within appeal and the motion was submitted, to be determined with the decision on the merits.

Order affirmed. Motion to dismiss appeal denied.

172 Cal.App.2d 505

William H. ADAMS, Plaintiff and Appellant,
v.
PACIFIC MOTOR TRUCKING CO., a corporation, et al., Defendant and Respondent.
Warren E. McCARTHY, Plaintiff and Appellant,
v.
PACIFIC MOTOR TRUCKING CO., a corporation, et al., Defendant and Respondent.
No. 18561.

District Court of Appeal, First District,
Division 2, California.
July 30, 1959.

Truck driver and passenger brought separate actions against owner of three-axle diesel tractor for alleged injuries sustained when truck was struck in the rear by the tractor, and the actions were consolidated for trial. The jury returned a verdict in favor of the truck driver for damages in the amount of $1,200 and a verdict against the passenger in the truck. The Superior Court, City and County of San Francisco, Theresa Meikle, J., denied the motion of the truck driver and passenger for a new trial, and they appealed from the judgment. The District Court of Appeal, Dooling, Acting P. J., held that the Superior Court did not abuse its discretion in denying motion for new trial, though there was evidence that truck driver suffered wage loss of $1,200 and incurred medical expenses in the sum of $568.72, where there was no objective manifestation of his injuries, and there was evidence of a pre-existing arthritic condition and of pre-existing back and shoulder complaints, and jury could have reasonably concluded that portions of his claimed wage loss were not attributable to the accident, and that evidence as to alleged injuries of passenger in truck indicated that he was taken to emergency hospital immediately after accident but received no treatment, and he lost no time from work, and he did not consult a doctor until about a month after the accident, and his complaints were completely subjective.

Judgments affirmed.

1. Appeal and Error 🔑1004(3)
Damages 🔑208(1)

Amount of damages is a question of fact, which is for the jury in the first instance and secondly for trial judge on motion for new trial.

2. Appeal and Error 🔑1004(1)

Normally, reviewing court cannot interfere on question of damages unless facts suggest passion, prejudice or corruption on part of jury, or uncontradicted evidence demonstrates that award is insufficient as a matter of law.

3. Appeal and Error 🔑948

In determining whether there has been an abuse of discretion, facts on issue of damage most favorable to respondent must be considered by reviewing court.

4. Damages 🔑130(4)

Award of $1,200 to truck driver for alleged back and shoulder injuries was not inadequate, and trial court did not abuse its discretion in denying motion for new trial, though evidence established that truck driver suffered wage loss of $1,200 and incurred medical expenses in sum of $568.72, where there was no objective manifestation of truck driver's injuries, and there was evidence of pre-existing arthritic condition and of pre-existing back and shoulder complaints so that jury could have reasonably concluded that portions of claimed wage loss were not attributable to the accident.

5. Damages 🔑208(1)

Jury, in determining in personal injury action whether passenger in truck involved in accident suffered any injury from accident, could take into account that passenger was able to do his work at all times, that he waited for a month before he consulted a physician, and that there was no objective evidence of injuries which he claimed to have received.

6. Damages ⚷185(1)
New Trial ⚷75(4)

In action for alleged injuries received by passenger in truck involved in collision, jury was justified in finding that he received no compensable injury, and trial court did not abuse its discretion in denying his motion for new trial, where evidence indicated that he received no treatment at emergency hospital immediately after accident, and he lost no time from work, and he did not consult a doctor until about a month after the accident, and his complaints were completely subjective.

7. Appeal and Error ⚷1004(3)

Conclusion of trial court on motions of plaintiffs for new trial, that evidence supported verdicts adverse to plaintiffs added weight of trial court's judgment to findings of jury that one of the plaintiffs sustained injuries for which he was entitled to recover only $1,200, and that the other plaintiff received no injuries in collision.

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Belli, Ashe & Gerry, Jack G. McBride, San Francisco, for appellants.

Boyd, Taylor, Nave & Flageollet, San Francisco, for respondents.

DOOLING, Acting Presiding Justice.

Plaintiffs Adams and McCarthy brought separate actions for personal injuries received when, on February 3, 1956, a pickup truck driven by Adams with McCarthy as a passenger was struck in the rear by defendant's vehicle, a three axle diesel tractor.

Defendant admitted liability for injuries, if any, but denied that either appellant suffered damage. The cases were consolidated for trial and the jury returned a verdict in favor of Adams, assessing damages at $1,200. They returned a verdict in favor of defendant and against McCarthy. Plaintiffs' motion for a new trial was denied and they appeal from the judgment.

It is asserted that the trial court abused its discretion in denying the motion for a new trial, and that the judgments were contrary to the evidence.

As to appellant Adams it is asserted that the uncontradicted evidence established that he had suffered a wage loss of $1,200 and that he had incurred medical expenses in the sum of $568.72. McCarthy's testimony as well as that of his doctor is cited concerning his injuries, pain and suffering. Several cases are cited for the proposition that where the damages awarded are clearly inadequate, the failure to grant a new trial constitutes a clear abuse of discretion. Bencich v. Market Street Ry. Co., 20 Cal.App.2d 518, 67 P.2d 398; Torr v. United Railroads, 187 Cal. 505, 202 P. 671; Phillips v. Lyon, 109 Cal. App. 264, 292 P. 711; Donnatin v. Union Hardware & M. Co., 38 Cal.App. 8, 175 P. 26, 177 P. 845.

[1-3] As stated in Gersick v. Shilling, 97 Cal.App.2d 641, at page 645, 218 P.2d 583, 586: "The principles applicable to such an appeal are well settled. The question as to the amount of damages is a question of fact. In the first instance, it is for the jury to fix the amount of damages, and secondly, for the trial judge, on a motion for a new trial, to pass on the question of adequacy. Whether the contention is that the damages fixed by the jury are too high or too low, the determination of that question rests largely in the discretion of the trial judge. The appellate court has not seen or heard the witnesses, and has no power to pass upon their credibility. Normally, the appellate court has no power to interfere except when the facts before it suggest passion, prejudice or corruption upon the part of the jury, or where the uncontradicted evidence demonstrates that the award is insufficient as a matter of law. In determining whether there has been an abuse of discretion, the facts on the issue of damage most favorable to the respondent must be considered."

[4] The evidence shows that Adams went to the emergency hospital immediately after the accident on February 3, 1956, Friday. He received no treatment. His

back and his right shoulder bothered him but he worked all day the following Monday. He reported to the company hospital on Tuesday, his day off, but could not recall whether he received treatment. On Thursday he consulted a physician and he was hospitalized the same day. The doctor who examined Adams found no objective manifestation of injury, but he discovered a pre-existing low grade arthritis in the patient's back and neck. A medical history obtained from Adams by the doctor indicated that Adams had received treatment from a chiropractor prior to the accident for some type of difficulty with his back and shoulders. Adams was hospitalized for 16 days but only 9 of those days could be in any way attributed to either the accident or the arthritic condition, the balance of the treatment being for a bacterial infection unconnected with the accident.

Since there was no objective manifestation of Adams' injury and there was evidence of a pre-existing arthritic condition and of pre-existing back and shoulder complaints the jury could have reasonably concluded that portions of the claimed wage loss were not attributable to the accident.

The evidence as to McCarthy's injuries indicates that he was taken to the emergency hospital immediately after the accident but he received no treatment. He lost no time from work and, although he visited the yard hospital about a week later, he did not consult a doctor until approximately a month after the accident. His complaints were completely subjective and his physician felt that he was fully recovered from these subjective symptoms by November 19, 1956. His medical expenses amounted to $70.25.

[5, 6] The jury in determining whether McCarthy suffered any injury from the collision could take into account that he was able to do his work at all times, that he waited for a month before he consulted a physician and that there was no objective evidence of the injuries which he claimed to have received. We cannot say that on these facts the conclusion that McCarthy suffered no compensable injury was not a reasonable one for the jury to reach.

[7] Additionally, the trial judge, who saw and heard the witnesses as well as the jury, denied appellants' motions for new trial. Her conclusion that the evidence supported the verdicts adds the weight of her judgment to the findings of the jury. Wood v. Davenport, 127 Cal.App.2d 247, 252, 273 P.2d 564.

Judgments affirmed.

DRAPER, J., concurs.

172 Cal.App.2d 208

John J. MEDINA and Bertha L. Clark Medina, husband and wife, Plaintiffs and Respondents,

v.

Rollen Edgar BROWN and Mildred Gertrude Brown, husband and wife, George Porter and Leah Porter, husband and wife, et al., Defendants and Appellants.

Civ. 9629.

District Court of Appeal, Third District, California.

July 21, 1959.

Hearing Denied Sept. 16, 1959.

Action to compel removal of a fence enclosing disputed land, to recover damages, and to prevent trespass upon the land which plaintiffs had continuously used since 1939, "claiming to own the same in fee". From adverse judgment in the Superior Court, Butte County, J. F. Good, J., the defendants appealed. The District Court of Appeal, Schottky, J., held that the quoted phrase was sufficient allegation of ownership when considered with other allegations to support a finding of adverse possession.

Judgment affirmed.

1. Adverse Possession ⟹111

In action to compel removal of a fence enclosing disputed land, to recover damages, and to prevent trespass upon land which plaintiffs had continuously used since 1939, "claiming to own the same in fee", the quoted phrase was sufficient allegation of ownership when considered with other allegations to support a finding of adverse possession. West's Ann.Code Civ.Proc. § 452.

2. Easements ⟹36(3)

In action to compel removal of a fence, to recover damages, and to prevent trespass to land which defendants allegedly had used for 17 years for harvesting their almonds and for discing, elements of continuity, hostility, and exclusiveness of possession were sufficiently proved to sustain a judgment giving plaintiffs an easement for almond farming and orchard farming in all usual and reasonable methods over the property in dispute.

3. Adverse Possession ⟹44

Continuity of use necessary to establish adverse possession can only be determined when nature of the right claimed is examined.

4. Easements ⟹8(4)

Exclusiveness of user is not a necessary element of an easement by prescription, and the use may be exclusive in the required sense even though it is participated in by the owner of the servient tenement.

5. Easements ⟹8(4)

Exclusiveness as used in reference to use necessary to establish an easement by prescription means that the right to use shall not depend for its enjoyment on a similar right in others, and exclusiveness must be as against the community or public at large, and use under claim of right while it must be hostile need not amount to an ouster of the owner of the servient tenement.

6. Easements ⟹37

Issue of acquisition of easement by prescription is ordinarily one of fact giving consideration to all circumstances and inferences that may be drawn therefrom.

7. Adverse Possession ⟹117

In action to compel removal of fence enclosing disputed tract of land, to prevent trespass and for damages, finding that plaintiffs had since 1939, "usually" cultivated the disputed land, and finding that since that date plaintiffs had "continuously" farmed the land, were not inconsistent.

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Robert E. Laughlin, Chico, for appellants.

A. John Merlo, Chico, for respondents.

SCHOTTKY, Justice.

Rollen Edgar Brown and his wife Mildred Gertrude Brown and George Porter and his wife Leah Porter have appealed from a judgment granting John J. Medina and his wife Bertha Clark Medina an easement for almond farming over a portion of appellants' land.

[1] The Medinas, the respondents, own the north one-half of Lot 14. The appellants own the south one-half of Lot 14. Each property has mature almond trees growing thereon. Mrs. Medina first took possession of the north one-half of Lot 14 in 1939, and shortly thereafter she built a cattle fence on the southern boundary of her property. This fence was removed one year later. Brown acquired the south one-half of Lot 14 in 1951. At the time no continuous fence separated the properties. In 1952 Brown built a fence around his property in order to pasture livestock. In 1956, before Brown sold a portion of his property to the Porters, the property was surveyed and the true boundary was determined. Immediately thereafter he constructed a new fence some 12 feet north of the old fence. The Medinas had used the land in dispute since 1943. They used the 12 foot strip in question for harvesting, which meant that canvas was spread upon the ground and the trees were knocked to shake the almonds to the ground. After Brown constructed the second fence,

the Medinas brought an action to compel the Browns to remove the fence, to prevent trespass, and for damages.

The second amended complaint alleged in count one that the Medinas were the owners of the north one-half of Lot 14; that the Porters and the Browns were the owners of the south one-half of Lot 14; that the Medinas were in exclusive and adverse possession of the northerly 12 feet of the Porters' and Browns' property since 1939, claiming to own the same in fee against the world; and that the Medinas had paid the taxes assessed against the property. Count two of the complaint alleged trespass. The Porters and the Browns cross-complained and sought to quiet title.

The trial court found that the Medinas were entitled to an easement for "almond farming and orchard farming" in all usual and reasonable methods over the property in dispute. The Porters and the Browns have appealed from the judgment entered in accordance with said findings.

Appellants' first contention is that the complaint does not state facts sufficient to constitute a cause of action. They argue that while under a general allegation of ownership title by adverse possession may be proved, at no place in the complaint is it alleged that respondents are the "owners" of the 12 feet in question. The second amended complaint alleged:

> "That Plaintiffs by themselves and predecessors in interest, have been in the actual, exclusive and adverse possession of the Northerly twelve feet of the property above described in Paragraph III continuously since the year 1939, claiming to own the same in fee against the whole world and have paid taxes of every kind levied or assessed against said property during the period of seventeen years continuously next preceding the filing of this Complaint."

Appellants contend that the words "claiming to own the same in fee" are insufficient to allege ownership, but we believe that the language, together with the other language of the paragraph, is clearly sufficient to support a finding of adverse possession. Pleadings "must be liberally construed, with a view to substantial justice between the parties." Code of Civ.Proc., sec. 452.

[2, 3] Appellants contend also that the judgment is against law because the elements of continuity, hostility, and exclusiveness of possession were not proved. The evidence disclosed that the Medinas used the strip for harvesting their almonds and for discing. Obviously, this was not a daily occurrence. But continuity of use can only be determined when the nature of the right claimed is examined. Hesperia Land & Water Co. v. Rogers, 83 Cal. 10, 23 P. 196. All that it would be necessary to prove in the instant case would be that the area was disced when necessary and that the area was used for harvesting when necessary. The testimony of the Medinas is sufficient to sustain the requirement of continuity.

[4, 5] Exclusiveness of user is not a necessary element of an easement by prescription. Marangi v. Domenici, 161 Cal. App.2d 552, 326 P.2d 527. The use may be exclusive in the required sense even though it is participated in by the owner of the servient tenement. Marangi v. Domenici, supra. What is meant when exclusiveness is used in reference to an easement is that the right shall not depend for its enjoyment on a similar right in others. It must be exclusive as against the community or public at large. The use under a claim of right while it must be hostile need not amount to an ouster of the owner of the servient tenement. The intermittent use by the Medinas under the circumstances presented here would suffice.

The element of hostility is satisfied by the testimony of the Medinas that they had used the strip without permission from any one. They alleged they claimed the right to use the strip. There was evidence that Brown knew they were using it.

This is sufficient to provide the element of hostility.

[6] In cases involving the acquisition of an easement by prescription, the rule is that the issue is ordinarily one of fact giving consideration to all the circumstances and the inferences that may be drawn therefrom. O'Banion v. Borba, 32 Cal.2d 145, 149, 195 P.2d 10. We are satisfied that there is substantial evidence in the record to support the judgment.

[7] Appellants contend further that certain of the findings are indefinite, uncertain, and ambiguous. The findings read as a whole are clearly sufficient to support the judgment, and the well-settled rule is as stated in 48 California Jurisprudence 2d, page 317: "* * * They will be construed with reference to the issues raised by the pleadings. If there are several findings they will be considered together, and as a whole, and if there is a conflict or inconsistency among them they will be reconciled, if possible, with a view of sustaining the judgment. The judgment will not be set aside unless the findings are incapable of being reconciled." In the light of this well-settled rule, appellants' contentions as to the findings appear to be hypertechnical. For instance, appellants state: "Finding number 5 is inconsistent in that in the first sentence it finds 'that since 1939 the plaintiffs have *usually* cultivated the aforesaid 11 feet'; and in the second sentence it finds that since that date plaintiffs have '*continuously* farmed the said strip of land, etc.'." There is no inconsistency in this finding when it is read as a whole, and so read it is fully supported by the evidence and supports the judgment. Said finding five reads: "That since 1939 the Plaintiffs have usually cultivated the aforesaid eleven feet; that since that date Plaintiffs have continuously farmed the said strip of land for almond nuts by irrigating, cultivating, discing, plowing, turning, harrowing, leveling, harvesting, fertilizing, spraying and otherwise continuously performing all necessary farming operations in the usual cultivation of the strip of land in question. That these usual farming operations and cultivations were in full view of Defendants and their predecessors in interest and were open, notorious, exclusive, continuous, hostile and adverse since the year 1939."

In summary, we are convinced that the evidence is ample to support the findings and that the findings support the judgment.

The judgment is affirmed.

VAN DYKE, P. J., and WARNE, J. pro tem., concur.

172 Cal.App.2d 324

Rosaline M. BLEVINS, Individually and as Executrix of the Estate of Austin Ralph Blevins, Deceased, Plaintiff, Cross-Defendant and Respondent,

v.

Mary J. PALMER, Defendant, Cross-Complainant and Appellant.

Civ. 18436.

District Court of Appeal, First District, Division 2, California.

July 27, 1959.

Rehearing Denied Aug. 26, 1959.

Hearing Denied Sept. 22, 1959.

Action by widow, individually and as executrix, against decedent's mother presenting question of whether a deed created a joint tenancy in decedent and his mother. From adverse judgment of the Superior Court, Monterey County, Anthony Brazil, J., the mother appealed. The District Court of Appeal, Dooling, J., held that where deed conveyed undivided one-half interest in property to husband and wife as joint tenants and the other undivided one-half was conveyed to husband's mother, deed subsequently executed by husband and wife and husband's mother as grantors to husband and his mother as joint tenants created a joint tenancy in husband and his mother.

Reversed.

Kaufman, P. J., dissented.

1. Property ⚿12

Provisions of Civil Code dealing with transfers of real property are to be liberally construed the same as other sections of the Civil Code. West's Ann.Civ.Code, §§ 4, 683.

2. Statutes ⚿184, 217.4

In construing a section of the Civil Code, court is entitled to look to the history of the legislation and the purpose sought to be achieved. West's Ann.Civ.Code, §§ 4, 683.

3. Deeds ⚿136

Purpose of statute concerning joint tenancies was to permit those grantors who also appeared in transfer as grantees to create a joint tenancy by a single deed. West's Ann.Civ.Code, § 683.

4. Statutes ⚿183

If a strict and literal construction is opposed to legislative intention apparent from act, literal construction should not prevail.

5. Deeds ⚿136

Where deed conveyed undivided one-half interest in property to husband and wife as joint tenants and other undivided one-half was conveyed to husband's mother, deed subsequently executed by husband and wife and husband's mother as grantors to husband and his mother as joint tenants created a joint tenancy in husband and his mother. West's Ann.Civ.Code, §§ 4, 14, 683.

◆

Trippet, Yoakum, Stearns & Ballantyne, Oscar A. Trippet, David Freeman, Los Angeles, for appellant.

Hudson, Martin, Ferrante & Street, Webster Street, Monterey, for respondent.

DOOLING, Justice.

Plaintiff and respondent Rosaline M. Blevins is the widow of A. R. Blevins who died on April 9, 1956 and appellant Mary J. Palmer is the mother of said A. R. Blevins. On May 5, 1947, by deed from one Hazel A. Harris to A. R. Blevins and Rosaline M. Blevins, his wife, and to Mary J. Palmer an undivided one-half interest in the subject real property was conveyed to the Blevins, husband and wife, as joint tenants, and the other undivided one-half was conveyed to Mary J. Palmer.

On Jaunary 14, 1948, the Blevins, husband and wife, and Mary J. Palmer as grantors, "the parties of the first part," executed a deed of this property to A. R. Blevins and Mary J. Palmer, "as joint tenants the parties of the second part."

After the death of A. R. Blevins, Mary J. Palmer by her sole deed conveyed this property to Donald and Elizabeth Partridge and took a note secured by deed of trust from the Partridges to secure the payment of the purchase price.

Respondent Rosaline M. Blevins filed this action in three counts both individually and as executrix of her deceased husband's estate. Count 1 alleges that the property was owned by the decedent and Mary J. Palmer as tenants in common; count 2 alleges the expenditure of community funds in payment for and improvement of the property and asserts a community interest in said property by reason thereof; and count 3 alleges that the conveyances to Mary J. Palmer were made as security for advances which have been repaid.

The trial court concluded that the deed of January 14, 1948, was ineffective to create a joint tenancy and that it in fact created a tenancy in common in the property conveyed to the grantees A. R. Blevins and Mary J. Palmer and entered judgment in favor of respondent as executrix for one-half the payments already received by appellant, Mary J. Palmer, from the sale of said property to the Partridges and decreeing the right of the estate to a one-half interest in the purchase note and deed of trust given by the Partridges to appellant. The court reserved, as unnecessary to the decision, the question of the asserted community property rights.

The trial court's conclusion that the deed of January 14, 1948, did not create a joint tenancy in the grantees was based upon the trial court's construction of section 683 of the Civil Code which then provided (Stats.1935, p. 912):

> "A joint interest is one owned by two or more persons in equal shares, by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy, or by transfer from a sole owner to himself and others, or from tenants in common to themselves, or to themselves and others, or from a husband and wife when holding title as community property or otherwise to themselves or to themselves and others when expressly declared in the transfer to be a joint tenancy, or when granted or devised to executors or trustees as joint tenants. A joint tenancy in personal property may be created by a written transfer, instrument or agreement. Provisions of this section shall not restrict the creation of a joint tenancy in a bank deposit as provided for in the Bank Act."

The court construed the words of this section: "to themselves, or to themselves and others," strictly as words of limitation upon the power of grantors in such a transfer, giving the word "themselves" a meaning equivalent to "*all* of themselves" in the case of transfers by tenants in common and to "*both* of themselves" in the case of transfers by husband and wife. Under this construction of the section as it then read while a joint tenancy could be created by a deed from tenants in common to *all* of such tenants in common or to *all* of such tenants in common and another or others, a joint tenancy could not be created by such a deed to *less than all* of such tenants in common or to *less than all* of such tenants in common and another or others. Similarly in the case of grants by husband and wife a joint tenancy could be created by transfer to *both* husband and wife or to *both* husband and wife and another or others, but could not be created by a transfer to either husband or to wife and another or others,

In determining whether the construction which leads to this rather peculiar result is the proper construction and the one intended by the Legislature our first touchstone is found in section 4 of the Civil Code itself, which provides:

> "The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this Code. The Code establishes the law of this State respecting the subjects to which it relates, and its provisions are to be liberally construed with a view to effect its objects and to promote justice."

[1] It is suggested by respondent that while in general the rule of liberal construction enjoined by this code section must be followed in construing the sections of the Civil Code, a statute providing a mode of divesting title to property must be strictly construed and followed. No good reason is suggested why sections of the Civil Code dealing with transfers of real property, should be excluded from the general provisions of section 4, which in terms applies to every section of that code without exception and it was expressly held in Tennant v. John Tennant Memorial Home, 167 Cal. 570, 573, 140 P. 242, that the provisions of the Civil Code dealing with transfers of real property are, as required by section 4, to be "liberally construed with a view to effect its object[s]."

[2] As an aid to a liberal construction of Civil Code, section 683 "to effect its objects" we are entitled to look to the history of the legislation and the purpose sought to be achieved by the amendment of the section in 1935 which added the provisions which we are called upon to construe. 45 Cal.Jur.2d, Statutes, § 129, pp. 636–637.

Historically joint tenancies were said to require four unities: time, title, interest and possession. 13 Cal.Jur.2d, Cotenancy, § 8, p. 295. Because a grant from one to himself and another was held to lack the unities of time and title many courts held that a joint tenancy could not be created by such a grant, although the courts in an increasing number of jurisdictions rejected the restraint of this archaic notion and held that a joint tenancy could be created in this fashion. 14 Am. Jur., Cotenancy, § 11, p. 83; notes in 62 A.L.R. 514; 137 A.L.R. 348; 166 A.L.R. 1026; 44 A.L.R.2d 595. To avoid the possibility of the application of the archaic rule (although no California case applying it has been called to our attention) careful lawyers and the even more cautious title insurance companies insisted, in every case where a grantor wished to create a joint tenancy in which such grantor would be one of the joint tenants, on a transfer to a dummy who in turn would convey to the intended joint tenants. 13 Cal.Jur.2d Cotenancy, § 11, pp. 297–298. The obvious and self-evident purpose of the Legislature in amending section 683 was to do away with this senseless procedure which required two deeds to accomplish the purpose of one.

[3] The evil sought to be corrected was the supposed necessity, where a grantor would also appear as grantee in a deed creating a joint tenancy, of having the title transferred through a dummy or intermediary—circuitously by two deeds rather than directly by one. The rule sought to be avoided imposed a restraint on grantees not on grantors. If A and B, cotenants, wished to convey to B and C in joint tenancy there was no supposed inability in A to convey to B and C in joint tenancy. The supposed inability lay in B's conveying to himself and C in joint tenancy. So when the Legislature amended section 683 its purpose was to permit those grantors who also appeared in the transfer as grantees to create a joint tenancy by a single deed.

To strictly construe the language of the section to require *all* grantors in the case of cotenants and *both* grantors in the case of husband and wife to also appear as grantees in order to effectively create a joint tenancy by one deed would be to frustrate and nullify the object of the amendment rather than to construe it liberally with a view to effect its objects as required by Civil Code, section 4.

[4] The courts have frequently pointed out that if a strict and literal construction is opposed to the legislative intention apparent from the act the literal construction should not prevail. 45 Cal.Jur.2d, Statutes, § 130, pp. 637–638; In re Haines, 195 Cal. 605, 612–613, 234 P. 883; County of Los Angeles v. Frisbie, 19 Cal.2d 634, 639, 122 P.2d 526; People v. Centr-O-Mart, 34 Cal. 2d 702, 704, 214 P.2d 378; Freedland v. Greco, 45 Cal.2d 462, 467, 289 P.2d 463.

In In re Haines, supra, 195 Cal. at page 613, 234 P. at page 886, the court quoted from Lewis' Sutherland on Statutory Construction, 2d Edition, section 376, page 721:

> "The mere literal construction of a section in a statute ought not to prevail if it is opposed to the intention of the Legislature apparent by the statute; and if the words are sufficiently flexible to admit of some other construction it is to be adopted to effectuate that intention."

[5] The construction placed on section 683 by the trial court is supposed to be compelled by the use of the reflexive "themselves" which the trial court concluded must be limited to a collective sense, i. e., "all of them." It may as logically be construed in a distributive sense, i. e., "all or any part of them." Such a construction is in keeping with the provision of Civil Code, section 14: "the singular number includes the plural, and the plural the singular." Construing the plural "themselves" as including the singular it includes, as well as "all of themselves" (plural), "any or one of themselves" (singular).

The amendment of 1935 reads: "to themselves and others." It would be an absurd construction to hold that because the statute uses the plural "others" such a deed could not be effectively made to themselves and one other (singular). No good reason appears why the plural "themselves" should not be similarly construed to include the singular. Such construction not ony carries out the legislative object, it also brings reason instead of unreason to the construction of an amendment designed to eliminate from the law an archaic concept of medieval conveyancing.

Respondent points out that in 1955 the section was amended by the addition of the words "or some of them", "or any of them", "or to one of them." Stats.1955, p. 645. This is cited as an evidence of legislative construction that before the amendment "themselves" meant "all" or "both of themselves." The Legislature of 1955 had no more knowledge than this court of the intent of the Legislature in amending section 683 in 1935, twenty years before. The amendment may be properly regarded as a clarification only.

The issue of community rights and perhaps other issues will arise on a second trial. We are only here deciding the single question of law presented by the judgment and the briefs.

Judgment reversed.

DRAPER, J., concurs.

KAUFMAN, Presiding Justice.

I dissent. The main question here involved is whether section 683 of the Civil Code as it existed in 1948 prohibited the creation of joint tenancy estates except as specified, as contended by the respondent, or whether the Legislature intended to permit additional ways of creating joint tenancy estates as contended for by the appellant. I think that it is clear that a joint tenancy interest must be created in accordance with the terms and language of section 683 of the Civil Code. Dalton v. Keers, 213 Cal. 204, at page 207, 2 P.2d 355, at page 356; In re Estate of Dean, 68 Cal.App.2d 86, 155 P.2d 901. Section 683 of the Civil Code has abrogated the common law on the subject. A statute providing a mode of divesting title to property is strictly construed and followed. 23 Cal. Jur., Statutes, § 177, p. 800. Under this view a joint tenancy may be created only in the precise manner set forth in the statute. Accordingly, as was done here, a conveyance from three tenants in common to two of them, or from a husband and wife to one of them and another, is not a conveyance "to themselves and others" within the language of the statute.

The 1955 amendment to section 683 of the Civil Code supports this view. This amendment expressly permitted the creation of a joint tenancy by a single transfer from tenants in common or joint tenants to *less* than all of them or to less than all of them and others, which was not permissible under the section as it existed prior to the 1955 amendment.

Here the 1948 deed did not comply with the provisions of section 683 of the Civil Code, hence no joint tenancy was created.

I would affirm the judgment of the trial court.

172 Cal.App.2d 381

Gertrude HECHT, Plaintiff, Cross-Defendant and Appellant,

v.

Fred HECHT, Defendant, Cross-Complainant and Respondent.

Civ. 5900.

District Court of Appeal, Fourth District, California.

July 27, 1959.

Action by wife for separate maintenance wherein the husband filed a cross complaint alleging extreme cruelty and desertion as cause of action for divorce. From a judgment of the Superior Court of San Diego County, L. N. Turrentine, J., granting a divorce to the husband on his cross complaint, the wife appealed. The District Court of Appeal, Mussell, Acting P. J., held that the evidence sustained judgment for the husband.

Judgment affirmed.

1. Divorce ⚷127(4)

All acts of cruelty relied upon in a divorce action need not be corroborated and the corroboration required to sustain charges of cruelty may be by direct or circumstantial evidence.

2. Divorce ⚷127(4)

The main purpose of the rule requiring corroboration for a divorce decree is to prevent collusion, and in a hotly contested case the corroboration required is slight and its sufficiency is largely for the trial court.

3. Divorce ⚷127(4)

The corroborating evidence is sufficient in a divorce action if it strengthens and confirms the testimony of the party seeking a dissolution of the marriage.

4. Divorce ⚷184(4)

On appeal from a judgment granting a divorce to the husband where the record did not contain the written interrogatories submitted to the court, the appellate court must assume under the circumstances shown by the record that they were properly considered by the court and that they contained evidence supporting the judgment for the husband.

5. Divorce ⚷127(4)

Corroborating evidence was sufficient to support decree for husband who filed cross complaint in wife's action for separate maintenance wherein he alleged cruelty and desertion as causes of action.

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Schall & Fitzwater and Maurice Boudreau, San Diego, for appellant.

Ralph W. Graves, El Cajon, for respondent.

MUSSELL, Acting Presiding Justice.

This is an appeal from an interlocutory judgment granting a divorce. The action was commenced by plaintiff Gertude Hecht by filing a complaint for separate maintenance. The defendant Fred Hecht answered and filed a cross-complaint in which he alleged extreme cruelty and desertion as causes of action for divorce. The trial court rendered judgment granting a divorce to him on his cross-complaint and Gertrude Hecht appeals from the judgment. The sole question presented on appeal is whether there was sufficient corroborating evidence presented to support the judgment.

The parties were married in New York City, New York, on October 1, 1928 and separated on July 7, 1953. Respondent moved to San Diego, California, and was living in that county on or about July 12, 1956, when appellant came to San Diego. She was found by the police on Garnet Street in that city "screaming at the top of her voice and stating that if she couldn't stay with her husband, she would kill herself." She was hospitalized and a few days later filed her action for separate maintenance.

Respondent testified that while they were living in New York City in an apartment appellant's conduct was such that it was impossible for him to continue to live with her; that she kept their apartment in a "horrible state"; that she refused to throw out refuse and garbage; that she kept calling him up at his work, constantly interfering with it and annoying him; that she locked the doors to their apartment, disconnected the bell, and would not let anyone in because of the condition of the apartment; that she kept rotting, wormy and odorous food in the ice box; and that no one came to their home because it was so filthy.

Bertha Jindrat, who was called as a corroborating witness, testified that respondent had lived in San Diego county for two years continuously preceding the trial date; that she knew respondent in New York; that he was "terribly overwrought many times"; that he was always "disturbed by this condition".

The trial court then questioned appellant as to her conduct when arriving in San Diego and as to the contents of a police report which was submitted to the court for consideration. The trial was then continued to permit the taking of depositions to corroborate respondent's testimony and on April 15, 1958, when trial was resumed, interrogatories and answers thereto were filed by respondent and considered by the court. After further testimony by the parties the trial court stated that "on the total case" respondent was entitled to a divorce and so found. Judgment was then rendered granting respondent a divorce on his cross-complaint.

[1-3] The extent of the corroboration necessary for the granting of a decree of divorce is not defined by statute. All acts of cruelty relied upon need not be corroborated, and in a hotly contested divorce case the rule is not as strictly applied. Waltz v. Waltz, 150 Cal.App.2d 731, 734, 310 P.2d 695. The corroboration required to sustain charges of cruelty in a divorce case may be by direct or circumstantial evidence. The main purpose of the rule requiring corroboration is to prevent collusion, and in a hotly contested case the corroboration required is slight and its sufficiency is largely for the trial court. Jones v. Jones, 135 Cal.App.2d 52, 57-58, 286 P.2d 908; Steele v. Steele, 132 Cal.App.2d 301, 304, 282 P.2d 171. The corroborating evidence is sufficient if it strengthens and confirms the testimony of the party seeking a dissolution of the marriage. Griffith v. Griffith, 129 Cal.App.2d 803, 809, 277 P.2d 850.

[4] The record before us does not contain the written interrogatories and answers submitted to the court and it must be assumed under the circumstances shown by the record that they were properly considered by the court and that they contained evidence supporting the judgment. Harper v. Buckles, 19 Cal.App.2d 481, 486, 65 P.2d 947.

[5] The evidence herein, viewed in the light of the rules announced in the cases cited, is in our opinion sufficient to support the findings and judgment.

Judgment affirmed.

SHEPARD, J., concurs.

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172 Cal.App.2d 421

Bertha M. HALL, an incompetent person, by her guardians, Richard L. GOODELL and W. E. Runk, Plaintiffs and Respondents,

v.

SAN JOSE ABSTRACT & TITLE INSURANCE CO., a corporation, Defendant and Appellant.

No. 18291.

District Court of Appeal, First District, Division 2, California.

July 29, 1959.

Action was brought for damages suffered by plaintiff because of error contained in title insurance policy, which defendant issued, and which misdescribed title of realty purchased by plaintiff and her deceased husband as vesting in them as joint tenants when in fact it vested in them as tenants in common, and for damages because of alleged negligence of defendant's agents in searching records and in reporting on status of title to realty. The Superior Court, Santa Clara County, N. J. Menard, J., entered judgment for the plaintiff, and the defendant appealed. The District Court of Appeal, Dooling, J., held that evidence sustained Superior Court's finding that defendant was not prejudiced by failure of plaintiff to comply with terms and conditions of policy requiring plaintiff to notify defendant in writing of the existence of the error complained of when the error was discovered, where oral notice of the error was given four days after discovery thereof, and defendant failed to take any action to protect its interest at that time.

Judgment affirmed.

1. Insurance ⚷665(1)

In action for damages suffered by plaintiff because of error contained in title insurance policy, which defendant issued, and which misdescribed title of realty purchased by plaintiff and her husband, and for damages because of alleged negligence of defendant's agents in searching records and in reporting on status of title to realty, wherein defendant contended that plaintiff failed to comply with the terms and conditions of the policy requiring that plaintiff notify defendant in writing of existence of error when error was discovered, evidence sustained trial court's finding that defendant was not prejudiced by any breach of the terms of the policy by plaintiff.

2. Insurance ⚷146(3)

Title insurance policies should be interpreted liberally in favor of the insured and against the insurer.

3. Stipulations ⚷16

A valid stipulation is binding on the parties and precludes objection to matters of procedure or evidence that have been expressly or impliedly agreed on. West's Ann.Superior Court Rules, rule 8.4(b).

4. Insurance ⚷426½

Title insurance ordinarily guarantees that title to certain property, as it appears from the record, is vested in a named individual. West's Ann.Insurance Code, § 104.

5. Insurance ⚷426½

In action for damages suffered by plaintiff because of error contained in title insurance policy, which defendant issued, and which misdescribed title of realty purchased by plaintiff and her husband, and for damages because of alleged negligence of defendant's agents in searching records and in reporting on status of title to realty, pretrial conference judge did not err in stating that policy was, in effect, a contract of guarantee. West's Ann.Insurance Code, § 104.

6. Limitation of Actions ⚷95(1)

Action on title insurance policy issued by defendant was not barred by two-year statute of limitations, where action was brought within two years after discovery by plaintiff of loss or damage suffered by plaintiff. West's Ann.Code Civ.Proc. § 339, subd. 1.

7. Appeal and Error ⚷843(2)

Where cause of action on policy of title insurance under first count of complaint was not barred by two-year statute of limitations, and judgment for plaintiff found full support in breach of the policy, and findings on second count alleging a cause of action for negligence were not necessary to support the judgment, it was unnecessary for District Court of Appeal on appeal by defendant to consider whether or not the cause of action for negligence was barred by the two-year statute of limitations. West's Ann.Code Civ.Proc. § 339, subd. 1.

8. Evidence ⚷271(17)

Where, under joint tenancy, entire realty would have passed to plaintiff, and under tenancy in common, one-half interest of plaintiff's deceased husband would pass by will, so that husband's intent as to what interest he desired plaintiff to receive would be important to indicate his reliance on error of defendant, which issued title insurance policy misdescribing title as vesting in plaintiff and husband as joint tenants when in fact it vested in them as tenants in common, when husband prepared his will, plaintiff's son was properly permitted to testify in action on policy that husband had stated to son that husband was going to see that plaintiff would never have any trouble with the estate, and that realty was in joint tenancy and that he was going to keep it that way.

9. Evidence ⚷271(16)

Since mental condition is made manifest to others by statements, declarations and conversations, as well as by conduct, evidence of declarations of one since deceased, indicative of mental condition, intention, feeling, or knowledge at time of making of declarations is competent and admissible when material to the issue, and evidence is admitted to show state of mind at the time, whether declarations were made at time of, or before or after, transaction in question, provided that they were not too remote therefrom, and such evidence is admissible even though declarations are self-serving.

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Royal E. Handlos, San Francisco, for appellant.

Toff & Ehlman, Mountain View, for respondent.

DOOLING, Justice.

This is an appeal by defendant Company from a judgment for plaintiff, Bertha Hall, in her action based upon a title insurance policy issued by defendant. The complaint sought damages suffered because of an error contained in the policy, misdescribing the title of property purchased by plaintiff and her husband. A second count sought damages incurred because of the negligence of defendant's agents in searching records and in reporting on the status of the title to the property.

In December 1945 respondent and her husband purchased certain real property in Mountain View and appellant acted as the escrow agent and title abstractor in the transaction. On June 26, 1946 appellant caused the deed to the property to be recorded and thereafter issued its policy of title insurance which recited that on June 26, 1946 title to the property was vested in "Albert E. Hall and Bertha M. Hall, husband and wife, as joint tenants."

There was evidence that it was the intention of respondent's husband that the property be held in joint tenancy and that it was his belief that it was so held. On November 8, 1949 his will was executed containing no specific reference to this property but providing that respondent should have a life estate in his interest in the community property. Respondent's husband died on August 25, 1950.

On September 22, 1950 a decree establishing the fact of death was filed decreeing that by reason of decedent's death, respondent became vested with absolute title to the property involved in this appeal. During the process of probating the estate and until the estate was closed in April of 1951, this property was treated as joint tenancy property. The deed to the property had been delivered to appellant on April 6, 1946 and remained in appellant's file until August 6, 1953.

In the spring of 1953, respondent retained an attorney to represent her in the sale of this property and on July 29, 1953 a purchase and sale agreement was executed by respondent and Mr. and Mrs. Musso. On July 23, 1953 respondent's attorney received a preliminary title report from another title company indicating that the property was not vested in respondent and decedent as joint tenants. The attorney telephoned to appellant and spoke with its vice-president, Hilton, informing him that the property had not been held in joint tenancy but had been held by respondent and her husband as tenants in common. It was requested that this matter be checked by appellant. Respondent's attorney also ascertained that appellant had the deed in its possession and he requested that it be forwarded to him. He received the deed and a letter from Hilton containing a handwritten notation, "erroneous, not in joint tenancy."

Hilton testified that he must have investigated after the conversation and determined that the recorded deed did not indicate that the title was in joint tenancy.

On September 16, 1953 a petition for letters testamentary for the previously administered estate was filed reciting that additional property belonging to the estate had been discovered. An order confirming sale of real property was then entered. On January 26, 1954 a supplemental petition for distribution of estate was filed, the subject matter of which was the distribution of one-half of the proceeds from the sale of the property to the Mussos.

On April 14, 1955 a written demand was made on appellant asserting a claim for the loss caused by the error in the policy. The complaint was filed on June 28, 1955. In the pre-trial conference order it is stated that the parties stipulated that the pre-trial conference judge should rule on the applicability of the defense of estoppel to the first cause of action and the defense of the statute of limitations (Code Civ.Proc. § 339(1) to both causes of action. The order recites that the court ruled that the statutory period of limitations with respect to each of the two causes of action did not begin to run until respondent had notice of the error. As to estoppel the court ruled that defense "untenable."

1. The first contention of appellant is that respondent failed to comply with the terms and conditions of the policy, which failure resulted in prejudice to appellant.

Respondent's first amendment to complaint alleged "[t]hat all of the conditions of said policy were not literally complied with, in that plaintiff did not notify defendant in writing of the existence of the error complained of when said error was discovered * * *" but that oral notice was given four days after discovery and since appellant could have taken steps to protect its interest at that time and since appellant failed to take any action, that no prejudice resulted from the failure of literal compliance. Appellant answered that failure to give written notice "actually prejudiced this defendant in taking any proceedings necessary to cure any alleged defect in the title * * *."

Since the court found respondent's allegations to be true and appellant's to be untrue this first contention raises the issue of the sufficiency of the evidence to support the court's findings.

The portions of the title policy, relevant to this issue, provide:

"2. The Company at its own cost shall defend the insured in all actions or proceedings against the insured founded upon a defect, lien, encumbrance, or other matter insured against by this policy, and may pursue such litigation to final determination in the court of last resort. In case any such action or proceeding shall be begun, or in case knowledge shall come to any insured of any claim of title or interest adverse to the title as insured, or which might cause loss or damage for which the Company shall or may be liable by virtue of this policy, such insured shall at once notify the Company thereof in writing. If such notice shall not be given to the Company at least five days before the appearance day in any such action or proceeding, or if such insured shall not, in writing, promptly notify the Company of any defect, lien, encumbrance, or other matter insured against, or of any such adverse claim which shall come to the knowledge of such insured, in respect to which loss or damage is apprehended, then all liability of the Company as to each insured having such notice in regard to the subject of such action, proceeding, or claim shall cease and terminate; provided, however, that failure to so notify shall in no case prejudice the claim of any insured unless the Company shall be actually prejudiced by such failure."

"6. A statement in writing of any loss or damage for which it is claimed the Company is liable under this policy shall be furnished to the Company within sixty days after such loss or damage shall have been ascertained. No action or proceeding for the recovery of any such loss or damage shall be instituted or maintained against the Company until after full compliance by the insured with all the conditions imposed on the insured by this policy, nor unless commenced within twelve months after receipt by the Company of such written statement."

Appellant bases its argument on the assumption that when there is a failure to comply with the terms of a policy there arises a presumption of prejudice. Artukovich v. St. Paul-Mercury Indem. Co., 150 Cal.App.2d 312, at page 326, 310 P.2d 461, at page 469, is cited wherein the court states:

"In the absence of waiver or estoppel it is well settled that if a liability policy makes compliance with a 'Notice of Injury, Claim or Suit' provision such as that in Industrial's policy a condition precedent to liability, no recovery can be had where the provision has not been complied with if prejudice to the insurer has resulted [Cases cited.] * * *"

"Whether an insured has complied with a 'Notice of Injury, Claim or Suit' is a question of fact. [Citation.] *There is a presumption that prejudice occurred.* The presumption is not a conclusive one. The burden of proving an excuse for a failure to give notice of suit, and to forward the complaint, process, and other suit papers to the insurer rests on the insured." (Emphasis added.)

Appellant submits that there was no evidence presented by respondent to overcome this presumption of prejudice. It also points to the testimony of its witness as to the various procedures it might have followed to clear the title as insured if notice and demand had been made as required by the policy.

Respondent answers that appellant's contention is based upon authority applicable to liability insurance and that there are clear distinctions between appellant's cases and the instant case involving title insurance. Liability insurance is defined in section 108 of the Insurance Code as including insurance against loss resulting from liability for injury to a person or resulting from liability for damage to property or property interests of others. Respondent submits that, clearly, title insurance cannot fall within this definition. See Ins. Code § 104.

Respondent argues that the requirement of notice is to apprise the carrier of the occurrence of one or more of the contingencies insured against under the policy, to enable the insurer to investigate and take the necessary action. Here the occurrence or loss which is the subject of this action resulted from appellant's own acts, and respondent submits that appellant is therefore chargeable with notice of its own acts.

At any rate, as respondent asserts, it was a question of fact as to whether or not there was prejudice from the lack of literal compliance with the notice provision. Since there was evidence of oral notice shortly after discovery of the error with oral notice thereafter and appellant neither informed respondent that such oral notice was unsatisfactory nor took any steps to correct the error, this was sufficient to support a finding of no breach which prejudiced appellant.

In Reed v. Pacific Indemnity Co., 101 Cal.App.2d 151, 225 P.2d 255, (cited by respondent) the appellant insured a truck owned by respondents. Another company also insured the truck. After an accident the other company was notified and that company investigated and about 11 days after the accident, at the request of respondents, the investigator notified appellant by telephone and by letter of the accident. The supervisor of appellant's claim department decided that the accident was not properly reported and instructed that no one should institute an investigation. On appeal it was contended that the trial court erred in holding that the conditions of appellant's policy were not breached by respondents to the prejudice of appellants. This court held that it is settled law that the question of whether an insured has complied with notice provisions of a policy is one of fact and that before a breach precludes recovery it must appear that the insurer has suffered prejudice. The court pointed out that our Supreme Court had expressly refuted the proposition that a presumption or inference of prejudice is a conclusive one which cannot be overcome by evidence that no actual prejudice occurred. "The ultimate conclusion in each case must depend on its own facts." Abrams v. American Fidelity & Cas. Co., 32 Cal.2d 233, 195 P.2d 797, 800, discussed in Gibson v. Colonial Ins. Co., 92 Cal.App.2d 33, 206 P.2d 387.

In the Reed case the appellate court found that the appellant was notified of the happening of the accident and the details thereof and also of the filing of suits, but that appellant chose to rely on its claim of non-liability under the policy and refused to investigate or defend on behalf of respondents. It was held that the evidence and the law supported the finding of the trial court that the conditions of appellant's policy were not breached to the prejudice of appellant. 101 Cal.App.2d 161, 225 P.2d 255.

[1, 2] In the instant case even if a presumption of prejudice is applicable, since this would not seem to be the type of "adverse claim" to which the policy notice requirements were applicable and since appellant did nothing when admittedly apprised of the error shortly after its discov-

ery, the finding of no breach to appellant's prejudice is supported by sufficient evidence. The general counsel for appellant company testified that generally, when a mistake of the company was discovered, the usual practice was to do nothing unless requested by the insured to take some action "because most of those are cured by time." It is clear that title insurance policies should be interpreted liberally in favor of the insured and against the insurer. J. H. Trisdale, Inc. v. Shasta etc. Title Co., 146 Cal.App.2d 831, 835, 304 P.2d 832; Overholtzer v. Northern Counties Title Ins. Co., 116 Cal.App.2d 113, 122, 253 P.2d 116.

2. Appellant next complains that it was prejudiced by the ruling of the pre-trial conference judge that the defense of estoppel was untenable. It is conceded that it was stipulated that the judge might rule on this defense. Rules of the Superior Court, rule 8.4(b) provides: "At the pre-trial conference, the parties may by stipulation also submit, and the judge may thereupon determine, any other matter which will aid in the disposition of the case."

[3] Appellant states that the pre-trial conference order was in effect a ruling as a matter of law and then cites authority for the rule that the question of whether estoppel exists is a question of fact. Since there is no record of the pre-trial proceedings it cannot be determined whether this determination was one of fact or of law. At any rate "[a] valid stipulation is binding on the parties, and precludes objection to matters of procedure or evidence that have been expressly or impliedly agreed on." (46 Cal.Jur.2d Stipulations, § 15, p. 34.) If such a stipulation is binding only on the party in whose favor the ruling is made then the purpose in authorizing such stipulations would become meaningless.

3. Appellant objects to the "ruling" of the pre-trial conference judge that the policy of title insurance was a contract of guaranty. Appellant does not indicate in what manner this ruling prejudiced it. The pre-trial conference order states: "This is in effect, a contract of guaranty." The order then states that since the first cause of action was based on a contract of guaranty it was not essential for respondent to show that her husband would have left her her one-half interest in the property if he had known the real state of title. This would not seem to be a ruling of the court but assuming it to be, no prejudicial error resulted.

[4, 5] Insurance Code § 104 defines title insurance as including "* * * insurance or *guaranty* of title to real or personal property * * *." (Emphasis added.) As stated in 28 Cal.Jur.2d, Insurance, § 525, p. 279: "It [title insurance] ordinarily guarantees that the title to certain property as it appears from the record is vested in a named individual." Citing Title Insurance & Trust Co. v. City of Los Angeles, 61 Cal.App. 232, 214 P. 667. Appellant has failed to show either error or prejudice.

[6] 4. Appellant also argues that the pre-trial judge erred in determining that the action was not barred by the two year statute of limitations. Code Civ.Proc. § 339(1).

Insofar as the action on the policy of title insurance is concerned, by express provision of section 339(1) the cause of action on such policy "shall not be deemed to have accrued until the discovery of the loss or damage suffered by the aggrieved party thereunder." The action was brought within two years after such discovery.

[7] This conclusion makes it unnecessary to consider whether or not the cause of action for negligence was barred since the judgment finds full support in the breach of the policy of title insurance and the findings on the negligence count are not necessary to support it. 4 Cal.Jur.2d, Appeal and Error, § 531, p. 382 and cases cited in note 7.

[8] 5. Appellant's final contention concerns the testimony of respondent's son that decedent stated to him that he was going to see that respondent should never have any trouble with the estate, that the property was in joint tenancy and he was

going to keep it that way. This testimony was objected to at trial.

The cases cited by appellant are not in point (Bollinger v. Wright, 143 Cal. 292, 297, 76 P. 1108; Fischer v. Bergson, 49 Cal. 294, 297; Barcroft v. Livacich, 35 Cal.App.2d 710, 718, 96 P.2d 951.) These cases involved the issue of the deceased's interest in property or the issues of whether the deceased had parted with title and the courts stated the general rule that "[d]eclarations of a person, since deceased, * * * in support of his own interests, and made outside the presence of the party sought to be bound by them, are not admissible in favor of those who claim rights which the declarations would maintain." Barcroft v. Livacich, supra, 35 Cal.App.2d 718, 96 P.2d 951, 956.

As respondent points out this testimony was not introduced and admitted to prove the truth of the contents of her husband's statements. In Hansen v. Bear Film Co., Inc., 28 Cal.2d 154, 168 P.2d 946, 959, the court states that "[t]he rule is succinctly stated in Whitlow v. Durst, supra, 20 Cal.2d 523, at pages 524–525, 127 P.2d 530. 'When intent is a material element of a disputed fact, declarations of a decedent made after as well as before an alleged act that indicate the intent with which he performed the act are admissible in evidence as an exception to the hearsay rule, and it is immaterial that such declarations are self-serving.' "

Since under joint tenancy the entire property would have passed to respondent and under a tenancy in common her husband's one-half interest would pass by will, decedent's intent as to what interest he desired his wife to receive would be important to indicate his reliance upon appellant's error when preparing his will. The declaration would also show his knowledge at the time of the making of the declaration of the fact that the policy recited that the property was held in joint tenancy and his reliance upon that recital of the policy.

[9] "Since mental condition is made manifest to others by statements, declarations and conversations as well as by conduct, evidence of declarations of one since deceased, indicative of mental condition, intention, feeling, or knowledge at the time of the making of the declarations is competent and admissible when material to the issue. It is admitted to show state of mind at the time, whether the declarations are made at the time of, or before or after, the transaction in question, provided they are not too remote therefrom. Such evidence is admissible even though the declarations are self-serving." 19 Cal.Jur.2d, Evidence, § 443, p. 198.

Judgment affirmed.

KAUFMAN, P. J., and DRAPER, J., concur.

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172 Cal.App.2d 520

**PEOPLE of the State of California,
Plaintiff and Respondent,
v.
Lonnie C. ALLEN, Defendant and Appellant.
Cr. 1406.**

District Court of Appeal, Fourth District,
California.
July 30, 1959.

Defendant was convicted of possession of firearm capable of being concealed upon the person by one previously convicted of a felony. The Superior Court of San Diego County, William A. Glen, J., entered judgment of conviction, and the defendant appealed. The District Court of Appeal, Mussell, Acting P. J., held that where defendant crossed international boundary line between United States and Mexico and came on to the customs inspections station and defendant was searched and a pistol was found in his pocket and defendant had crossed a part of highway known as "United States Highway 101" or a county road to reach customs house from

Mexico, there was not exclusive jurisdiction of United States government over area crossed by defendant in reaching customs house and California court was not deprived of jurisdiction.

Affirmed.

Criminal Law ⚷97(4)

Where defendant crossed international boundary line between United States and Mexico and came on to the customs inspections station, and defendant was searched and a pistol was found in his pocket, and defendant had crossed a part of highway known as "United States Highway 101" or a county road to reach customs house from Mexico, there was not exclusive jurisdiction of United States government over area crossed by defendant in reaching customs house and California court was not deprived of jurisdiction in prosecution for possession of firearm by a person previously convicted of a felony. West's Ann.Pen. Code, § 12021.

◆

Lonnie C. Allen, in pro. per.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., Jack K. Weber, Deputy Atty. Gen., for respondent.

MUSSELL, Acting Presiding Justice.

Appellant was charged with Possession of Firearm Capable of Being Concealed Upon the Person by one Previously Convicted of a Felony (Pen.Code, sec. 12021). He admitted four prior felony convictions alleged in the information, personally waived trial by jury, and was found guilty of the charge by the court. He was committed to the state prison and appeals from the judgment of conviction.

It was stipulated by appellant personally and through his counsel that he, appellant, came across the international boundary line between the United States and Mexico, at San Ysidro, and came on to the Customs Inspection Station there; that he was searched by a Mr. Fawver and a pistol was found in his pocket; that a passenger, Mr. Dace, who was with appellant at that time would testify that he had not seen the pistol before; and that he (appellant) told the officers that he knew that the pistol was in his pocket at the time he came across.

The sole defense raised by appellant at the trial was that the court had no jurisdiction of the territory where the act took place, as the situs was under the exclusive jurisdiction of the United States government.

Maps introduced in evidence show that United States Highway 101 runs south to the border at San Ysidro, adjacent to the customs house on the west; that a county road runs east from highway 101 adjacent to the customs house on the south, and that its west end intersects with highway 101. It is apparent from the record that appellant crossed a part of the highway 101 or the county road to reach the customs house from Mexico and the trial court expressly so held.

While the criminal jurisdiction of a state is confined to its borders, it has power to punish crimes committed in part in this state. People v. MacDonald, 24 Cal. App.2d 702, 709, 76 P.2d 121. In the case of In re Carmen, 48 Cal.2d 851, 855, 313 P.2d 817, 819, the court said:

> "Federal jurisdiction over offenses which are committed within the boundaries of this state and which are defined by state law is exceptional and, in trials in the courts of this state, such jurisdictional claims are ordinarily defensive matter. See People v. Collins, 105 Cal. 504, 509, 39 P. 16. Petitioner therefore should have alleged and proved in the trial court any facts which he now claims might have had the effect of vesting exclusive jurisdiction in the federal courts."

In the instant case appellant failed to prove exclusive jurisdiction of the United States government over the area crossed by him in reaching the customs house, where he was placed under arrest.

Judgment affirmed.

SHEPARD, J., concurs.

172 Cal.App.2d 295

PEOPLE of the State of California,
Plaintiff and Respondent,
v.
Joe COLLINS, True Name John Joseph Collins, and Beverly Fields, Defendants.
Beverly Fields, Defendant and Appellant.
Cr. 6371.

District Court of Appeal, Second District,
Division 1, California.
July 24, 1959.

Defendant was convicted, along with codefendants, of petty theft of automobile tires. The Superior Court of Los Angeles County, Clement D. Nye, J., rendered judgment and defendant appealed. The District Court of Appeal, White, P. J., held that evidence sustained conviction and that any defect in question to witness, in calling for facts not in evidence, was waived by failure to object thereto.

Affirmed.

1. Larceny 🔑62(1)

In prosecution for petty theft of automobile tires, People's evidence was sufficient to establish that tires were in joint possession of appealing defendant and his codefendant and that appealing defendant aided and abetted in their asportation.

2. Larceny 🔑57

Proof of intent to steal may consist of reasonable inferences drawn from affirmatively established fact.

3. Criminal Law 🔑1159(2)

Reviewing tribunal does not weigh evidence for or against accused but it decides only whether it can reasonably be held that sufficient substantial facts could have been inferred from evidence introduced to warrant inference of guilt.

4. Criminal Law 🔑1159(4)

Appellate court is not bound to exculpate one who tells what might be considered a plausible story in explanation of charge against him.

5. Larceny 🔑65

Evidence was sufficient to sustain conviction for petty theft of automobile tires.

6. Criminal Law 🔑448(2)

Question asking witness if, when he saw persons taking tires, he ran after them, did not call for conclusion of witness.

7. Criminal Law 🔑698(1)

Any defect in question to witness, in assuming facts not in evidence, was waived by failure to object thereto.

8. Criminal Law 🔑1169(1)

Complaint as to receipt of certain testimony could not be favorably considered on appeal where record revealed that testimony was received only as to a codefendant and not as to the appealing defendant.

9. Criminal Law 🔑1166½(12)

Trial judge's remarks, revealed by record as made only to clarify that testimony given by certain witnesses was receivable only as against a codefendant and not as against appealing defendant, being beneficial to appealing defendant, could not constitute prejudicial error.

10. Criminal Law 🔑419(3)

Testimony admitted for sole purpose of establishing probable cause for arrest was receivable and was not inadmissible as hearsay.

11. Criminal Law 🔑1159(3)

Conflicts and inconsistencies in testimony of witness are to be resolved by fact-finding authority and not by reviewing court.

12. Criminal Law 🔑163

Statute providing for increased punishment for one convicted of petty theft who has been previously convicted of a felony does not offend against constitutional guarantees against double jeopardy. West's Ann.Pen.Code, § 667.

13. Criminal Law 🔑1169(12)

Where confession of codefendant was received in evidence only as against him, appealing defendant could not successfully raise contentions, on appeal, that confession was admitted before corpus delicti had been established or that confession was not voluntary.

14. Criminal Law 🔑1202(1)

That defendant was charged with crime of petty theft with prior conviction of felonies by information rather than by indictment could furnish him no ground for reversal of conviction. West's Ann.Pen. Code, § 667.

15. Criminal Law 🔑1137(2)

Defendant who selected his own attorney could not successfully challenge his competence, on appeal from judgment of conviction. U.S.C.A.Const. Amend. 6.

16. Criminal Law 🔑322

In view of presumption that official duty was regularly performed, conviction could not be reversed upon defendant's contention that he had been arrested without warrant where record was silent as to whether officer had been fortified with warrant. West's Ann.Code Civ.Proc. § 1963, subds. 1, 15, 33.

17. Criminal Law 🔑1128(4)

Evidence which was not before trial court but which was attached to defendant's brief on appeal, as newly discovered evidence, could not be considered by court in reviewing conviction.

◆

Beverly Fields, appellant in pro. per.

Stanley Mosk, Atty. Gen., S. Clark Moore, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

An information was filed by the District Attorney of Los Angeles County wherein defendants were charged with the crime of petty theft with a prior conviction of felonies (Penal Code, Sec. 667), in that they did steal tires of the value of $71.36, belonging to Reed R. Dowell. As to defendant Fields the prior conviction charged against him was for the crime of burglary. Represented by the public defender, defendant Fields pleaded not guilty and duly waived trial by a jury. Pursuant to stipulation the cause was submitted on a transcript of the testimony adduced at the preliminary examination, with all stipulations entered into at said hearing deemed entered into for the purposes of the trial. When the cause was called for trial private counsel was substituted in place of the public defender, as attorney for defendant Fields. The latter was adjudged guilty and sentenced to state prison. From the judgment of conviction, defendant Fields prosecutes this appeal.

We consider the following a fair epitome of the evidentiary features of this prosecution.

William Edward Tucker, stipulated to be an expert in the reading and rolling of fingerprints, was shown a certificate of commitment for defendant Fields, which was marked Exhibit 2, and a fingerprint exemplar for the same defendant, marked Exhibit 3. The witness testified he had made a comparison between the aforesaid exhibits, and that in his opinion, "The rolled impressions on People's Exhibit 2 and the rolled impressions in Peoples Exhibit 3, are made by one and the same fingers, those of Beverly Fields, Junior, in this case". Defendant Fields admitted that he had suffered the prior conviction alleged in the information.

Reed R. Dowell testified that he operated a filling station, garage and frame business at 3555 West Slauson. On February 18, 1958 he saw both defendants near his place of business. He was making a phone call when he heard tires "going around the corner". He ran out and saw an automobile at the curb, and defendant Collins jumping in the car. Dowell saw defendant Fields in the car. He got within eight feet of the vehicle and it drove off. He took down the license number of the car, which was HFS 136. This all occurred around 12:00 noon.

Mr. Dowell had placed tires outside of his station between 7:00 and 7:30 a. m. on that date, and had passed them four or five times during the morning and saw nothing unusual. After the automobile left the curb, he checked and found two tires worth $71 and some odd cents missing. These tires were U. S. Royal Safety 8 Nylon, 850 x 14, four-ply tires.

Parker C. Kenner was a service station manager at 2000 West Adams, at Western Avenue. On February 18th the defendants drove into this station at 1:00 p. m. Defendant Collins tried to borrow some money from Kenner. Kenner refused, and Collins said that he could hold certain tires until Friday, and that if he mounted the tires and balanced the wheels Collins would pay him a bonus. Kenner gave Collins $30. These tires were U. S. Royal, white sidewall, nylon cord, size 850 x 14.

Harold C. Brasher, a police officer, received a call from the detective bureau that the owner of a vehicle that was listed in a crime report had stated the vehicle was not in his possession on February 18th, but that a friend of his, who lived at 1121 East 68th Street, had used the car on that date. He drove out to that address. He was met there by defendant Collins, who stated that he had had the car the day before.

On February 19th, between 11:00 and 11:30 a. m., the officers had a conversation with defendant Fields. He denied having been in the car on the 18th. He denied having seen defendant Collins on the 18th, and denied any knowledge of the tires taken from 3555 West Slauson.

Sworn as a witness in his own behalf, defendant Fields testified that on February 18, 1958, he was leaving his home on his way to a store when his co-defendant passed by in an automobile, stopped and offered defendant Fields a "lift". The latter accepted and entered the automobile. That enroute, defendant Collins told the witness "he was going to make a little run and then he would, you know, drop me off at the store". That defendant Collins stopped at a filling station, "in the Crenshaw vicinity" and got out of the automobile, "and the next thing I know, well he comes—he jumped in the car, and a man was hollering at him. I presume it was the station man. So then I felt that there was something going on, you know, that was wrong, you know. And so I wanted to get out of the car. He left then. And I wanted to get out of the car, but he wouldn't—wouldn't stop. So when he did stop at this other station—he went to another filling station, and that's when I relieved, you know, left." Defendant Fields testified he did not tell the arresting officers this story and denied to them that he had seen his co-defendant on February 18th, because he "was afraid of—of being implicated in something, you know * * I was confused. I didn't know what to tell so I just told them I didn't know anything about it". On cross-examination defendant Fields was asked:

> "Q. But he wouldn't let you get out, is that right? A. Well, no, he wouldn't stop.
>
> "Q. Are there any stop signals between that service station and the second service station where you stopped? A. Yes.
>
> "Q. Did you make any attempt to get out any time the car stopped? A. No."

[1] As grounds for reversal of the judgment appellant first contends that, "The weight is on the Prosecution to prove the defendant's guilt, and not for the defendant to prove his innocence". With this statement we agree, but from a perusal of the record herein and for reasons hereinafter to appear, we are satisfied that the burden imposed upon the prosecution was met with ample evidence.

[2] As to appellant's claim that the prosecution failed to prove that he had knowledge of, "or took part in the crime", the evidence fully warrants a conclusion by the trial judge that the stolen tires were in the joint possession of appellant and his co-defendant, and that the former aided and abetted in the asportation of the stolen property. As to appellant's contention that no intent to steal was shown on his part, it is sufficient to say that proof of intent may consist of reasonable inferences drawn from affirmatively established facts. In the case at bar there was sufficient substantial evidence of appellant's conduct from which the court could reasonably draw an in-

ference of his wilful participation in the offense charged against him. Appellant contends that from where he was seated in the automobile, he was in no position to see or know that a crime was being committed. This, however, presented a question of fact to be determined by the trial judge, who stated, "Well, frankly I think the defendant is lying, Mr. Canady (appellant's counsel), just plain ordinary lying. I have observed his demeanor on the stand, and he has the demeanor of a man who is not trying to tell the truth."

[3–5] As to appellant's claim that the evidence is insufficient to support the adjudication of guilt, we are satisfied that the contention cannot be sustained. We shall not here repeat the testimony which we have herein narrated. Suffice it to say that the reviewing tribunal does not weigh the evidence for or against the accused. It decides only whether it can reasonably be held that sufficient substantial facts could not have been inferred from the evidence introduced to warrant the inference of guilt (People v. Newland, 15 Cal. 2d 678, 681, 104 P.2d 778). Neither is the appellate court bound to exculpate one who tells what might be considered a plausible story in explanation of the charge and the evidence against him (People v. Shellenberger, 25 Cal.App.2d 402, 406, 77 P.2d 506; People v. Von Benson, 38 Cal.App.2d 431, 434, 101 P.2d 527). We are unable to say that the trial judge was bound to believe appellant's testimony as against the incriminating established facts.

[6, 7] Appellant complains of alleged errors in the admission of evidence. He asserts that the question, asked of Mr. Dowell, the filling station operator by the prosecutor, "When you saw these two persons taking the tires past where you were standing, did you run after them? Is that correct?", called for a conclusion of the witness. While the question may assume facts not in evidence, it certainly does not call for a conclusion of the witness, but merely asks him to state whether he did or did not pursue the persons in question. Any defect was waived by failure to object to the question (People v. Willis, 30 Cal. App.2d 419, 421, 86 P.2d 670). Neither was any objection urged to the conversation between Mr. Kenner, the operator of the second filling station at which a stop was made, and appellant's co-defendant Collins. However, the conversation did not concern appellant and he was not prejudiced thereby.

[8] Appellant's complaint as to the statements of a police officer concerning information he received relative to the automobile here in question is answered by the record which reveals that this conversation was received only as to defendant Collins.

[9] Appellant voices objection to certain statements of the trial judge, but a reference to the record shows that the court sought only to clarify certain testimony given by the officers by making it clear that it was the co-defendant Collins, and not appellant, who made the statements. Since this benefitted appellant, manifestly there was no prejudicial error committed.

[10] Appellant contends that certain testimony given by Officer Brasher "relating the facts leading up to the arrest of the defendants", was hearsay. This evidence was admitted for the sole purpose of establishing probable cause for the arrests, and therefore, was admissible (People v. King, 140 Cal.App.2d 1, 5, 6, 294 P.2d 972).

[11] Appellant next calls our attention to certain claimed conflicts between the testimony of various witnesses, and inconsistencies in the testimony of certain witnesses. This contention is unavailing because the rule is fundamental that the credibility of a witness is committed to the duly authorized arbiter of the facts. Hence, conflicts and inconsistencies in the testimony of a witness are to be resolved by the fact finding authority (People v. Frankfort, 114 Cal.App.2d 680, 700, 251 P.2d 401; People v. White, 115 Cal.App.2d 828, 831, 253 P.2d 108; People v. Ashley, 42 Cal. 2d 246, 266, 267 P.2d 271).

[12–14] Appellant asserts that his constitutional rights were abridged in certain instances. His contention that the use of his prior conviction in the instant proceeding placed him in double jeopardy and offended constitutional guarantees, is without merit. Section 667 of the Penal Code is not unconstitutional (People v. Biggs, 9 Cal.2d 508, 512, 71 P.2d 214, 116 A.L.R. 205; People v. Dutton, 9 Cal.2d 505, 507, 71 P.2d 218; People v. Quiel, 68 Cal.App.2d 674, 680, 157 P.2d 446; People v. Stanley, 47 Cal. 113, 116). Equally without merit is appellant's contention that a confession of Collins was admitted as to him before the *corpus delicti* was established. The record clearly shows that the admissions of the co-defendant Collins were admitted only as to him and were not binding on appellant. The same answer is applicable to appellant's claim that the confession of Collins was not voluntary. The fact that appellant was accused by an information rather than an indictment furnishes no ground for appeal (Hurtado v. People of State of California, 110 U.S. 516, 538, 4 S.Ct. 111, 292, 28 L.Ed. 232).

[15] Appellant complains concerning inadequate representation by counsel (Constitution of the United States, 6th Amendment). He was represented by the public defender at the preliminary examination, and at the trial, by counsel of his own choosing, the latter of whom conducted appellant's defense in a competent manner. And, having selected his own attorney, appellant cannot be heard to now challenge the former's ability (People v. Stevens, 5 Cal.2d 92, 98, 99, 53 P.2d 133).

[16] Appellant's claim that he was arrested without a warrant cannot now be considered because the record is silent as to whether the arresting officer was fortified with a warrant. In the absence of evidence to the contrary, it will be presumed that official duty was regularly performed (Code Civ.Proc., sec. 1963, subds. 1, 15, 33; People v. Farrara, 46 Cal.2d 265, 269, 294 P.2d 21). Furthermore, no evidence was obtained as a result of the arrest of appellant.

[17] Appellant contends that he now is in possession of new evidence consisting of a letter from his co-defendant Collins, which he has attached to his brief. This evidence was not before the trial court, is therefore, outside the record on appeal, and may not be considered (People v. Justice, 167 Cal.App.2d 616, 334 P.2d 1031; People v. Hernandez, 150 Cal.App.2d 398, 400, 402, 309 P.2d 969; People v. McKinney, 152 Cal.App.2d 332, 335, 313 P.2d 163; People v. Gormley, 64 Cal.App.2d 336, 338, 148 P.2d 687.)

The judgment is affirmed.

FOURT and LILLIE, JJ., concur.

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172 Cal.App.2d 142

Elmer Patrick FRIEL, Reynaldo D. Espana, Anita A. Espana, Maurice Alvarez, et al., Plaintiffs and Appellants,

v.

COUNTY OF LOS ANGELES, Herbert C. Legg, Kenneth Hahn, John Anson Ford, Burton C. Chace and Warren M. Dorn, as Members of the Board of Supervisors of the County of Los Angeles, et al., Defendants and Respondents.

Civ. 23766.

District Court of Appeal, Second District, Division 1, California.

July 20, 1959.

Rehearing Denied Aug. 14, 1959.

Hearing Denied Sept. 16, 1959.

Action by certain landowners for a declaration of invalidity of certain county zoning ordinances in so far as they prohibited drilling of oil wells on plaintiffs' land. The Superior Court, Los Angeles County, Ellsworth Meyer, J., entered judgment in favor of county, and plaintiffs appealed. The District Court of Appeal, Fourt, J., held that fact that there might be drainage from under certain land zoned for residential purposes exclusively was not a controlling factor in determining whether county could, by zoning ordinance, prohibit oil drilling on property overlying the oil pool.

Judgment affirmed.

1. Counties ⚷21½

A county has the right to regulate the drilling and operation of oil wells within its limits and to prohibit their drilling and operation within particular districts if reasonably necessary for the protection of the public health, safety and general welfare.

2. Constitutional Law ⚷225(1)
Counties ⚷21½

County zoning ordinance prohibiting oil well drilling in residential areas did not violate equal protection or uniformity provisions of Constitution notwithstanding fact that a residential area was adjacent to a district which permitted oil well drilling.

3. Counties ⚷21½

If in fact owners of certain property suffered some money detriment from the fact that a county zoning regulation prohibited oil drilling on certain of their property overlying an oil pool, such fact did not require that the ordinance be declared invalid on theory it was confiscatory, arbitrary, oppressive, unreasonable or void as to landowners involved.

4. Counties ⚷21½

Fact that there might be drainage from under certain land zoned for residential purposes exclusively was not a controlling factor in determining whether county could, by zoning ordinance, prohibit oil drilling on property overlying the oil pool.

5. Appeal and Error ⚷1054(1)

In an action for a declaration of invalidity of a zoning ordinance as applied to plaintiff's property, error, if any, of court in admitting testimony that an oil company had offered leases to plaintiff, or in refusing to admit evidence that such oil company coerced plaintiff, was not prejudicial in view of fact trial was to the court, and the court stated in its memorandum of decision that such evidence was not controlling with the court.

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Elmer Patrick Friel, Stanley & Kirby, Los Angeles, for appellants.

Harold W. Kennedy, County Counsel of Los Angeles County, John H. Larson and Donald K. Byrne, Deputy County Counsel, Los Angeles, for respondents.

FOURT, Justice.

This is an appeal from a judgment wherein the court declared that certain provisions of the zoning ordinances of the county of Los Angeles, with reference to the drilling of oil wells were constitutional, reasonable, non-discriminating and not arbitrary, and that plaintiffs were not entitled to an injunction or any relief.

The appellants are the owners of, or claim the exclusive right to drill for oil in three non-contiguous parcels of land consisting of about one acre each, situated in a residential, unincorporated area of the county of Los Angeles, and which said area is zoned for residential purposes. Parcel one of the parcels in question is an area zoned R–2 (two-family residences), and parcels two and three are zoned R–1 (single-family residences). A strip of commercially zoned property exists within the over-all area in question, being generally along each side of Atlantic Boulevard, which traverses the residential properties. There are approximately nine hundred and sixty families residing within the residentially zoned district in question. To the north of the residentially zoned district, the property is occupied by the Union Pacific Railroad yards, and that property is zoned as M–2 (manufacturing). Several oil wells have been drilled on the Union Pacific property, some of which are bottomed under the railroad property and some of which have been slant drilled and are bottomed under the residentially zoned property, but none of them are bottomed under the appellants' property.

The zoning ordinances were adopted and the area was zoned as is long before any oil was discovered.

The zoning ordinances permit the drilling of oil wells in industrially zoned areas, such as M–2, under certain restrictions and conditions, and prohibit the drilling of oil wells within the area zoned for residential purposes.

The appellants requested exceptions or variances from the regulations of the zoning ordinances prohibiting oil well drilling in residential areas as to parcels one and two. No exception or variance was requested as to parcel three. The Regional Planning Commission refused to grant an exception upon the grounds, among others, that there were many protests against the application; that the Richfield (presumably Richfield Oil Corporation) would compensate all property owners for the oil extracted from beneath their property within the boundaries of Unit A; that although it appeared probable that there was oil under the parcels in question, it could be extracted and compensated for by Richfield, and that under the circumstances it would be *materially detrimental to the public welfare and to the property of other persons located in the vicinity of appellants' property.* That action was appealed to the Board of Supervisors, which Board, after a public hearing, refused to grant the exceptions or variances requested.

The present action was then brought to restrain the respondents from enforcing the zoning ordinances, and to secure a declaration that the zoning ordinances as applied to the appellants were unconstitutional and arbitrary.

A pre-trial stipulation was entered into, which in effect, among other things, set forth: that Friel is the owner of a certain community oil and gas lease, dated July 30, 1954, executed by plaintiffs as lessors and by Friel as lessee, and that as such he has the exclusive right to drill for oil from the three parcels; that the three parcels are zoned residentially and are a part of a much larger residential area; that parcels two and three are near, and that parcel one adjoins a part of the right-of-way and yards of Union Pacific; that the entire general area in question is bounded on the north by the Union Pacific Railroad right-of-way, and on the south by the Sante Fe Railroad right-of-way, on the east by Eastern Avenue, and on the west by Long Beach Freeway; that such general area varies in width, north and south, from 4,800 feet at Eastern Avenue, to 3,500 feet at the Long Beach Freeway, and is about 4,000 feet wide from east to west; that the residential portion thereof is about 1,800 feet wide from north to south at the point where the plaintiffs' said parcels are located; that the parcels one, two and three and the residential area surrounding are located within a portion of an oil field commonly known as Bandini Field; that there are about forty-five producing wells in the general area; that the total production from the field as reported by a state agency for January, 1957, was 74,781 barrels; that the lands in question are subject to zoning laws of the County of Los Angeles, the first of which was adopted in 1929, and amending ordinances adopted from time to time thereafter; that at all times prior to 1953, the Union Pacific yard was zoned M–2, and that parcel one was zoned R–2, and parcels two and three were zoned R–1; that at all times the ordinances have prohibited the operation of any oil and gas wells in either zone R–1 or R–2, even though such properties are being drained of oil and gas from neighboring property; that it was permissible to drill oil wells in zone M–2 under certain conditions; that the defendants have construed and administered the prohibitions of the zoning ordinance with respect to oil and gas as applying only to the surface location of said wells; that the Union Pacific Railroad Company has been permitted to use the portion of its yards lying more than 300 feet from R–2 zone property along the northerly side of the residential area in question for the purpose of drilling and operating oil wells and of slant drilling to any location desired by Union Pacific, without any restriction under the zoning ordinances; that prior to March, 1955, the Union Pacific entered into an oil and gas lease with Richfield Oil Corporation covering the Union Pacific yards, and also permitting Richfield to use the yards for surface locations for slant drilling and the operation of oil and gas wells; that during 1955 through 1957, Richfield slant drilled six oil wells from surface locations in said yards, and more than 300 feet from zone R–2, and completed the said wells within certain of the properties to the south thereof in zones R–1 or R–2; that Richfield did not obtain any special use permit for such drilling; that other wells were drilled by Richfield for which no permits were secured; further, that the ordinances provided for exceptions which could be granted if it appeared probable that there was oil underneath the property under consideration, or under adjacent property, which oil could not otherwise be extracted, and that such exception would not be materially detrimental to the public welfare nor to the property of other persons located in the vicinity; that in December, 1955, certain of the plaintiffs filed two applications with the Regional Planning Commission, each for an exception to drill and operate an oil well, one on and with respect to parcel one, and one on and with respect to parcel two; after hearing before the zoning board the Commission denied the applications, although it was found that it was probable that there was oil under each of the two parcels; that plaintiffs appealed to the Board of Supervisors and that Board confirmed the findings and recommendations of the Planning Commission denying the applications and denied the appeals, no application for an exception to drill has been made with reference to parcel number three; that at one time the county granted an exception to General Petroleum Corporation to drill an oil well on one of the lots in the residential area, which said well was slant drilled from the surface location into the subsurface of industrial land, zone M–2, and was not drilled to protect against drainage; that Richfield in 1955 was granted a special permit to establish and operate some production tanks and other units in the M–2 zone, and which tanks and units were within 100 feet of the dwelling houses in a part of the R–2 zone; that it is provided in one of the ordinances that to violate any provision of the ordinances shall constitute a crime, and that the defendants will, unless restrained, prevent the plaintiffs from drilling and operating oil and gas wells on their parcels one, two and three, and will arrest and prosecute any of the plaintiffs who undertake to drill such a well from the surface of parcels one, two and three. There was also filed a supplemental stipulation as to how the shares of production were divided between Richfield and Union Pacific.

The issues were stated, in effect to be: (1) Whether the complaint stated a cause of action; (2) as to parcel three, whether the plaintiffs had exhausted their administrative remedies; (3) whether oil wells could be constructed on parcels one, two or three, without material detriment to the surrounding properties; (4) whether the effect of the county zoning ordinances is to tend to create a monopoly as to oil and gas production in the area in favor of Richfield and Union Pacific; (5) whether oil and gas is being drained from parcels one, two and three by Richfield; (6) whether the ordinance affords the plaintiffs an adequate substitute for the right denied them by said ordinance to drill offset wells on parcels one, two and three; (7) whether the ordinance is unconstitutional and void as being: (a) a denial to plaintiffs of due process; (b) a denial to plaintiffs of equal protection; (c) a taking of private property for public use without compensation; (d) a conferring of special privilege and immunity on Union Pacific and Richfield with respect to oil and gas underlying the area, while depriving the plaintiffs of their privileges with respect thereto.

The trial court, pursuant to a request and stipulation, viewed the area and made observations in all parts thereof. As heretofore indicated, judgment was in favor of the defendants.

The appellants rely mainly upon the language in the cases of Bernstein v. Bush, 1947, 29 Cal.2d 773, 177 P.2d 913; Hunter v. Justice's Court, 1950, 36 Cal.2d 315, 223 P.2d 465; Bernstein v. Smutz, 1947, 83 Cal. App.2d 108, 188 P.2d 48; Sindell v. Smutz, 1950, 100 Cal.App.2d 10, 222 P.2d 903; Braly v. Board of Fire Commissioners, 1958, 157 Cal.App.2d 608, 321 P.2d 504; Beverly Oil Co. v. City of Los Angeles, 1953, 40 Cal.2d 552, 254 P.2d 865. We have read each of the cases so cited, and we believe that a thorough analysis of these cases will support the position of the respondents, and not that of the appellants.

The trial court, in this matter, prepared and filed a comprehensive memorandum of decision which, in our opinion, disposed of the appellants' contentions. The memorandum sets forth in part the following:

"(1) The allegation that the residential area constitutes an 'island' probably was provoked by language in Wilkins v. City of San Bernadino, 29 Cal.2d 332, 340 [175 P.2d 542], wherein the court classified zonings which have been held invalid, but the classification of an island used therein is not the situation herein, the language used was, '4. Where a small parcel is restricted and given less rights than the surrounding property, as where *a lot* in the center of a business or commercial district is limited to use for residential purposes, thereby creating an "island" in the middle of a larger area devoted to other uses.' There is a substantial difference between the islands of which the court was speaking and the residential district herein, which is sixteen blocks long and over two double blocks wide and wherein over 960 families reside. Such a district is not within the island zoning cases. The district may be said to be an island only in the sense that nearly every residential zone has commercial or industrial zones on all sides at a greater or lesser distance.

"(2) The allegation that the residentially zoned property herein 'is so hedged in by industry that it does not have truly residential characteristics' is directly contrary to the fact as disclosed by the viewing. After examining the maps and photographs received, the court was surprised to find on the viewing that the district possessed residential characteristics to the degree it does. It is a district of well-kept medium value homes. It compares favorably with the scores of residential districts in the city of Los Angeles. Maintenance of homes and grounds is more uniform than of comparable value homes in many districts. Except while on Atlantic Boulevard, Strong Avenue or in the vicinity of Washington Boulevard, business and industrial uses are strikingly not visible, due to the level terrain. Even while travelling along Astor Avenue it was difficult to make out the railroad property which lies beyond the rear yards of the homes on the northerly side of the street. The derrick shown in several of the photographs * * * apparently has been removed, although a temporary rig was near the same location.

"(3) Plaintiffs introduced no evidence in support of the allegation that drilling and operation of oil and gas wells could be carried on upon the three parcels and at most other points without any material detriment to any of the surrounding properties, residents or landowners. The viewing did not support this allegation, unless the statement could be made as to all residential districts, wherever situated.

"(4) No evidence was presented in support of the allegation that the operation of the railroads and industries cause greater detriment than would be caused by drilling and operating oil wells. * * * As to industrial plants on the south and southeastern boundaries, no noises were noted except those of an occasional truck entering or leaving a plant.

"(5) While it is generally true that more revenue is produced from the exploitation of oil than from the use of land for residences, plaintiffs introduced no evidence of the value of any surface rights and the court cannot make appraisals by taking judicial notice of the value of improved lots.

"(6) Implications which might be drawn from the allegation that the county 'has established zoning for parcels 1, 2 and 3 and for the area surrounding them which permits the owner of the railroad yards to drain oil and gas' from beneath the three parcels while preventing offset drilling are not accurate. The legislative history and other stipulated facts show that the present zoning preceded by some years the first drilling for oil in the field.

"The situation is quite different from that in Bernstein v. Smutz, 83 Cal.App.2d 108 [188 P.2d 48], wherein it was held that the general demurrer should have been overruled and which involved an ordinance limiting wells to one per block, passed as an emergency measure while that plaintiff had an application pending for permission to drill a second well on his land, or the situation in Sindell v. Smutz, 100 Cal.App.2d 10 [222 P.2d 903], wherein the sequel ordinance limiting wells in a small area, 'less than one percent of the total area of Wilmington City which is devoted to the production of oil,' to two wells per block ("The facts alleged in the Bernstein case differ from those in the case at bar only in this: In Bernstein, the ordinance limited drilling to one well in a block in a small part of the field; in the present case, the ordinance limits drilling to two wells in a block in the same small part of the field," [100 Cal.App.2d at page 19, 222 P.2d 903]). Likewise in Pacific Palisades Association v. City of Huntington Beach, 196 Cal. 211 [237 P. 538, 40 A.L.R. 782] (a decision on a demurrer) the residential zoning was applied to that plaintiff's thirteen acres as an emergency measure after a lease to drill.

"The ordinance at bar also differs from the three ordinances involved in the foregoing cases in that it contains provisions for the granting of exceptions or variances termed special use permits.

"In the last analysis, the present case presents the question whether a county or municipality may prevent drilling for oil and gas in a residential zone. The question is categorically so stated because the character of the area restricted to residential usage is truly and exclusively residential when viewed by an objective viewer.

"Plaintiffs have cited no case holding that oil drilling cannot be prohibited in a residential zone and certain of their cited cases stated that it can be. The court's own research has disclosed no case invalidating such zoning.

"Plaintiffs have cited Pacific Palisades Association v. City of Huntington Beach, supra; as previously noted, it was at the demurrer level and involved an ordinance passed as an emergency measure after a lease to drill on plaintiff's thirteen acres. The court stated, '* * * the complaint * * * presents a case in which a property owner is prohibited by the municipality from installing machinery and operating an oil well on its property, *while in other districts of the city, more thickly populated and densely settled, and devoted to residence purposes*, the conduct of like operations is permitted. (Citations.) For these reasons, appellant should be accorded the opportunity to establish, if it can, the unreasonableness and discriminatory character of the ordinance * * *. The outcome of the controversy will, of course, depend upon the findings of the trial court when the issues have been finally submitted and determined.' (Italics added.) Earlier the court had stated, 'The City of Huntington Beach has the unquestioned right to regulate the business of operating oil wells within its city limits, and to prohibit their operation within delineated areas and districts, if reason appears for so doing. (Ex parte Hadacheck, 165 Cal. 416 [132 P. 584, L.R.A.1916B, 1248, affirmed 239 U.S. 394, 36 S.Ct. 143, 60 L.Ed. 348].) * * * Every intendment is to be made in favor of the lawful exercise of municipal power making such regulations, and it is not the province of courts, except in clear cases, to interfere with the exercise of that authority.'

"Bernstein v. Smutz, supra, was also at the demurrer level. The complaint disclosed that a well had been drilled in the block, an application to drill a second well was pending, and the city enacted as an emergency measure an ordinance, applicable to less than one per cent of the oil field, which limited wells to one per block notwithstanding that nearly all of the 140 blocks in the area had two or more wells. As the court said, 'Whether only one well to a block in the area in question is reasonable is not something of which the courts may take judicial notice. The only way in which the validity of the ordinance can be determined is by a trial of the issues of fact tendered by the petition.'

"Sindell v. Smutz, 100 Cal.App.2d 10 [222 P.2d 903], cited by plaintiffs, was a decision after a trial. Therein, an ordinance was held unreasonable which prohibited more than two wells in a block (known as District 19) which already had two producing wells, a filling station, restaurant and garage, was 'largely unimproved', and more than half of which was commercially zoned. 'Immediately to the south across Highway 101 wells are producing on the basis of several wells to one block * * *. Immediately to the east, in District 36, wells are permitted on the basis of one well to an acre, and in two other blocks on the basis of more than two wells to the block. There is no difference in the character of District 36 and the two other blocks and that of District 19.' The foregoing will suffice to point up the difference between the facts therein and herein. In the present case (1) there are not two wells, but none on the properties; (2) there are no wells on any other properties across the various streets on which the properties of plaintiffs abut; (3) the physical condition of the railroad yards in which the wells are located is not comparable to the residentially improved property of plaintiffs and the surrounding residential properties; and (4) there is a vast difference, in the realm of reasonableness, between an ordinance which seeks to prevent a third well in a block and one which prevents the invasion of the first.

"Plaintiffs have cited Bernstein v. Bush, 29 Cal.2d 773 [177 P.2d 913], which held the original state requirements as to spacing of wells to be invalid as to the plaintiff therein. The court stated [29 Cal.2d at] page 775 [177 P.2d at page 914]: 'It is alleged that due to the leasing by General Petroleum Corporation of California of strategic acre parcels, certain single lots of less than one acre owned by the petitioners * * * have been isolated and cut off from participation in the leases and the royalties * * *.' It should be noted that the court distinguished zoning regulations and spoke approvingly of residential zoning restrictions which prohibited drilling, saying at page 775 [777 of 29 Cal.2d, at page 916 of 177 P.2d], 'Instances where that was the necessary result of the legislation [damnum absque injuria] are numerous. *Zoning regulations are familiar examples. As applied to oil well operations an absolute and all-inclusive prohibition against the drilling for oil and gas in a specified district zoned as residential was deemed reasonable and constitutional.* (Cromwell-Franklin Oil Co. v. Oklahoma City [D.C.], 14 F.Supp. 370.) A statute which forbids the drilling of a well within 100 feet of a railroad right of way was upheld as a constitutional exercise of the police power. (Winkler v. Anderson, 104 Kan. 1 [177 P. 521, 3 A.L.R. 268].) The present legislation, however, is not in that category.' (Italics added.)

"Plaintiffs cited Beverly Oil Co. v. City of Los Angeles, 40 Cal.2d 552 [254 P.2d 865]. This case involved an ordinance which prohibited the plaintiff from drilling any new wells on its property (this phase, it might be argued, might cast some doubt on the Bernstein v. Smutz and Sindell v. Smutz decisions) or redrilling any existing wells to greater depths. The court held [40 Cal.2d at] page 557 [254 P.2d at page 867] 'The plaintiff has argued in the present case that the ordinance is invalid because it takes away or impairs his vested right to reach any and all oil underlying his property. However, the very essence of the police power as differentiated from the power of eminent domain is that the deprivation of individual rights and property cannot prevent its operation, once it is shown that its exercise is proper and that the method of its exercise is reasonably within the meaning of due process of law.' [40 Cal.2d at page 558, 254 P.2d at page 868.] 'And it is recognized that oil production is a business which must operate, if at all, where the resources are found. Nevertheless city zoning ordinances prohibiting the production of oil in designated areas have been held valid.'

"The court quoted the same language from Pacific Palisades Association quoted earlier herein and then continued, 'In Marblehead Land Co. v. City of Los Angeles [9 Cir.], 47 F.2d 528 (cert[iorari] denied, 284 U.S. 634 [52 S.Ct. 18, 76 L.Ed. 540]), the Circuit Court of Appeals affirmed a judgment of the district court denying an injunction against the enforcement of the Los Angeles zoning ordinance in its prohibition of oil well drilling operations in an area zoned for other uses. The argument raised the question of the right of the property owner to extract natural resources. The court stated (at page 532): '* * * there can be no question of the inherent right of the city to control or prohibit such production, provided it is done reasonably and not arbitrarily. In that event the loss must fall on the owner whether it prevents him from erecting structures or establishing industries which he desires to erect or establish, or whether it prevents him from developing potentialities of his land.' The court decided that the particular ordinance was not arbitrary or unreasonable, even though the city council had once amended the ordinance to permit oil drilling operations and had then repealed the amendment, while in the meantime the land had been leased for oil drilling purposes and a considerable sum of money had been spent in preliminary work.

"'*It must be deemed to be well settled that the enactment of an ordinance which limits the owner's property interest in oil bearing lands located within the city is not of itself an unreasonable means of accomplishing a legitimate objective* within the police power of the city.' (Italics added.)

"In the case at bar plaintiffs have not shown facts comparable to those prima facie or held to be unreasonable in the cases cited. Each of the cited cases recognizes the power of the government to restrict an area to residential use and prohibit drilling for oil. If plaintiffs are entitled to invalidate the zoning herein, then no restriction against drilling is valid if it can be shown that oil and gas underlie the area.

"There is no difference between an ordinance which prohibits A, the owner of the surface in a residential zone from reducing to possession oil which cannot be reached by any other person and an ordinance which prohibits A, the owner of the surface in a residential zone from reducing to possession oil which can be reached by B through slant drilling from outside the residential zone. Plaintiffs are in no worse situation than the owners of residentially zoned property in Long Beach or parts of Los Angeles over admitted oil pools who cannot drill either. They may have better opportunities since they did give evidence that the Richfield Oil Company had approached them 'many times' to sign royalty contracts, but that fact does not influence the decision herein.

"The mere fact that the property north of the residential zone has long been zoned for industrial uses, in which zone anywhere in the county, drilling is permitted, does not invalidate the residential zoning. As was said in Reynolds v. Barrett, 12 Cal.2d 244 [83 P.2d 29], 'The line between business and residential property must be drawn somewhere. The mere fact that business property is located across the street or even adjoining the residential property involved does not determine that the ordinance is invalid or discriminatory. (Smith v. Collison, 119 Cal.App. 180 [6 P.2d 277]; Feraut v. [City of] Sacramento, 204 Cal. 687 [269 P. 537].) * * * Damage to petitioner's property by reason of being in a residential zone adjoining business property in no way affects the validity of the ordinance. Damage caused by the proper exercise of the police power is merely one of the prices an individual must pay as a member of society.'

"At several points in the complaint and their points and authorities plaintiffs use the unpopular connotated word 'monopoly' and allege that restricting their properties to residential use creates a monopoly. The term also is used in some of the cases cited. The unpleasant connotations must not be permitted to mislead. It might be asserted by the owner on the south side of a street that limiting that side to residential usage while the north side is zoned for commercial uses creates a monopoly in the hands of the owners on the north side, but the appellation is not sufficient to invalidate the residential zoning. The boundary line must be located somewhere and there will always be property just over the line. Further, before there could be said to be a monopoly created herein, there must be a similarity of properties and there is no similarity between the railroad yard herein and plaintiffs' parcels 1, 2 or 3.

"7. It is not apparent why it was alleged that the comprehensive zoning ordinance of the county did not require a special use permit to drill in an M–2 zone, was amended January 27, 1956, to require such a permit, shortly thereafter on May 20, 1956, was amended to remove the requirement; Richfield Oil Company drilled three of its wells in the railroad yard during that period without obtaining permits, but the county did not take steps to prosecute or enjoin it. Such matters are surplusage, for the failure to prosecute for a violation committed in the railroad yard does not render the residential zoning on plaintiffs' properties unreasonabe or arbitrary. There is no bearing thereon at all.

"8. It is alleged and stipuated that the county granted a special use permit to the General Petroleum Corporation in 1947 to drill a well on a lot in the southeasterly end of the residence zone across from a manufacturing zone. The complaint prays for a judgment that drilling be permitted on plaintiffs' properties upon the same terms and conditions prescribed by the county as to that well. Neither the complaint nor the evidence ever disclosed any of said terms or conditions, nor the subsequent history of the well. Whatever the conditions of the area may have been eleven years ago, the view by the court failed to disclose any evidence of a well in the triangle in which it is spotted in the exhibits. There are homes located there now and the court's efforts (short of trespass) disclosed no vestige of the well. However, the granting eleven years ago of one exception as to the usage of a lot does not render the continuance of residential zoning on some four hundred other lots unreasonable or arbitrary. What the condition of surrounding properties was eleven years ago is not before the court, but it is worthy of note that the lot is in a small triangle with streets on each side, whereas each of the parcels owned by plaintiffs is part of a large block or blocks completely improved with the homes of others.

"9. Plaintiffs allege that the county 'further discriminated' against them by permitting the location of some tanks, separators and other equipment in the railroad yard adjacent to an R–2 zone when these things could have been located elsewhere in said yards. This equipment is close to parcel 1 but not to parcels 2 or 3, but the fact that it might have located elsewhere (although there is no evidence thereon) has no bearing on the reasonableness of the continuance of residential zoning of plaintiffs' properties. It does not follow that the county's action was a discrimination and this action does not involve a review of the administrative action in granting that permit.

"10. It is alleged that the Richfield Oil Company has combined some of its wells into one development unit and others into another. It was stipulated that as to production 'in the Union Pacific yards' (wells bottomed thereunder?) the shares are seven-twelfths to the railroad and five-twelfths to the oil company; that 'in Southside Unit A' the shares are, Union Pacific 41.35675%, Richfield 40.18942%. The remaining 18.45383% was not explained. It was stipulated that 'in Southside Unit 3' the shares were Union Pacific 41.51031%, Richfield 39.86981%. This leaves 18.61988% unexplained. It was pointed out in the argument that Richfield would get a larger share of the production in the yard than in Unit B (1.79684%) but neither the grouping in units nor the small percentage variation has any bearing upon the issue of validity of the county ordinance.

* * * * * *

"The declaration will be that the zoning ordinance is valid, does not violate any of the provisions of the Constitution or the constitution of California, is reasonable, not arbitrary, nondiscriminatory, and plaintiffs are not entitled to an injunction or any relief beyond the declaration."

Appellants' contention, reduced to the simplest of terms, is that if there is oil under their property, and it is being drained, that then they, as owners, must be permitted to drill irrespective of any zoning ordinance provision—or, that if oil underneath the plaintiffs' property cannot be captured from other locations, then the county need not permit any capture at all; but, that if the recovery of oil starts from off-site wells located within an M–2 zone, then the zoning regulations may not prohibit oil drilling on the property overlying the oil pool, even though such property be zoned R–1 for residential purposes exclusively. If this theory be adopted then any zoning ordinance which prohibits the drilling of oil wells will be invalidated upon a showing that there is drainage from under, and a refusal to permit the drilling for oil in the prohibited area. We do not believe such to be the law in California.

[1] There is no question that the county has the right to regulate the drilling and operation of oil wells within its limits and to prohibit their drilling and operation within particular districts if reasonably necessary for the protection of the public health, safety and general welfare. See, Marblehead Land Co. v. City of Los Angeles, 9 Cir., 1931, 47 F.2d 528; Pacific Palisades Ass'n v. City of Huntington Beach, 1925, 196 Cal. 211, 237 P. 538, 40 A.L.R. 782; Wood v. City Planning Commission, 1955, 130 Cal.App.2d 356, 279 P.2d 95; Beverly Oil Company v. City of Los Angeles, 1953, supra, 40 Cal.2d 552, 254 P.2d 865.

[2] The mere fact that the residential area in this case is adjacent to a district which does permit oil well drilling, does not, in and of itself, constitute the ordinance a denial of equal protection of the laws, or not uniform in operation. See, Zahn v. Board of Public Works, 195 Cal. 497, 234 P. 388; Feraut v. City of Sacramento, 204 Cal. 687, 269 P. 537.

[3] The zoning ordinance is not confiscatory, arbitrary, oppressive, unreasonable or void as to the appellants. The mere fact, if it is a fact, that they suffer some money detriment, does not require that the ordinance be declared to be invalid. See, McCarthy v. City of Manhattan Beach, 41 Cal.2d 879, 264 P.2d 932; City of Los Angeles v. Gage, 127 Cal.App.2d 442, 274 P.2d 34; also see, Ulmer Park Realty Co. v. City of New York, 297 N.Y. 788, 77 N.E.2d 797; Gignoux v. Village of Kings Point, 199 Misc. 485, 99 N.Y.S.2d 280.

[4] As to the drainage of oil from under the property of the appellants, we do not think that drainage is the controlling factor in zoning ordinances. The cases cited by appellants are not cases involving drainage in a residential zone, and appellants' main case, Bernstein v. Bush, supra, specifically recognizes the non-applicability of such a ruling to a residential area.

[5] Appellants further contend that the court committed reversible error in admitting testimony that Richfield had offered leases to the appellants, or in refusing to admit evidence that Richfield coerced the appellants. Suffice it to say that the trial court stated in its memorandum of decision that such evidence was not controlling with him. Even if Richfield had attempted to coerce the appellants, how could that affect the validity or the constitutionality of the

ordinances? The appellants and Richfield can each drill in an M–2 zone and neither can drill in an R–1 zone.

Admittedly the appellants neglected to ask for an exception or variance as to parcel three, thus they have made no pretense of exhausting their administrative remedies before seeking any judicial relief as to that particular parcel.

Judgment is affirmed.

WHITE, P. J., and LILLIE, J., concur.

Hearing denied; SCHAUER, J., dissenting. WHITE, J., not participating.

172 Cal.App.2d 392

In the Matter of the ESTATE of Leo BRISACHER, Deceased.

William BRISACHER, Contestor and Appellant,

v.

Ethel BRISACHER, Petitioner and Respondent,

Ben F. White, Special Administrator.

Civ. 5986.

District Court of Appeal, Fourth District, California.

July 28, 1959.

Proceeding on petition by widow for a family allowance. From orders of the Superior Court, Riverside County, Hilton H. McCabe, J., granting the petition, the contestor appealed. The District Court of Appeal, Mussell, Acting P. J., held that where husband and wife executed antenuptial agreement providing that either of them could by will dispose of his or her entire separate property to such persons and in such manner as they might choose and that survivor should not have a claim against the estate of the other unless such devise or bequest was left by decedent to wife, as surviving widow, waived any claim for a family allowance against survivor husband's estate and was entitled to an allowance only to extent of any community property being administered.

Affirmed as modified.

1. Executors and Administrators 🔑173

Family allowances are strongly favored in the law.

2. Executors and Administrators 🔑185

A wife may waive her right to a family allowance by an agreement to that effect, but in order to waive a family allowance, intention to waive the right must be clear and explicit, and any uncertainty in the language of the agreement will be resolved in favor of the right.

3. Executors and Administrators 🔑185

Where husband and wife executed antenuptial agreement providing that either of them could by will dispose of his or her entire separate property to such persons and in such manner as they might choose and that survivor should not have a claim against estate of other unless such devise or bequest was left by decedent to survivor, wife, as surviving widow, waived any claim for a family allowance against husband's estate and was entitled to an allowance only to extent of any community property being administered.

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Irmas & Rutter and Elizabeth M. Horowitz, Beverly Hills, for appellant.

Thompson & Colegate and F. Gillar Boyd, Jr., Palm Springs, for respondent.

MUSSELL, Acting Presiding Justice.

Ethel Brisacher, petitioner herein, is the widow of Leo Brisacher, who died on March 17, 1958. On April 7, 1958, petitioner filed in the Superior Court of Riverside county a petition for a family allowance. Opposition to the petition was filed by William Brisacher, son of the decedent, in which he alleged that the petitioner and the decedent entered into an antenuptial agreement, dated April 14, 1947, in which it was stated that

> "It is understood that either of us may by will either heretofore or hereafter made, dispose of our entire separate property to such persons and in such manner as we may choose, and that the survivor of us shall not have a claim against the estate of the other unless some devise or bequest is left by the decedent to the survivor."

It was further alleged that said agreement was in full force and effect, and the prayer was that the petition for family allowance be denied.

On June 12, 1958, the trial court entered the following order:

> "Proceedings: (1) Court finds as a matter of law that even though in full force and effect the antenuptial agreement would not preclude the widow from receiving a family allowance. Petition for family allowance is hereby granted to the extent of $350.00 per month."

On June 30, 1958, there was filed by Ethel Brisacher a supplemental petition for family allowance, reciting, among other matters, that on June 16, 1955, the decedent created a trust to take effect upon his death, and under its terms petitioner was to be paid $500 per month for life thereafter; that when petitioner filed her first petition for family allowance she had not received any income from said trust; that on June 19, 1958, she received three monthly payments thereon and was advised that she would receive the monthly payments thereafter; that she therefore requested the court to reduce the family allowance to $250 per month. The court granted this petition and thereafter the contestor, William Brisacher, appealed from the order as amended.

There is no reporter's transcript of the proceedings in which the Superior Court made the allowance and the appeal is presented on the clerk's transcript, plus a stipulation that the antenuptial agreement involved is as set forth in appellant's opening brief and may be considered by the court in lieu of the original. The agreement is as follows:

> "April 14, 1947.
>
> "Dear Leo,
>
> "We have certain mutual problems in view of the fact we intend to be married concerning our respective properties and assets. It is understood that we both have certain assets which we have heretofore received and which are at present our own separate property. It is our purpose that our said property shall remain our separate property, and it is our purpose to also agree with respect to the distribution and division thereof in the event of death or in the event of other unforeseen difficulty or disagreement. We have therefore agreed as follows:
>
> "(1) It is specifically understood that we shall each retain as our own separate property at all times all property and assets which we have heretofore acquired.
>
> "(2) It is understood that either of us may by will either heretofore or hereafter made, dispose of our entire separate property to such persons and in such manner as we may choose, and that the survivor of us shall not have a claim against the estate of the other unless some devise or bequest is left by the decedent to the survivor.
>
> "(3) In the event unfortunate circumstances shall arise by reason of which we shall become separated or divorced it is specifically understood that under such circumstances we shall each retain as our own separate property any and all assets herein described as separate property, and that neither of us shall have or hold a claim against the other with respect to finance or for support or otherwise.
>
> "(4) If any part or portion of this memorandum shall be held invalid or unenforceable, such invalidity shall not affect the remaining provisions hereof. It is our intention to, in this informal manner, finally settle and determine all matters herein referred to.

> "If the foregoing meets with your understanding, please indicate your acceptance and agreement to each of the provisions above stated by signing in the space hereinbelow provided, it being understood that this Agreement shall continue to apply during and through our respective lifetimes.
>
> "(Signed) Ethel Earhart.
>
> "I do hereby agree to and accept the foregoing conditions.
>
> "(Signed) Leo Brisacher."

The principal question presented on this appeal is whether the antenuptial agreement by its terms precludes the granting of a family allowance to the widow, Ethel Brisacher.

[1, 2] Family allowances are strongly favored in the law (In re Estate of Jacobs, 61 Cal.App.2d 152, 155, 142 P.2d 454) and it is also well established that an applicant may have waived her right to an allowance by an agreement to that effect (In re Estate of Brooks, 28 Cal.2d 748, 750, 171 P.2d 724). In order to bar a family allowance the intention to waive the right must be clear and explicit, and any uncertainty in the language of the agreement will be resolved in favor of the right. In re Estate of Bidigare, 215 Cal. 28, 30, 8 P.2d 122.

In re Estate of Yoell, 164 Cal. 540, 129 P. 999, 1003, the widow petitioned for a family allowance and as a ground of opposition thereto the special administratrix set up a postnuptial agreement between the decedent and his wife wherein the parties agreed to a division of their community property; that the execution of the agreement and the delivery of the various instruments involved was intended to be a full, complete and final adjustment of all the property rights of the parties thereto and that neither party thereto would at any time thereafter make or attempt to make any other or further claim than as therein stipulated. The agreement further provided:

> "It is further expressly covenanted and agreed that neither party will * * * interfere with the other, their heirs or assigns, in the exercise of the rights of property herein stipulated and agreed to; and that neither of them will, at any time hereafter, assert any right, interest or title as heirs at law of the other, to any property devised or bequeathed by such will or as against the estate of the other, should the other die intestate, and all claim as such heir, or as surviving husband and wife respectively, and all right to contest or oppose the last will of the other is hereby expressly waived."

The court there held that

> "Upon the death of the husband the surviving wife may receive a family allowance when and only when she is a member of the family, and receiving or entitled to receive support as such member, and when, even though a member of the family, she has not parted with or relinquished her right to make demand for such allowance. (a) To establish such relinquishment of right, no more apt words could be chosen than those deliberately employed in the agreement under consideration. True, it does not in terms and by name relinquish the right to a family allowance, but it does more than this. The wife covenants that she has renounced and waived all claim which she has or may have as *heir* of the husband or as his *surviving wife*. It is only as heir and surviving wife that she could make her demand for a family allowance, a demand which she has solemnly renounced."

While this case was decided in 1913, it has been cited many times in subsequent decisions dealing with the question of waiver of family allowances and apparently, it has not been overruled.

In re Estate of Schwartz, 79 Cal.App.2d 308, 310, 179 P.2d 868, 869, the antenuptial agreement involved provided as follows:

> "And whereas, the parties hereto desire to make a fair and reasonable provision for party of the second part, in lieu of the rights, which after the consummation of said marriage, said party of the second part might or could have, as wife, or widow, or otherwise in said real and personal property which said party of the first part now has, or may hereafter own;
>
> "Now therefore, it is hereby mutually agreed as follows: (1) That said party of the second part shall receive and accept from the estate of party of the first part, after his death, if she shall survive such party of the first part as his widow, the sum of Five Thousand ($5,000.00) Dollars in place and instead of all rights, which, as widow of party of the first part, she might otherwise have, either as a homestead community interest or otherwise or as a distributive share of the estate, by operation of law, under present or future laws of the State, to be enacted, or in force and effect now or hereafter; * * *"

The court there said:

> "Viewed in the light of the rules hereinbefore enunciated, we are presuaded that it must be held in the instant case that by the antenuptial agreement appellant intended to and did waive her right to a family allowance. The wording of the contract makes it clear that appellant and decedent intended to settle, for a consideration of $5,000 paid to the former, 'all rights, which, as widow of party of the first part, she might otherwise have.' The language of the court in Re Estate of Yoell, 164 Cal. 540, 550, 129 P. 999, 1003, which involved the question of whether a widow had waived her right to a family allowance, is cogently applicable to the cause now before us: 'To establish such relinquishment of right, no more apt words could be chosen than those deliberately employed in the agreement under consideration. True, it does not in terms and by name relinquish the right to a family allowance, but it does more than this. *The wife covenants that she has renounced and waived all claims which she has or may have as heir of the husband or as his surviving wife. It is only as heir and surviving wife that she could make her demand for a family allowance, a demand which she has solemnly renounced.*' (Emphasis added.) See, also, In re Estate of McCoy, 51 Cal.App.2d 483, 125 P.2d 71."

In re Estate of Wamack, 137 Cal.App.2d 112, 289 P.2d 871, 873, appellant, prior to his marriage to decedent, executed an antenuptial agreement with decedent providing that decedent should retain ownership of all her property with the "exclusive right to dispose of any and all property" she "now owns" or "may hereafter acquire or receive, as her own absolute and separate property without interference or claim" by Mr. Wamack, "and in like manner as if said marriage had not taken place". The court held, 137 Cal.App.2d at page 115, 289 P.2d at page 874:

> "Neither is appellant entitled to a family allowance. Such income is specifically mentioned in the agreement, and is clearly comprehended among the benefits to be anticipated by a prospective husband. By reserving the 'Exclusive right' to dispose of all her property and income, decedent could have meant nothing other than that she was keeping all she had for herself and would bequeath it to anyone she might choose. Having by contract renounced all interest in and right to decedent's property, appellant has no basis for demanding a family allowance. In re Estate of Yoell, 164 Cal. 540, 550, 129 P. 999. In re Estate of Schwartz, 79 Cal.App.2d 308, 179 P.2d 868, where each contracting party had waived all claims to inherit, it was held that the right to a family allowance had been waived."

In re Estate of McCoy, 51 Cal.App.2d 483, 125 P.2d 71, a property settlement agreement entered into by the parties provided in part that

> " 'Each party to this agreement in consideration of the covenants and considerations above set forth hereby expressly waives his or her right to administer the property or estate of the other party in the event of his or her death; each party hereby waives any claim to inherit any share or portion of the estate of the other, by heirship, descent, succession or otherwise, unless by the will of the decedent. * * *
>
> " '* * * each party specifically discharges the other from all liability for maintenance as husband or wife, or otherwise, in consideration of the covenants and transfers of property herein set forth, each party hereby waives and releases the other from all claim, other than as herein stated, to alimony, support money, * * *
>
> " 'The parties agree * * * that this instrument constitutes a full and complete settlement between the parties of all of their property rights, and of all claims of either party arising out of the marital relation of the parties.' "

After discussing the holdings in Re Estate of Bidigare, 215 Cal. 28, 8 P.2d 122; In re Estate of Yoell, 164 Cal. 540, 129 P. 999, and In re Estate of Shapero, 39 Cal.App.2d 144, 102 P.2d 569, the court said:

> "Applying the rules hereinbefore set forth to the particular contract involved in the instant case, we believe it must be held that appellant, in and by said agreement, intended to and did waive her right to a family allowance. The language used in the contract under consideration is far more inclusive than the language used in any of the cases in which it was held that the right to a family allowance was not waived. It is clear from the agreement that appellant and deceased intended to settle all present and future rights as against each other and against their respective estates. Each party in said agreement waived all right to administer the estate of the other and all claim to inherit any part of the estate of the other; and each party discharged the other from all liability for maintenance of the other; and, finally, both parties agreed that said agreement 'constitutes a full and complete settlement between the parties of all of their property rights, and *of all claims of either party arising out of the marital relation of the parties.*' (Italics ours.)
>
> "We conclude, therefore, that taking the agreement as a whole, and applying to it the elementary rules of construction, appellant in and by said agreement waived her right to a family allowance and that the trial court did not err in denying her petition therefor."

In re Estate of Howe, 81 Cal.App.2d 95, 183 P.2d 329, it was stated in the prenuptial agreement:

> " 'That neither party shall at any time claim any interest in the separate property of the other, except that in the event of the death of either party hereto, the survivor shall be entitled to any devises or bequests, if any, in favor of such survivor made in the Last Will and Testament of the said deceased party. And this agreement shall in no wise be construed as a waiver of the right of either party hereto in or to any provision in favor of the survivor as to any devise or bequest made in such Will of such deceased one in favor of the other.' "

The court held as follows:

> "The agreement declares that neither party should at *'any time'* claim 'any interest' in the separate property of the other. It would be difficult, if indeed possible, to select simpler and more comprehensive words. They require no amplification; any time includes all time and any interest includes every interest. There is no need to be specific for the law never has demanded

> emphasis. The respondent's efforts to obtain the homestead therefore asserts a 'claim' clearly foreclosed by the terms of the agreement. And the agreement being valid in every respect it must be upheld. See In re Estate of Yoell, 164 Cal. 540, 550, 129 P. 999; In re Estate of Schwartz, 79 Cal.App.2d 308, 179 P. 2d 868.
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> "With regard to the widow's allowance the record on appeal is silent as to whether there was community property from which it could be paid. The parties were married about thirteen years before the husband died and it therefore must be assumed that there was evidence to support the court's order to this extent."

[3] In the instant case, in the absence of a record showing the circumstances under which the agreement involved was made, our interpretation of it is confined to the document itself. It appears therefrom that the purpose was to provide that each party would retain his or her separate property and to agree with respect to the distribution and division thereof in the event of death or in the event of unforeseen difficulty or disagreement. It was agreed that

> "(2) It is understood that either of us may by will either heretofore or hereafter made, dispose of our entire separate property to such persons and in such manner as we may choose, and that the survivor of us shall not have a claim against the estate of the other unless some devise or bequest is left by the decedent to the survivor."

In this quoted language Ethel Brisacher clearly states that she shall not have a claim as surviving widow against the estate of the decedent, thus waiving any claim for a family allowance from his estate.

In re Estate of Lufkin, 131 Cal. 291, 293, 63 P. 469, 470 the term "claim" is defined as follows:

> "The term 'claim,' in its usual and proper sense, is broad enough to include the statutory claim or right of the widow to an allowance from the estate of the testator, and, where a different intention is not manifested by the context, must be so construed. Code Civ. Proc., § 16." See also In re Estate of Walker, 169 Cal. 400, 403, 146 P. 868.

In the instant case the record before us is silent as to whether there was community property from which an order for a family allowance could be paid. Apparently the parties lived together as husband and wife for many years and it therefore must be assumed that there was evidence to support the trial court's order to this extent. See In re Estate of Howe, supra, 81 Cal.App.2d 95, 99, 183 P.2d 329.

The orders granting a family allowance are modified by adding to each of said orders the words "Said allowance is payable only to the extent of the community property being administered in said estate". As so modified the orders are affirmed.

SHEPARD, J., concurs.

* * *

172 Cal.App.2d 60

Lloyd RUSSELL, Petitioner,

v.

SUPERIOR COURT of the State of California IN AND FOR COUNTY OF ALAMEDA, Respondent.

Civ. 18780.

District Court of Appeal, First District, Division 2, California.

July 15, 1959.

Hearing Denied Sept. 11, 1959.

Proceeding by state prisoner against the Superior Court, Alameda County, for writ of mandate requiring court to return prisoner to the Municipal Court for further action with reference to criminal charge of loitering about a school, to which prisoner had pleaded guilty, and for writ of prohibition restraining the Superior Court from further proceedings under the sexual psychopathy provisions of the Welfare and Institutions Code. The District Court of Appeal, Draper, J., held that, where state hospital superintendent certified that petitioner had been treated to such an extent that he would not benefit by further care and treatment in the hospital and that the person was not a menace to health and safety of others, petitioner would have to be returned to Municipal Court for further action with reference to the criminal charge, and the Superior Court would not be entitled to proceed further under the sexual psychopathy provisions of the code, even though court-appointed psychiatrists believed petitioner still to be a menace.

Peremptory writs of mandate and prohibition issued.

Mental Health 🔑**448**

Where state hospital superintendent certified that petitioner, who had been placed at state hospital as an alleged sexual psychopath, would not benefit by further treatment and was not a menace to others, petitioner would have to be returned to Municipal Court for further action with reference to the original criminal charge of loitering about a school, and the Superior Court, which had committed the petitioner to the hospital, would not be entitled to proceed further under sexual psychopathy statute, even though court-appointed psychiatrists believed petitioner still to be a menace. West's Ann.Pen.Code, § 647a (2); West's Ann.Welfare & Inst.Code, §§ 5512, 5517, 5519.

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Edward J. Rice, Jr., Oakland, for petitioner.

J. F. Coakley, Dist. Atty., County of Alameda, R. Robert Hunter, Chief Asst., John C. Baldwin, Deputy Dist. Atty., Oakland, for respondent.

DRAPER, Justice.

This proceeding requires construction of code sections concerning sexual psychopaths. In October, 1956, petitioner pleaded guilty to loitering about a school where children attend, a misdemeanor (Pen.Code, § 647a(2)). The municipal court, finding probable cause to believe petitioner to be a sexual psychopath, certified him to the superior court. After proper proceedings, including placement in Atascadero State Hospital for observation, that court committed him for an indefinite period to the Department of Mental Hygiene for placement in a state institution (Welf. & Inst.Code, § 5512). In 1959, he was returned from California Men's Colony to Atascadero. On April 15, 1959, the superintendent of that hospital certified to the superior court that petitioner "has been treated to such an extent that he will not benefit by further care and treatment in the hospital and is not a menace to the health and safety of others." This certification specifies that it is made under Section 5517(b) of Welfare and Institutions Code, and is in the precise language of that subdivision. This certification was filed with the court April 30 and the court promptly ordered return of petitioner. On May 14, the court on its own motion "institute(d) proceedings for redetermination of the defendant's condition in regard to sex psychopathy," purporting to act under Section 5519, Welfare and Institutions Code. Psychiatrists were appointed to examine petitioner and a date set for hearing. Before hearing, petitioner applied to this court for writ of mandate requiring respondent court to return petitioner to the municipal court to await further action with reference to the criminal charge, and for writ of prohibition restraining respondent from further proceedings under the sexual psychopathy provisions of the code. Alternative writs were issued.

Section 5517 is mandatory when the opinion certified by the superintendent, in proceedings instituted under that section, is under subdivision (b). In such case, the committing court shall forthwith order return of the person to that court, "and shall thereafter cause the person to be returned to the court in which the criminal charge was tried to await further action with reference to such criminal charge." The next paragraph provides that "Such court shall resume the proceedings * * *". This language appears to leave no discretion in the committing court.

This view is strengthened by the construction given to almost identical language contained in Section 5512. "When such a report is made, the sexual psychopathy proceedings are at an end and the specific direction of the code is that the person is returned to the court in which he was convicted, * * * to await further action, not with reference to psychopathy, but with reference to the criminal charge of which he was convicted. The plain purport of the statute in this respect is that the court may not disregard the report of the superintendent * * * but must abide by the same, treat the psychopathy proceedings as at an end and proceed in the criminal case." People v. Bachman, 130 Cal.App.2d 445, 449–450, 279 P.2d 77, 80. This holding is fully applicable to the portion of Section 5517 before us.

Respondent relies upon People v. Thurmond, 154 Cal.App.2d 797, 316 P.2d 721. But that decision is not helpful here. It holds only that the provisions of Section 5517 which we have quoted do not govern a proceeding under Section 5519. Thurmond appealed only from orders entered under the latter section. The only Thurmond proceeding which could possibly have been under either Section 5517 or 5512 was had in 1952, and the decision emphasizes that no appeal was taken from the 1952 orders.

Respondent finds anomaly in the fact that a broad discretion is vested in the committing court in a proceeding under Section 5519, while no such discretion is allowed in a 5517 proceeding if the superintendent's opinion is under subdivision (a) or (b). But that question is one for the Legislature, which has resolved it by the clear language used in Section 5517. It is apparent that the Legislature anticipated situations where, as here, the hospital staff feels that no further treatment is warranted and the court believes that additional treatment under supervision of the Director of Mental Hygiene is indicated, and has chosen to give the hospital superintendent the right to terminate such care when he feels sure enough of the patient's improvement to certify that he is no longer a menace to the health and safety of others. Obviously, if such a conflict is not resolved, the defendant would be consigned to an interminable shuttle between hospital and courthouse, a process which would be expensive but hardly of therapeutic or penal value. The Legislature has avoided such a stalemate by authorizing conclusive determination by the superintendent in (a) and (b) situations, if he initiates proceedings under Section 5517. We appreciate that where two court-appointed psychiatrists believe defendant still to be a menace, the committing court is reluctant to accept the opinion of the superintendent. But the statute vests the power of final decision in him. It would defeat the legislative intent to permit the court to circumvent that determination by instituting proceedings under Section 5519 after the superintendent has commenced a 5517 proceeding.

It appears that much of the problem here arose from the fact that the 1959 report of the superintendent refers to the 1957 examination of defendant, says that he "was processed again" and "restaffed," and states that "The same diagnosis as before was made." Upon the assumption that "diagnosis" includes "opinion" and "recommendation," the trial court considered that the 1959 report is contradictory. However, the statute (§ 5517) requires the superintendent to certify his "opinion," and to include a "report, diagnosis and recommendation." This separate treatment of the several items of the certification appears also in other sections (§§ 5512, 5519). It seems clear that "diagnosis" is, for purposes of the sexual psychopathy statutes, distinct from "opinion" and "recommendation." Detailed review of the communication of the superintendent, somewhat hampered by its admixture of professional language and official jargon, shows it to state that defendant still suffers from the same condition originally diagnosed, but has ceased to be a menace. In any event, it is the "opinion" which is controlling under Section 5517.

Peremptory writs of mandate and prohibition ordered issued.

KAUFMAN, P. J., and DOOLING, J., concur.

172 Cal.App.2d 470

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Peter T. VELIS, Defendant and Appellant.

Cr. 6583.

District Court of Appeal, Second District, Division 2, California.

July 29, 1959.

Defendant was convicted of possession of heroin. The Superior Court of Los Angeles County, William E. Fox, J., entered judgment of conviction and an order denying motion for new trial, and defendant appealed. The District Court of Appeal, Fox, P. J., held that where police officer received information from confidential informant, whose help had resulted in previous narcotic arrests and convictions, that traffic in narcotics was being carried on by defendant at certain address, and informant took officer to such address and informed officer that it was customary method of operation for a customer of defendant to call to defendant or honk horn of automobile and then go down the street and wait for defendant, and that defendant would then come from his house, get order from customer, return to house, and then bring narcotics to customer to fill the order, and police officer thereafter observed automobile stop near defendant's house, heard the horn honk, saw automobile move down the street, saw defendant approach the automobile, talked to occupant of automobile, and then return to his house, arrest of defendant when he returned from his house was lawful without a warrant, and that as an incident to the arrest it was proper for officers to search premises where defendant reportedly kept his supply of narcotics, and from which he had just emerged, and seize evidence, which demonstrated that he was violating the narcotics law, and that heroin thus obtained was properly admissible in evidence.

Judgment and order affirmed.

1. Arrest 🔑63(4)

A valid arrest may be made solely by reason of information communicated by a reliable informant.

2. Arrest 🔑63(4)

Where police officer received information from confidential informant, whose help had resulted in previous narcotic arrests and convictions, that traffic in narcotics was being carried on by defendant at certain address, and informant took officer to such address and informed officer that it was customary method of operation for a customer of defendant to call to defendant or honk horn of automobile and then go down the street and wait for defendant, and that defendant would then come from his house, get order from customer, return to house, and then bring narcotics to customer to fill order, and police officer thereafter observed automobile stop near defendant's house, heard horn honk, saw automobile move down the street, saw defendant approach automobile, talked to occupant, and then return to house, arrest of defendant when he returned from house was lawful without a warrant.

3. Arrest 🔑71
Criminal Law 🔑394.4(9)

Where arrest of defendant, who was suspected of selling narcotics, was lawful without a warrant, it was proper for officers, as an incident to such arrest, to search premises where defendant reportedly kept his supply of narcotics, and from which defendant had just emerged, and to seize narcotics, which demonstrated that defendant was violating the narcotics law, and narcotics thus obtained were properly admissible in evidence in prosecution for possession of heroin. West's Ann.Health & Safety Code, § 11500.

4. Criminal Law ⚿656(1)

In prosecution for possession of heroin, trial court's remark that defendant had swallowed "some heroin," was a reasonable assumption by the trial court from evidence that defendant stated to police when he was arrested that he had swallowed "four caps," and that capsules found in defendant's home contained heroin. West's Ann.Health & Safety Code, § 11500.

See publication Words and Phrases, for other judicial constructions and definitions of "Cap".

5. Criminal Law ⚿1030(2)

On appeal by defendant from judgment of conviction for possession of heroin, defendant was not entitled to raise contention that his constitutional rights were violated because informant against defendant was not produced, where no such request had been made on behalf of defendant in the trial court. West's Ann.Health & Safety Code, § 11500.

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Peter T. Velis, in pro. per.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., Marvin L. Part, Deputy Atty. Gen., for respondent.

FOX, Presiding Justice.

Defendant was convicted of possession of heroin in violation of section 11500, Health and Safety Code. He appeals from the judgment and from the order denying his motion for a new trial.

Officer Virgin, of the Los Angeles Police Department, received information from a confidential informant, whose help had resulted in previous narcotic arrests and convictions, that traffic in narcotics was being carried on at 804 Bartlett Street. The informant took the officer to the address where defendant lived. He told the officer that the defendant was dealing in narcotics and that his operations were as follows: that persons would either drive or walk up to the house, either call to the defendant or honk a horn, and then go down the street and wait for him, and he would then come down from his house, walk to the car or to the person, take their order, and return to the house, and, when he returned, he would have the narcotics with him with which to fill the order.

On the evening of June 26, 1958, Officers Virgin and Cook went to this location shortly after dark and took a vantage point from which they observed a vehicle come to the house, honk the horn, and then move on down the street. Defendant thereupon approached this vehicle, talked to the passenger in the car, and returned to the house. When he went into the house, the officers took a position near the corner of the house. As defendant came out a few moments later he was placed under arrest, although he attempted to run. During a struggle that ensued he swallowed some object. The officers asked what he had swallowed. He stated that he had swallowed "four caps." He did not have any narcotics on his person. Upon being taken back into the house, the officers inquired "where the rest of it was hidden." He said it wasn't "hidden in the house but on the outside." Defendant then took the officers outside and indicated that it was hidden underneath a pile of rubbish. A search revealed nothing; defendant indicated he was just attempting to fool them. He was then returned to the house and again asked where the narcotics were. He took the officers to the bathroom and pointed out a small piece of tissue paper over the ledge of the door of the bathroom. It was found to contain one capsule of a whitish powder. Further search of the ledge revealed another such capsule. Upon searching the rear bedroom, the officers found a latex balloon which contained approximately 50 similar capsules. The officers then inquired whether that was all of his stock. He said "No," and then took them to a bedroom in the front portion of the house and said, "In a sock in the top drawer you'll find the rest of it." He pointed out a brown sock, from which the officers removed a latex bag containing 15 capsules. Examination by experts revealed that the whitish powder contained in these capsules was heroin.

When defendant was interrogated at the Police Building he told the officers that he "had been dealing only since he got out of the joint and just enough to supply his own habit; that he wasn't a big dealer."

In seeking a reversal defendant contends that (1) the evidence upon which he was convicted was obtained through an illegal search and seizure and therefore was inadmissible; (2) that the trial judge was guilty of prejudicial misconduct in that he was biased and prejudiced because of the nature of the charge against him; and (3) that he assumed a fact not in evidence.

[1] In People v. Montes, 146 Cal.App.2d 530, at page 532, 303 P.2d 1064, at page 1065, this court stated: "A valid arrest may be made solely by reason of information communicated by a reliable informant." In accord are People v. Penson, 148 Cal.App.2d 537, 539, 307 P.2d 24; Lorenzen v. Superior Court, 150 Cal.App.2d 506, 509, 310 P.2d 180. See also Willson v. Superior Court, 46 Cal.2d 291, 294, 294 P.2d 36; People v. Boyles, 45 Cal.2d 652, 656, 290 P.2d 535. This rule governs in the instant case.

[2, 3] The record shows that the officers had received information from a known source, which on former occasions had proved to be reliable. The informant not only gave the address where the defendant lived and from which he plied his trade, but actually pointed out the premises to the officer. He also explained in detail the defendant's technique of operation. When the officers observed the actions on the part of a motorist and the defendant to be identical with the mode of operations related by the informant, they had reasonable grounds to believe that defendant was in the process of taking and filling an order for narcotics. Defendant's arrest was therefore lawful. Cases supra. As an incident to such an arrest it was proper for the officers to search the premises where he reportedly kept his supply, and from which defendant had just emerged, and seize evidence which demonstrated that he was violating the narcotics law. See In re Dixon, 41 Cal.2d 756, 761–762, 264 P.2d 513. The heroin thus obtained was properly admissible in evidence. People v. Coleman, 134 Cal.App.2d 594, 598–599, 286 P.2d 582.

There is no foundation whatever in the record for defendant's assertion that the trial judge was biased and prejudiced against him because of the nature of the charge for which he was being tried.

[4] Defendant's contention that the court assumed a fact not in evidence is based on defendant's statement to the police when he was arrested, that he had swallowed "four caps," and the court's later remark that he swallowed "some heroin." Defendant argues that the record does not disclose the contents of the "four caps" and that the court's conclusion that it was heroin is pure conjecture. The comment of the trial judge was after the chemist had identified the contents of the capsules found in defendant's home as being heroin. The term "cap," of course, is simply an abbreviation for "capsule." In fact, this term was used by the arresting officer in referring to the first capsule of heroin found in defendant's premises.

In the light of defendant's attempt to avoid arrest and his desperate act in disposing of the "four caps" in his possession, and the testimony that the caps found on defendant's premises contained heroin, it was reasonable for the trial court to infer that the caps defendant swallowed were contraband. It is therefore apparent that there was ample justification for the trial judge's remark.

[5] In his reply brief, defendant argues that his constitutional rights were violated because the informant was not produced. The complete answer to this argument is that no such request was made on

behalf of defendant in the trial court. This point is specifically covered by Priestly v. Superior Court, 50 Cal.2d 812, 819, 330 P.2d 39, 43. The court stated: "A defendant cannot raise the problem of nondisclosure in the appellate courts when he did not seek disclosure at the trial or preliminary hearing or did not move to strike the testimony on a refusal to disclose [citations]."

Defendant had a fair trial and we find no basis whatever for reversing the conviction.

The judgment and order are affirmed.

HERNDON, J., concurs.

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172 Cal.App.2d 415

LEO J. MEYBERG COMPANY, Inc., a corporation, Plaintiff and Appellant,

v.

BOARD OF TRADE OF SAN FRANCISCO, a voluntary association; Walter J. Hempy, as trustee for the benefit of creditors of Burton & Rose, a co-partnership, Defendants and Respondents.

Civ. 18250.

District Court of Appeal, First District,
Division 2, California.
July 29, 1959.

Action against Board of Trade by one of its members, brought to recover for losses which plaintiff sustained when checks which it had accepted from firm which had been under supervision of board were not paid, brought on theory that board had breached duty to plaintiff in failing to notify plaintiff that it was terminating its supervision of the debtor's affairs. The Superior Court, City and County of San Francisco, Raymond J. Arata, J., rendered judgment for defendant and plaintiff appealed. The District Court of Appeal, O'Donnell, J. pro tem., held that complaint was insufficient to show any duty owed by board to creditors, like plaintiff, who became such after board undertook supervision of debtor's activities.

Affirmed.

1. Associations 🔑20(5)

In action against Board of Trade, by one of its members, complaint alleging that board was maintained to furnish its members with information and service in dealing with affairs of embarrassed or insolvent debtors, that board appointed committee to supervise affairs of one debtor, that it announced to members that it had appointed representative to countersign checks of such debtor, that in reliance on board's information, plaintiff had accepted its checks but after such checks were not paid, plaintiff learned that, without any previous notice, board had ceased to supervise debtor, was insufficient to allege any obligation by board to keep members at all times informed of financial condition of debtors or to show any breach of duty by board to plaintiff. West's Ann.Civ.Code, § 1549.

2. Associations 🔑20(5)

In action against Board of Trade, by one of its members, complaint alleging, inter alia, that board was maintained to furnish its members with information and service in dealing with embarrassed or insolvent debtors, that board appointed committee to supervise one debtor, that it announced to members that it had appointed representative to countersign checks of such debtor, that in reliance on board's information, plaintiff had accepted checks from such debtor but such checks were not paid, together with exhibits, revealed board's concern was with debts existing at time of first creditors' meeting so that even if board undertook to notify such creditors of termination of supervision, it did not undertake to notify subsequent creditors like plaintiff. West's Ann.Civ.Code, § 1549.

3. Estoppel ⚷107

In action against Board of Trade, by one of its members, complaint alleging that board was maintained to furnish its members with information and service in dealing with embarrassed or insolvent debtors, that board appointed committee to supervise one debtor, that it announced to members that it had appointed representative to countersign its checks, that in reliance thereon plaintiff had accepted checks and that when such checks were not paid, plaintiff learned that, without any previous notice, board had ceased to supervise debtor, as it failed to allege that board should reasonably have expected that a member would extend additional credit in reliance on asserted representation to notify creditors of termination of supervision, was insufficient to plead cause on ground of promissory estoppel.

4. Appeal and Error ⚷918(1)
Pleading ⚷236(1)

Where plaintiff had made several attempts to state cause of action but had failed to do so, reviewing court would presume that no further facts existed which could form basis for stating cause of action and it could not hold that trial court abused discretion in denying further leave to amend complaint.

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H. W. Glensor, San Francisco, for appellant.

Wallace, Garrison, Norton & Ray, San Francisco, James M. Conners, San Francisco, for respondent.

O'DONNELL, Justice pro tem.

This is an appeal by plaintiff from a judgment rendered in favor of defendant and respondent Board of Trade of San Francisco after respondent's general demurrer to plaintiff's second amended complaint was sustained without leave to amend.

The second amended complaint (hereinafter referred to as the complaint) alleges: That the respondent Board of Trade of San Francisco (hereinafter sometimes referred to as the board) is a voluntary association composed of some 376 mercantile dealers; that plaintiff is a member of the board; that the board is supported by monthly dues paid by its members; that the board is maintained "for the purpose of furnishing and which does furnish its members information and service when dealing with affairs of embarrassed or insolvent debtors and also serves said members in the collection of debts other than in the ordinary course of business. In the case of insolvent or financially embarrassed debtors, it operates, in practice, by forming Creditors Committees, taking assignments to trustees selected by said [board] and which trustees usually are officers of or connected with said [board], furnishing said committees with advice and guidance, with legal service in preparation of necessary legal papers, and conducting all details connected with said assignments and administration of the affairs of said insolvent or financially embarrassed debtors by its Secretary and Secretarial Staff under the management of said Creditors Committees"; that Burton & Rose, a partnership, was engaged in the mercantile business; that on or about February 28, 1955, Burton & Rose became unable to pay its debts as they matured; that on March 4, 1955, the board called a meeting of the creditors of Burton & Rose. Paragraph VIII of the complaint reads as follows: "That at said meeting, and under the supervision and control of said [board] and its officers, a committee was selected from the Creditors of said Burton & Rose to investigate and thereafter to conduct the affairs of said Burton & Rose, the control of its bank account and finances was taken over by said committee, and one member of said committee was appointed and designated to countersign any checks that in the future would be issued by said Burton & Rose." On March 7, 1955, the board issued and mailed to the creditors of Burton & Rose its Bulletin No. 1 which contained a report of the business transacted at the March 4th meeting and a request that the creditors refrain from pressing their claims. April 12, 1955, Bulletin No. 2 was issued, reading: "Weekly statements of receipts and disbursements have been furnished this office, copies of which have been transmitted to the members of the committee and all checks drawn by the debtor company have been and are being countersigned by a member of the committee." Bulletin No. 3, issued May 17, 1955, reads: "As you have already been advised all checks issued are being countersigned by a member of the committee," and "The committee will continue to meet as often as necessary to maintain adequate scrutiny of the business." Bulletin No. 5, issued August 24, 1955, reads: "The members of the committee have been keeping in close touch with the operation of the business through weekly statements of receipts and disbursements and monthly balance sheets and operating statements prepared by a C.P.A."; that for some time prior to the formation of the creditors' committee plaintiff had been doing business with Burton & Rose on a cash basis only, and did not accept checks in payment of goods sold. Paragraph XII of the complaint states: "That after the appointment of said committee and appointment of a member thereof to countersign checks, and at the solicitation of Burton & Rose and upon oral assurances in addition to said bulletins from the said [board] and its officers that said committee was carefully scrutinizing the operations of said Burton & Rose and a representative of said committee was countersigning checks of said Burton & Rose, plaintiff agreed to sell and did sell merchandise at various times to said Burton & Rose, not on credit but by taking in payment for said merchandise the checks of said Burton & Rose, all of which checks were honored and paid for a period of approximately 20 months and until the cessation of the operation of said committee as hereafter alleged." Paragraph XIII reads: "That between November 1st and 8th, 1956 plaintiff, relying upon the representations that a member of the creditors' committee was countersigning checks and that the committee was keeping a careful scrutiny on the business operations of said Burton & Rose, accepted checks in payment for merchandise, of and from said Burton & Rose, aggregating $3613.13 and in due course, presented said checks to the bank upon which they were drawn for payment. Said checks were not paid and plaintiff upon investigation learned for the first time that, without any previous bulletin or notice from defendants or any of them to plaintiff, or from the creditors' committee or any member thereof, the creditors' committee which had been formed had ceased to carry out the purposes for which it had been formed, and that the person assigned by said committee to countersign said checks was not doing so and had not been doing so for sometime [sic] past and that said committee was not keeping a close, or any, scrutiny on the business of Burton & Rose." The complaint proceeds to allege that on or about December 1, 1956, Burton & Rose assigned all its assets to defendant Hempy in trust for the benefit of its creditors. The prayer of the complaint seeks various types of relief, among them being damages in a sum equal to the amount of the dishonored checks of Burton & Rose.

On this appeal plaintiff contends that the complaint states a good cause of action on either one or the other of the following two theories: 1) that respondent had a contractual duty to keep appellant informed of the financial condition of Burton & Rose which it breached; and 2) promissory estoppel.

[1] Appellant's first theory is not supported by the allegations of its complaint. It is nowhere alleged that respondent had promised, or undertaken any obligation to keep its members at all times informed of the financial condition of debtors of its members. The only allegation that touches that subject is that which states that respondent "is maintained by said members for the purpose of furnishing and which does furnish its members information and service when dealing with affairs of embarrassed or insolvent debtors * * *." It was, of course, incumbent upon appel-

lant to set forth in its complaint sufficient allegations to show the existence of a duty owed by respondent to it, and a breach of that duty by respondent. To say that respondent is maintained for the purpose of furnishing information is not the equivalent of saying that it has promised or agreed to furnish information. "A contract is an agreement to do or not to do a certain thing." Civ.Code, § 1549. It is nowhere alleged that respondent has promised or agreed to furnish information to its members.

[2] Nowhere is it alleged that respondent Board of Trade asked appellant to accept checks of Burton & Rose, or had any knowledge that appellant was accepting such checks. On the contrary, a fair reading of the several bulletins pleaded shows that the concern of the board was with debts existing at the time of the first creditors' meeting. Nowhere is it alleged that the board in any way solicited or suggested the extension of further credit, however limited. Thus even if the allegations of the complaint could be construed to show an agreement, express or implied, to notify creditors of termination of supervision of the debtor's affairs, such promise would run only to creditors whose claims existed at the outset of the financial difficulties of Burton & Rose. Appellant's action is not based upon such a debt.

The above comment applies equally to appellant's theory of promissory estoppel. The most commonly accepted definition of promissory estoppel is that contained in Restatement of Contracts, section 90, which reads: "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."

[3] There is nothing in the pleaded representations to indicate that respondent "should reasonably expect" that appellant would extend additional credit in reliance thereon. The statements, as pointed out, were made solely to persuade existing creditors to refrain from pressing their claims.

[4] As we pointed out above, the complaint with which we are here concerned is appellant's second amended complaint. It is presumed that a plaintiff has stated his case as favorably to himself as he can. Where a plaintiff has made several attempts to state a cause of action but has failed to do so the court will assume that no further facts exist which could form the basis for stating a cause of action—else plaintiff would have alleged them. Taliaferro v. Salyer, 162 Cal.App.2d 685, 692, 328 P.2d 799; Spencer v. State Farm Mut. Auto Ins. Co., 152 Cal.App.2d 797, 313 P.2d 900. Appellant does not assert the existence of other facts which might aid its pleading. It does not appear, therefore, that the lower court abused its discretion in denying appellant further leave to amend its complaint.

The judgment is affirmed.

DOOLING, Acting P. J., and DRAPER, J., concur.

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173 Cal.App.2d 107

James Hervey JOHNSON, Plaintiff and Appellant,

v.

John T. HOLT, William H. Macomber, David H. Thompson and William F. Alderson, Defendants and Respondents.

Civ. 5889.

District Court of Appeal, Fourth District, California.

Aug. 17, 1959.

Action was brought for damages for alleged unlawful interference by defendants with contractual relationship between plaintiff and his mother. The Superior Court of San Diego County, C. M. Monroe, J., entered summary judgment in favor of the defendants, and the plaintiff appealed. The District Court of Appeal, Shepard, J., held that plaintiff was not entitled to recover damages for alleged unlawful interference by defendants with contractual relationship between plaintiff and his mother, merely because defendants had instituted, on behalf of the plaintiff's mother, an action against the plaintiff, where the mother would have been justified in bringing action against plaintiff for breach of contract, and she was an incompetent, since others could bring the action for the mother under the direction of the courts.

Judgment affirmed.

1. Appeal and Error ⚷1097(1)

Where District Court of Appeal on previous appeal affirmed action of trial court in permitting filing of amended complaint with which District Court of Appeal was dealing on subsequent appeal, and necessarily ruled on prior appeal that amended complaint stated a cause of action, and order, so ruling, had become final, it was the law of the case.

2. Judgment ⚷185.2(4)

Though it is trial court's duty to refuse summary judgment if opposition affidavits, assuming them to be wholly true, establish factual matter showing that there is a triable issue of fact, affidavits must show facts from which it appears that party opposing summary judgment has a good and substantial defense or a good cause of action on the merits, depending on whether or not he is a defendant or a plaintiff. West's Ann.Code Civ.Proc. § 437c.

3. Torts ⚷12

Plaintiff was not entitled to recover damages for alleged unlawful interference by defendants with contractual relationship between plaintiff and his mother, merely because defendants had instituted, on behalf of the plaintiff's mother, an action against the plaintiff, where the mother would have been justified in bringing action against plaintiff for breach of contract, and she was an incompetent, since others could bring the action for the mother under the direction of the courts.

4. Torts ⚷12

A person who breaches a contract cannot maintain an action for interference with or inducement to breach such contract against another when such interference or inducement occurred during a continuance of such plaintiff's own breach.

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Clifford J. Baxter, Santa Ana, for appellant.

Orfield & Thompson, San Diego, for respondents.

SHEPARD, Justice.

This is an appeal by plaintiff from a summary judgment entered in favor of defendants in an action brought by plaintiff seeking damages for alleged unlawful interference by defendants with the contractual relationship between plaintiff and his mother, Nora E. Johnson.

[1] Plaintiff's complaint alleges *inter alia* that plaintiff and said mother, some years previous to 1952, had entered into an agreement by which the parties thereto agreed to hold certain real and personal property in joint tenancy to the end that the survivor would become the sole owner thereof; that pursuant thereto the said parties did transfer into joint tenancy of record said real and personal properties; that on or about September 18, 1952, defendants did communicate to said mother certain false information for the wrongful and unlawful purpose of causing said mother to breach said agreement, knowing said information to be untrue; that pursuant to said wrongful purpose defendants caused an action to be brought in the superior court of San Diego County in the name of said mother (who was then incompetent) seeking to cause the termination of said contractual relationship; that certain allegations contained in said action were defamatory of this plaintiff, were untrue and known by these defendants to be untrue; and that in defending said action

this plaintiff sustained damage, including loss of personal time, costs, expenses and attorney's fees in amounts detailed therein. Plaintiff prays actual and punitive damages. This court in a previous appeal affirmed the action of the trial court in permitting the filing of the amended complaint with which we are now dealing, and necessarily ruled that said amended complaint stated a cause of action. Said order, so ruling, has become final and is now the law of the case. Johnson v. Holt, 152 Cal.App.2d 338, 343 [1b], 313 P.2d 150.

After remittitur, defendants answered and moved for a summary judgment under the provisions of Code of Civil Procedure, Section 437c, and filed affidavits in support of said motion. In general effect, defendant's affidavits assert that early in 1952 David H. Thompson (one of the defendants herein), acting as the attorney for said mother, requested of this plaintiff an accounting of this plaintiff's handling of said mother's assets, and that this plaintiff refused such accounting; that said Thompson did advise said mother of this plaintiff's refusal to account for her share of income from the joint tenancy property, but denies that he did at any time advise her of any of the other false statements. Said affidavits further assert that the action on behalf of said mother against this plaintiff was commenced solely and only for the protection of the mother's interests and not from any wrongful motives; that said action was commenced with the full knowledge and consent of the mother; that savings bank account No. 37703, Security Trust & Savings Bank, Main Branch, San Diego, California, which account contained the sum of $30,183.74 (which is one of the primary subjects of the contractual agreement upon which the present action is based) was opened on February 19, 1945, and on March 19, 1952 stood in the name of said mother and this plaintiff as joint tenants; that on said March 19, 1952, this plaintiff did transfer all of the monies of said account into his name alone and closed said account; that on June 14, 1952, there was added to said account the name of J. H. Johnson, trustee for Nora E. Johnson; that on January 7, 1953, in said action of September 18, 1952, on behalf of said mother against this plaintiff, which is Superior Court of San Diego County Action No. 175890, a judgment was entered by the court by stipulation of the parties without findings, decreeing the ownership in each of the parties of certain parcels of property in said decree described and included in said decree as the adjudication that said mother was then the owner of said savings account No. 37703. Said decree further provided that all of the property described in said decree, including any change of form thereof on reinvestment of proceeds thereof, is to remain subject to the survivorship characteristics of joint tenancy in accordance with the agreement of the parties theretofore entered into, and each party is impressed with a trust so that such right of survivorship may not be defeated by any act of the other party during his or her lifetime, or by operation of law. Said decree further provided that each of said owners, respectively, is entitled to possession of the property so owned and to the use and benefit of the income thereof.

Plaintiff herein filed several affidavits in opposition to the affidavits of defendants on said motion for summary judgment. The affidavits of plaintiff deal in large part with refutation or attempted refutation of the denials in defendants' affidavits of those portions of plaintiff's complaint alleging the communication to the mother of certain allegedly defamatory material regarding this plaintiff's honesty and motives. Plaintiff's affidavits further deal largely with accusations of dishonesty, bad motive and malice on the part of these defendants in the bringing of said action No. 175890. The repetition of the details of these various charges and countercharges is of no benefit to any of the parties hereto nor are they necessary in the decision of this cause, and we therefore refrain from such repetition. The counteraffidavits of this plaintiff, however, fail to refute certain vital portions of the affidavits in support of the motion for summary judgment. First, these defendants have denied flatly the communication to the mother of the alleged defamatory material regarding dishonesty and motive of this plaintiff toward said mother. The affidavits of this plaintiff and of defendants show only that the complaint itself was communicated to said mother. Nowhere in any of the affidavits is there any attempt by this plaintiff to show that these defendants communicated such material independently of the written complaint, so that the source of the allegations contained in the complaint remains untouched except that defendants deny that they were such source. The source may well have been from the bewildered and confused mind of the incompetent mother. Second, this plaintiff has not denied that he refused to account to said mother through her attorney for her share of the income from joint tenancy property, nor has he denied that he failed from March 19, 1952, until at least September 18, 1952, to account to said mother for her share of the income of said joint tenancy property. Third, nor has plaintiff denied that he did close out said joint tenancy account No. 37703 and take the $30,183.74 therein contained into his own name alone, thereby excluding her absolutely not only from the title but also from the use and benefit of property which by the stipulated judgment in said action No. 175890 was owned by said mother. Fourth, nor do plaintiff's affidavits refute the fact of the judgment by stipulation in said action No. 175890 hereinbefore related. Plaintiff by his affidavit seeks to justify the removal of the funds from account No. 37703 by certain rather nebulous statements to the effect that his action was for the benefit of said mother, to prevent her from being cheated. However, his duty in that respect should have been fulfilled by a guardianship proceeding if such were necessary, and not by excluding her from the use and benefit of her own property.

[2] The law regarding the application of Code of Civil Procedure Section 437c in a motion for summary judgment has already been well clarified by numerous decisions of the courts of this state. As applied to those factors with which we are especially concerned in the case at bar, it may be concisely stated that while it is the duty of a trial court to refuse a summary judgment if the opposition affidavits (assuming them to be wholly true) establish factual matter showing that there is a triable issue of fact, nevertheless, the affidavits must show facts from which it appears that the party opposing the summary judgment has a good and substantial defense or a good cause of action on the merits (depending on whether or not he is a defendant or a plaintiff). Hardy v. Hardy, 23 Cal.2d 244, 246 [3], 143 P.2d 701; Coyne v. Krempels, 36 Cal.2d 257, 260 [1], 262 [7], 223 P.2d 244; People v. City of Garden Grove, 165 Cal.App.2d 794, 798, 799, 332 P.2d 841.

[3, 4] It is apparent from the uncontroverted facts that the mother was justified in maintaining said action No. 175890 against plaintiff since he, and not she, had breached the contract. Since she was an incompetent, others could do it for her under direction of our courts. The real gist of her cause of action was in the breach of the contract by him for the removal of said savings account No. 37703 and his failure to account. It is perfectly apparent that if he had died at any time during the months following March 19 and at least up to June 14, 1952, the assertion of her survivorship rights would have been fraught with difficulty, probably a court action, the result of which would have been indeterminate because of the sealed lips of the primary source of information due to death. It is also true that she was by plaintiff's action barred from the use of her own property for her own necessities. It cannot be viewed in any other light than as a breach of the very contract upon which he is suing, and which contract was restored to its full status only by the very action of which he now complains. A person who breaches a contract cannot maintain an action for interference

with or inducement to breach said contract against another when such interference or inducement occurred during a continuance of such plaintiff's own breach. Case v. Kadota Fig Ass'n, 35 Cal.2d 596, 602 [2], 220 P.2d 912.

The judgment appealed from is affirmed.

GRIFFIN, P. J., and MUSSELL, J., concur.

172 Cal.App.2d 164

RECORD MACHINE AND TOOL COMPANY, a corporation, Plaintiff and Appellant,

v.

PAGEMAN HOLDING CORPORATION, a corporation, Defendant and Respondent.

Carl Francis BAKER, Oretta Mae Baker, Record Machine and Tool Company, a corporation, Plaintiffs and Appellants,

v.

Rudolph A. PAGEMAN, Caroline Johnson Pageman, Pageman Holding Corporation, a corporation, Defendants and Respondents.

Civ. 23473.

District Court of Appeal, Second District, Division 3, California.

July 20, 1959.

Hearing Denied Sept. 16, 1959.

Consolidated actions wherein the Superior Court of Los Angeles County, George A. Dockweiler, J., rendered the judgment challenged by plaintiffs' appeals. The District Court of Appeal, Vallée, J., held that operation of statute of limitations against assigned cause of action for breach of contract was suspended during pendency of assignor's suit for specific performance.

Reversed in part and affirmed in part.

1. Appeal and Error 🔑870(1)
New Trial 🔑157

If, on trial of special defenses only, decision is in favor of defendant pleading same, trial is at an end, judgment is then entered for defendant, and, on motion for new trial or on appeal from judgment, decision on special defenses and all rulings on trial of them may be reviewed.

2. Appeal and Error 🔑1078(5)

Where no point was made in appellants' brief with respect to part of judgment, appellants were deemed to have abandoned their appeal from that part of judgment.

3. Appeal and Error 🔑1078(3)

Where appellants contended that three counts of complaint were not barred by statute of limitations, as held by lower court, and that judgment in another action was not, as held by lower court, res judicata as to those counts, but they made no contention with respect to remaining count, they were deemed to have abandoned appeal in respect to that count.

4. Limitation of Actions 🔑46(9)

Cause of action for failure to deliver property subject of sale accrued at time buyer took possession and found no such items "on hand," and was barred when not sued on within four years. West's Ann. Code Civ.Proc. § 337, subd. 1.

5. Limitation of Actions 🔑201

Reservation in judgment could not, and did not, save cause of action which was barred by statute at time action was commenced. West's Ann.Code Civ.Proc. § 337, subd. 1.

6. Judgment 🔑714(1)

Where facts and cause of action with respect to failure to grant exclusive license under patent were identical with those alleged and adjudicated in buyer-assignor's action against seller, judgment therein was res judicata as to assignees' action.

7. Judgment 🔑731

Where cause of action for buyer's loss of profit on contract to sell goods to third party was not adjudicated in buyer's action against seller for specific performance, judgment therein was not res judicata as to cause of action for refusal of seller to deliver evidence of good title to property which was subject of sale to third party.

8. Judgment ⟹729

A judgment is not an adjudication as to matters which court expressly refrains from deciding and which it directs should be litigated in another action.

9. Limitation of Actions ⟹43

A cause of action accrues when a suit may be maintained thereon, and statute of limitations begins to run at that time.

10. Limitation of Actions ⟹46(9)

Buyer's cause of action against seller for failure to deliver evidence of good title accrued when purchase price was tendered.

11. Limitation of Actions ⟹166

Statute of limitations runs against right of action, not against holder of right.

12. Limitation of Actions ⟹127(13)

Alleged sole owners of corporate buyer had no right of action against seller for breach of contract until corporation assigned to them all of its interest in contract; and filing of amended complaint by them subsequent to date of assignment was, for limitation purposes, the commencement of a new action. West's Ann.Code Civ.Proc. §§ 337, subd. 1, 338, subd. 4, 343, 597.

13. Limitation of Actions ⟹104½

Running of statute of limitations is suspended during any period in which plaintiff is legally prevented from taking action to protect his rights.

14. Limitation of Actions ⟹115

Commencement of action suspends statute of limitations as to matters arising out of transaction set forth in complaint.

15. Action ⟹71

An action is deemed to be pending from time of its commencement until its final determination on appeal, but following final judgment of affirmance on appeal, action is no longer pending.

16. Limitation of Actions ⟹104½

When operation of statute of limitations is suspended for given length of time, effect is to add an equal period to statutory period.

17. Limitation of Actions ⟹105(2)

Operation of statute of limitations against assigned cause of action for breach of contract was suspended during pendency of assignor's suit for specific performance. West's Ann.Code Civ.Proc. §§ 312, 337, subd. 1.

18. Costs ⟹256(1)

In allocating costs on appeal, court took into consideration fact that record contained much material that could not possibly have any bearing on issues raised and that same had been made part of record at request of appellants.

◆

Edward L. Condon, Long Beach, for appellants.

Thomas P. Cruce and Max Tendler, Los Angeles, for respondents.

VALLÉE, Justice.

Appeal from a judgment in two consolidated actions: superior court numbers 590631 and 659106. The judgment directs the county clerk to pay funds in his hands to Pageman Holding Corporation (superior court No. 590631), and adjudges that the plaintiffs take nothing from defendants (superior court No. 659106).

On April 16, 1947 Pageman Holding Corporation, called Pageman, agreed to assign five United States letters patent and to convey certain real and personal properties to Record Machine & Tool Company, a corporation, called Record, for $100,000 on terms and conditions detailed in a conditional sales contract. On August 23, 1951 Record tendered, at the place specified in the contract, the total unpaid balance of $26,549.18 and its demand that Pageman perform the contract by depositing the necessary instruments of title in escrow for delivery concurrently with Pageman's receipt of the last mentioned sum. Pageman refused the tender and refused to perform the contract or to deliver any title paper conveying any of the properties to be conveyed to Record although Record was able and willing to perform according to its tender. In action 590631 for specific performance of the contract, the court found that Record performed all the conditions required of it by the contract and that the tender was valid and immediately vested in Record all title Pageman had in the properties to be conveyed. Pageman did not convey one of the patents, No. 2133022, designated as 022, and was unable to do so because it had previously conveyed it to others. Patent 022 was a master patent. No manufacture, use, or sale could be made under the four other patents named in the contract without the consent or license of the person or persons to whom patent 022 had been conveyed. In action 590631 the trial court adjudged that Record was entitled to performance, but failed to find the amount that should have been credited on the purchase price of $100,000 by reason of Pageman's failure to convey patent 022. On appeal the judgment was reversed with directions to "render the same judgment heretofore given, but in addition, shall ascertain and declare the rights of the parties with respect to the payment of the unpaid balance of the purchase price, if any, under the contract, and the effect thereon of defendant's [Pageman's] inability to give good title to the patent it does not own." Record Machine & Tool Co. v. Pageman Hold. Corp., 42 Cal.2d 227, 266 P.2d 1, 5. On a retrial, the court found that $12,000 was the amount to which Record was entitled by reason of Pageman's inability to convey patent 022. On appeal from the ensuing supplementary judgment, Pageman questioned the amount of the award. The reviewing court affirmed the supplementary judgment, holding that the award complied with the Supreme Court order in that it was a proper amount for damages resulting to Record by its loss of the exclusive right to operate under the patent. Record Machine & Tool Co. v. Pageman Hold. Corp., 132 Cal.App.2d 821, 283 P.2d 724. The original and the supplementary judgment in action 590631 contained this provision: "plaintiff [Record] is not precluded by the judgment herein from asserting any other claims from the defendant [Pageman] under said conditional sales contract, and preventing plaintiff from having full use of all properties, real, personal or mixed, described in said conditional sales contract from and after the date of said tender on or about August 23, 1951."

The original complaint in action 659106 was filed April 17, 1956. The complaint named Carl Francis Baker and Oretta Mae Baker as the parties plaintiff, and they appeared in propria persona. They alleged they were the sole owners of Record Machine & Tool Company, a corporation. On demurrer, the court ordered that Record be made a party plaintiff, which was done on the face of the complaint. Each of six amended complaints was filed by Carl Francis Baker and Oretta Mae Baker in propria persona. Defendants successfully demurred to the original complaint and to five amended complaints. On January 30, 1957 the Bakers, as the only plaintiffs, filed the sixth amended complaint, hereinafter referred to as the complaint, in which for the first time they alleged that on January 29, 1957 Record had assigned all of its interest in the contract which was the subject of the controversy in action 590631 and all of its rights therein and causes of action against defendants, to them.

The complaint contained four counts. As affirmative defenses defendants pleaded that the cause of action alleged in each count was barred by the provisions of sections 337(1), 338(4), and 343 of the Code of Civil Procedure and by the prior judgment in action 590631.

At the pre-trial hearing in action 659106 it was agreed that all files, exhibits, and records in action 590631 be received in evidence in that action by reference and that the judgment in action 659106 should provide for the disposition of funds then on deposit with the county clerk as a result of payments made pursuant to proceedings in action 590631.

Pursuant to section 597 of the Code of Civil Procedure the court proceeded to the trial of the special defenses before the trial of any other issue in the case. The questions were submitted on the allegations of the complaint in action 659106 and the record in action 590631. The court found that no filing fee for Record had been paid to the clerk as a filing fee in the action; Record did not appear in the action by reason of nonpayment of the filing fee, and it did not appear by licensed attorney; it was not a party plaintiff in the action; each of the four counts was barred by sections 337(1) and 343 of the Code of Civil Procedure; and the prior judgment in action 590631 was res judicata as to each count. Judgment was that plaintiffs take nothing by their complaint.

[1] If, on the trial of special defenses, only the decision is in favor of the defendant pleading the same, the trial is at an end (Steiner v. Thomas, 94 Cal.App.2d 655, 658, 211 P.2d 321); a judgment is then entered for the defendant; and, on a motion for a new trial or upon appeal from the judgment, the decision on the special defenses and all rulings on the trial of them may be reviewed. Woodhouse v. Pacific Elec. Ry. Co., 112 Cal.App.2d 22, 25, 245 P.2d 701.

[2] No point is made in plaintiffs' brief with respect to that part of the judgment directing the county clerk to pay funds in his hands to Pageman. Plaintiffs are deemed to have abandoned their appeal from that part of the judgment. Bellon v. Silver Gate Theatres, Inc., 4 Cal.2d 1, 17, 47 P.2d 462.

[3] Plaintiffs contend that counts I, II, and III of the complaint are not barred by the statute of limitations and that the judgment in action 590631 is not res judicata as to those counts. They make no contention with respect to the fourth count. We, therefore, deem that plaintiffs have abandoned the appeal in respect to that count. Clay v. Lagiss, 143 Cal.App.2d 441, 452, 299 P.2d 1025.

Count I

Count I incorporates a copy of the conditional sales contract of April 16, 1947 and alleges that under its terms plaintiffs on that date should have immediate possession and retain possession of all of the property described therein, including work in process, completed parts, and fully assembled rotary drill bits, of a sales value of $30,000; and defendants, by the contract, authorized plaintiffs to manufacture, assemble, and sell any part of said stock, and apply the proceeds in payment pro tanto of the conditional sales contract. It alleges that about April 16, 1947 plaintiffs entered into possession and immediately thereafter ascertained that defendants had no usuable or salable work in process, no completed parts and no assembled rotary bits on hand, and defendants never delivered same, to plaintiffs' damage in the amount of $30,000.

[4, 5] It clearly appears that the cause of action for failure to deliver the stated items accrued at the time plaintiffs took possession on April 16, 1947 and found no such items "on hand." Action 590631 was filed September 14, 1951. The breach occurred more than four years before that action was filed. The cause of action accrued on the breach and was barred by the statute prior to the filing of action 590631. Code Civ.Proc., § 337(1). The reservation in the judgment and in the supplementary judgment in action 590631 to the effect that Record was not precluded from asserting any claim for damages because of not having full use of the properties described in the contract from and after August 23, 1951 could not, and did not, save a cause of action which was barred by the statute at the time that action was commenced.

Count II

Count II realleges all the allegations of count I. It alleges that prior to the execution of the contract defendants, on June 24, 1939, granted to a third party the exclusive right and license to manufacture, use, and sell rotary drill bits incorporating the invention of patent number 022 and thus controlling the four other patents named in the contract. It alleges the failure to grant an exclusive license to manufacture, sell, and use under patent 022 to Record. It alleges that by reason of the failure of defendants on April 16, 1947 to deliver work in process, completed parts, and assembled rotary bits of the market value of $30,000, and by the failure to grant the exclusive license under the patent, plaintiffs could not enjoy sufficient credit to retool the plant and to enter into full-scale manufacture of the new bits until about February 16, 1948; that plaintiffs intended to, could have, and would have entered into such full-scale manufacture and sale, and would have received proceeds therefrom in the amount of not less than $120,000 a year from February 16, 1948, to the damage of plaintiffs of loss of future profits from February 16, 1948 in the amount of $1,000,000.

[6] Insofar as count II alleges a cause of action for failure to deliver work in process, completed parts and assembled rotary bits, it is the same cause of action that is alleged in count I. For the reasons we have stated, it was barred by the statute. Insofar as count II alleges a cause of action for failure to grant an exclusive license under patent 022, the subject matter was adjudicated in action 590631. The facts and cause of action with respect to the failure to grant an exclusive license under patent 022 are identical with those alleged and adjudicated in action 590631. In the latter action it was adjudged "That the defendant is in default under said contract in that at no time since the contract was executed has plaintiff been vested with the exclusive license to use the patents therein specified, and that at no time has defendant had title to all of said patents; and that therefore the Clerk of the above entitled court shall deliver to the plaintiff immediately upon the judge's signing of this Supplementary Judgment, from the funds deposited with said clerk by said plaintiff in accordance with the order of the above entitled Court in the above entitled action, the sum of $12,000.00 less the 'Solvent Credit Tax' levied upon said amount, as damages to plaintiff for defendant's inability to deliver to the plaintiff the exclusive license to United States Letters Patent number 2133022." That the supplementary judgment in action 590631 is res judicata as to this part of count II in action 659106 is clear from what was said by the Supreme Court on the appeal from the judgment and by the District Court of Appeal on the appeal from the supplementary judgment. On the appeal from the judgment the Supreme Court stated that the trial court had failed to find "the damage plaintiff [Record] would suffer by defendant's inability" to give good title to patent 022 and: "It is true that defendant objected during the proceedings to broadening the scope of the determination and the court declared that defendant's action to recover the purchase price as well as plaintiff's action for damages were preserved, but because of the scope of the judgment with respect to plaintiff's rights in the property (it in effect specifically enforces the contract on behalf of plaintiff) justice requires that defendant's rights also be determined. The trial court has discretion as to the extent of the relief to be afforded in a proceeding for declaratory relief (5 Cal.Jur. 10-Yr. Supp. [1944 Rev.], Declaratory Relief, § 22 et seq.), but where a case is made for such relief the court should not deny it. Lord v. Garland, 27 Cal.2d 840 [168 P.2d 5]. Where a contract is specifically enforced the court should do complete justice." The judgment was reversed and the trial court was directed to render the same judgment and to "ascertain and declare the rights of the parties with respect to the payment of the unpaid balance of the purchase price, if any, under the contract, and the effect thereon of defendant's inability to give good title to the patent it does not own." Record Machine & Tool Co. v. Pageman Hold. Corp., 42 Cal.2d 227, 233–234, 266 P.2d 1, 5. On the appeal by Pageman from the supplementary judgment rendered pursuant to the directions of the Supreme Court, the District Court of Appeal said:

> "Appellant contends that the finding of $12,000 as the value of respondent's loss for not receiving an exclusive li-

cense to manufacture under patent 022 is not supported by, and is contrary to the evidence; that such award did not comply with the Supreme Court's order; that the patent had only a nominal value and that the court's finding was purely speculative. In its opening brief, appellant states the correct issue, to wit, in what amount should damages be awarded for failure to deliver an exclusive license to manufacture rotary drills. Appellant attempts to show that the actual patent 022 unincumbered was not worth the award. The Supreme Court's order required the trial court to find '*the effect* thereon of defendant's inability to give good title to the patent it does not own.' The court order says nothing about the actual value of the rotary drills under the patent. *Effect* is defined by Webster's Dictionary as meaning 'consequence' or 'result.' The consequence or result to the respondent is its loss of the exclusive right to operate under the patent, not the amount of damages suffered by reason of appellant's having made or not made so many rotary drills under patent 022. At the trial, the evidence showed that the rotary drill in question is being produced by a rival company under the patent 022 by due and sufficient assignment as a result of which it could not be transferred, with clear title to respondent. * * * Substantial evidence was adduced to the effect that grave injury occurred from the breach of the contract by the appellant.

"The question of damages that might have been suffered by respondent's having been deprived of the profits from sales of rotary drills was not the issue. It would have been purely speculative. But the loss of exclusive rights of operation and manufacture is substantial. It is the accepted rule of law that where a buyer has suffered substantial damages by the seller's failure to deliver a part of the property included in his contract of sale, the uncertainty in the evidence relating to the amount of damages sustained is relatively unimportant. * * * The question of whether the patent had only a nominal value or was worth $12,000 as awarded by the court is immaterial in the face of the substantial evidence pointing to the loss of the exclusive rights of production, and by appellant's failure to deliver such rights to the detriment of respondent who had relied on the valid assignment and a clear title. * * *

* * * * * *

"The trial court with the facts at hand has effectually carried out the direction of the Supreme Court. It is a fair presumption that the Supreme Court would not have burdened the trial court with the task of fixing token damages. The high court recognized that respondent had been deprived of a substantial right and by their decision amended the situation."

Record Machine & Tool Co. v. Pageman Hold. Corp., 132 Cal.App.2d 821, 822–824, 283 P.2d 724, 726. The supplementary judgment was affirmed. The judgment in action 590631 is res judicata as to that part of count II which alleges a cause of action for failure to grant an exclusive license under patent 022. 29 Cal.Jur.2d 167, § 214.

Count III

Count III realleges all the allegations of counts I and II. It alleges that about August 16, 1951 plaintiffs had contracted to sell two of the lathes described in the contract to a third party for $20,000; that the price agreed to be paid for the lathes by plaintiffs to defendants was $14,500; that defendants refused to deliver evidence of good title to the lathes and plaintiffs lost the sale to their damage in the sum of $5,500. The same cause of action was alleged as count II in action 590631.

[7, 8] This cause of action was not adjudicated in action 590631 and neither the original judgment nor the supplementary judgment in that action is res judicata as to the cause of action for refusal to deliver

evidence of good title to the two lathes.[1] The court in action 590631 expressly refused to determine the matters alleged in count II with respect to refusal to deliver evidence of good title to the lathes and directed they should be litigated in another action. A judgment is not an adjudication as to matters which the court expressly refrains from deciding and which it directs should be litigated in another action. Carson v. Glass Blowers Ass'n, 37 Cal.2d 134, 141, 231 P.2d 6, 21 A.L.R.2d 1387; Stark v. Coker, 20 Cal.2d 839, 843, 129 P.2d 390; Barnes v. Dobbins, 118 Cal.App.2d 808, 814, 258 P.2d 1112; 2 Freeman on Judgments, 5th ed., 1485, § 704; 29 Cal.Jur.2d 207, § 245.

[9–12] The question is whether the cause of action with respect to the refusal to deliver evidence of good title to the two lathes alleged in count III is barred by the statute of limitations. A cause of action accrues when a suit may be maintained thereon, and the statute of limitations begins to run at that time. Dillon v. Board of Pension Com'rs, 18 Cal.2d 427, 430, 116 P.2d 37, 136 A.L.R. 800. The court found Record made the tender on August 23, 1951. Thus the cause of action accrued on August 23, 1951. Action 659106 was commenced April 17, 1956. However, it was not commenced by Record, but by the Bakers. As found by the trial court, Record was not at any time a party to the action. A statute of limitations runs against the right of action, not against the holder of the right. 31 Cal.Jur.2d 619, § 199. The Bakers had no right of action until January 29, 1957, the date Record assigned to them. The filing of the sixth amended complaint was the commencement of a new action. Michelin Tire Co. v. Coleman & Bentel Co., 179 Cal. 598, 602, 178 P. 507. Thus the cause of action in question alleged in count III is barred by the statute of limitations unless, as plaintiffs contend, the operation of the statute was suspended during the pendency of action 590631.

[13] It is well settled that the running of the statute of limitations is suspended during any period in which the plaintiff is legally prevented from taking action to

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[1] In action 590631 the court found: "That it is true that on or about the 20th day of August, 1951, plaintiff obtained a purchaser for two of the lathes included in the said conditional sales contract; that said purchaser was ready, willing and able to pay the sum of $20,000.00 cash consideration for the said two lathes provided plaintiff could deliver them free and clear by September 10, 1951; but that plaintiff may not be awarded damages in this action for any breach of contract in so far as this is an action for declaratory relief, but that plaintiff is not precluded herein from asserting any such claim from the defendant in a proper proceeding."

"That it is true that the total cost to plaintiff of the two lathes is less than the sum of $15,000.00; but that in this connection the court finds that plaintiff may not be awarded damages in this action for such breach of the contract in so far as this is an action for declaratory relief."

The supplementary findings incorporate the findings theretofore given and state they "shall have the same force and effect as if set forth fully herein."

Both the original and the supplementary judgment contained these provisions: "That the defendant is in default under said contract in that at no time since the contract was executed has plaintiff been vested with the exclusive license to use the patents therein specified, and that at no time has defendant had title to any of said patents; that plaintiff may not be awarded damages in this action for such breach of the contract in so far as this is an action for declaratory relief, but that said plaintiff is not precluded by the judgment herein from asserting any such claim from the defendant in any proper proceeding, or for damages for any default of defendant under said conditional sales contract, and preventing plaintiff from having full use of all properties, real, personal or mixed described in said conditional sales contract from and after the date of said tender on or about August 23, 1951."

"[T]hat in as much as damages alleged by the plaintiff are not proved with sufficient certainty and particularity, that plaintiff take nothing on such claims in the present action for declaratory relief."

protect his rights. Dillon v. Board of Pension Com'rs, 18 Cal.2d 427, 431, 116 P.2d 37; County of Santa Clara v. Hayes Co., 43 Cal.2d 615, 618, 275 P.2d 456; Eistrat v. Cekada, 50 Cal.2d 289, 291–292, 324 P.2d 881; Van Hook v. Southern Cal. Waiters Alliance, 158 Cal.App.2d 556, 565, 323 P.2d 212. In Marden v. Bailard, 124 Cal.App.2d 458, at page 465, 268 P.2d 809, 813, this court said:

> "Respondents' contention that the purported causes of action are barred by the statute of limitations is based principally upon the argument that running of the statute was not suspended during the pendency of the appeal in the former action. The former action included the issue involved herein regarding the restrictions on the lot. While that litigation was pending these plaintiffs were not required to commence another action—their declaratory relief action—for the determination of the same issue."

Also see Burns v. Massachusetts etc. Ins. Co., 62 Cal.App.2d 962, 967–972, 146 P.2d 24; 54 C.J.S. Limitations of Actions § 248, p. 280.

[14–16] The commencement of an action suspends the statute of limitations as to matters arising out of the transaction set forth in the complaint. 31 Cal.Jur.2d 593, § 171. An action is deemed to be pending from the time of its commencement until its final determination on appeal. Code Civ.Proc., § 1049; San Francisco Gas & Electric Co. v. Superior Court, 155 Cal. 30, 33–34, 99 P. 359; Pacific Gas & Elec. Co. v. Nakano, 12 Cal.2d 711, 714, 87 P.2d 700, 121 A.L.R. 417; Riley v. Superior Court, 49 Cal.2d 305, 309–310, 316 P.2d 956; Cain v. French, 29 Cal.App. 725, 727, 156 P. 518; Davis v. Fidelity & Deposit Co., 93 Cal.App.2d 13, 16, 208 P.2d 414; People v. Superior Court, 145 Cal.App.2d 683, 687, 303 P.2d 628. Following a final judgment of affirmance on appeal, an action is no longer pending. Schumm v. Berg, 37 Cal.2d 174, 190, 231 P.2d 39, 21 A.L.R.2d 1051. When the operation of a statute of limitations is suspended for a given length of time the effect is to add an equal period to the statutory period. In re Estate of Caravas, 40 Cal.2d 33, 42, 250 P.2d 593; 54 C.J.S. Limitations of Actions § 248, p. 280.

[17] The cause of action alleged in count III with respect to the refusal to deliver evidence of good title to the two lathes accrued on August 23, 1951. Action 590631, which alleged that cause of action in count II of the complaint, was filed September 14, 1951. The remittitur on the appeal from the supplementary judgment in that action was filed July 11, 1955. On April 17, 1956 the Bakers, strangers to the contract, commenced action 659106 against defendants for damages for breach of the contract based on defendants' refusal to deliver evidence of good title to the two lathes on August 23, 1951. Record was not a party plaintiff. On January 29, 1957 Record assigned all its interest in the contract and all causes of action to the Bakers. The sixth amended complaint in action 659106, in which the Bakers as plaintiffs for the first time had a right of action and in which they alleged the assignment, was filed January 30, 1957. A period of 5 years, 5 months, and 7 days elapsed between August 23, 1951 and January 30, 1957. A period of 3 years, 9 months, and 26 days elapsed between September 15, 1951 and July 11, 1955, during which action 590631 was pending. The period of limitation of an action on a contract, obligation, or liability founded on an instrument in writing is 4 years. Code Civ.Proc., §§ 312, 337(1). Excluding the period during which action 590631 was pending, the cause of action alleged in count III with respect to the refusal of defendants to deliver evidence of good title to the two lathes was commenced by the filing of the sixth amended complaint and was within the 4-year period.

We conclude that count III, insofar as it alleges a cause of action for refusal to deliver evidence of good title to the two lathes, is not barred by the statute of limitations. Insofar as count III realleges the allegations of counts I and II, the judgment is correct for the reasons we have stated with respect to counts I and II. We do not decide that count III may not be subject to special demurrer.

[18] The judgment, insofar as it adjudges that plaintiffs take nothing by reason of the allegations of count III of the sixth amended complaint that defendants refused to deliver evidence of good title to the two lathes, is reversed; in all other respects it is affirmed. The record contains much material that could not possibly have any bearing on the issues raised, all made part of the record at the request of plaintiffs-appellants. We take this factor into consideration in allocating the costs on appeal. Plaintiffs-appellants shall bear 95 per cent of the costs on appeal; defendants-respondents shall bear 5 per cent thereof.

SHINN, P. J., and PARKER WOOD, J., concur.

172 Cal.App.2d 30

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Bob BROWN, Defendant and Appellant.

Cr. 6362.

District Court of Appeal, Second District, Division 3, California.

July 14, 1959.

Defendant was convicted of escape from a state prison, and an order was entered granting probation. The Superior Court of Los Angeles County, Maurice C. Sparling, J., entered an order revoking the probation, and the defendant appealed. The District Court of Appeal, Parker Wood, J., held that conviction for which defendant was under commitment when he escaped was a "previous conviction" within section of the Penal Code providing that probation shall not be granted to a defendant who has been convicted of escape from a state prison unless court shall be satisfied that defendant has not been previously convicted of a felony, and that since defendant was ineligible for probation, it was not necessary to prove a violation of the terms of the probation before revoking the probation.

Order affirmed.

1. Criminal Law 🔑**982.1**

The authority of a court to grant probation and to suspend execution of a sentence is wholly statutory, and the statute itself furnishes the measure of the power which may thus be exercised. West's Ann. Penal Code, § 1203.

2. Criminal Law 🔑**982.1**

"Probation" is not a matter of right, but is an act of grace and clemency. West's Ann.Penal Code, § 1203.

See publication Words and Phrases, for other judicial constructions and definitions of "Probation".

3. Criminal Law 🔑**982.4(2)**

Conviction, for which defendant was under commitment to state prison when he escaped, was a "previous conviction" within statute providing that probation shall not be granted to any defendant who has been convicted of escape from a state prison, unless court shall be satisfied that defendant has not been previously convicted of a felony. West's Ann.Penal Code, §§ 1203, 4531.

See publication Words and Phrases, for other judicial constructions and definitions of "Previous Conviction".

4. Criminal Law 🔑**982.9(1)**

Where defendant, who had been found guilty of escape, was ineligible for probation because he had previously been convicted of a felony, but judge erroneously granted probation, judge could thereafter revoke the probation without proof of a violation of the terms of the probation. West's Ann.Penal Code, §§ 1203, 4531.

Harvey E. Byron, North Hollywood, for appellant.

Stanley Mosk, Atty. Gen., and William E. James, Asst. Atty. Gen., for respondent.

PARKER WOOD, Justice.

Defendant pleaded guilty to a charge of escape from a state prison (violation of section 4531 of the Penal Code). Thereupon a probation report was ordered, and the matter was continued five days—to February 11, 1958. On said date, the defendant was sentenced to imprisonment in the state prison, probation for five years was granted, and execution of the sentence was suspended.

On May 21, 1958, in the presence of defendant and his counsel (deputy public defender), the judge said that he had made an error in law in giving defendant probation. Then the judge revoked the order granting probation and sentenced defendant to state prison for the term prescribed by law. Defendant appeals from the "judgment" rendered on May 21, 1958. He contends that the court erred as a matter of law in revoking probation. His argument is that the court was empowered under section 1203 of the Penal Code to grant probation, and since the court in the exercise of its discretion granted probation, and since there was no error in law in granting probation, and since there was no evidence that appellant had violated the terms of probation, the order revoking probation should be reversed. He argues further that probation was revoked "on an erroneous point of law." With reference to the reason for revoking probation, the reporter's transcript shows, as above stated, that the judge said he had made an error in law in granting probation. The record does not show, however, that the judge made any statement designating the error of law so referred to by him. With reference to the reason for revoking probation, appellant states in his brief that the trial judge "feeling that it was not within his power to grant defendant probation by determining the facts and exercising his discretion, revoked the probation."

Respondent asserts that appellant was not eligible for probation, and that the order revoking probation was proper.

Section 4531 of the Penal Code provides, in part: "Every prisoner committed to a State prison who escapes * * * from any prison road camp * * * or other prison camp * * * while under the custody of prison officials * * * is punishable by imprisonment in a State prison for a term of not less than one year * * *."

Section 1203 of the Penal Code (Stats. 1951, Ch. 1438, p. 3396), in effect when the escape occurred (July, escape from a state escape occurred (July, 1954), provides, in part: *"Probation shall not be granted to any defendant who shall have been convicted of* robbery, burglary, * * * *escape from a state prison,* * * * and who at the time of the perpetration of said crime * * * was himself armed with a deadly weapon * * * nor to a defendant who used or attempted to use a deadly weapon upon a human being * * * nor to one who in the perpetration of the crime * * * wilfully inflicted great bodily injury or torture, nor to any defendant unless the court shall be satisfied that he has not been twice previously convicted of felony in this State nor twice previously convicted in any other place or places of public offenses which would have been felonies if committed in this State; *nor to any defendant convicted of* the crime of robbery, burglary of the first degree, * * * *escape from a state prison* * * * *unless the court shall be satisfied that he has never been previously convicted of a felony in this State nor previously convicted in any other place of a public offense which would have been a felony if committed* in this State; * * *." (Italics added.)

A brief or summary statement of the pertinent portion of said section 1203 is that probation shall not be granted to a defendant who has been convicted of escape from a state prison, unless the court shall be satisfied that the defendant has not been previously convicted of a felony.

In the present case the information alleged that the defendant did unlawfully "escape from Honor Camp No. 21, Chilao, while under the custody of prison officials, * * * he, the said defendant, being then and there a prisoner committed to a state prison under and by virtue of a judgment of conviction of said defendant in the Superior Court of the State of California, in and for the County of Los Angeles." On February 11, during the proceeding wherein probation was granted, the defendant's counsel said: that in 1952 the defendant was sentenced for "insufficient funds checks" from the "Pomona Court," and he was taken to Chino and had served almost all of his sentence; that he had about "six months to go" when he walked off of a road work camp and went to New Mexico, where he got into difficulty and was sentenced to the New Mexico penitentiary; that he "did approximately 40 months all told" and was released to the custody of the California authorities in January, 1958.

It thus appears that the record before the trial judge showed that defendant had been previously convicted of a felony in California. The record also showed that after the defendant had escaped from prison in California he had been sentenced in New Mexico to the New Mexico penitentiary, but the record (before the trial judge herein) did not show that the offense committed in New Mexico would have been a felony if it had been committed in California. It cannot be said that by reason of the New Mexico conviction the defendant was ineligible for probation in California on the conviction of escape from state prison.

[1–3] Appellant argues that the conviction for which he was under commitment to the state prison when he escaped could not be deemed a previous conviction of a felony within the meaning of said section 1203, "since a person could not be committed to a State Prison without first having been convicted of a felony"; and if such a conviction is a previous conviction within the meaning of the section, then the portion of the section with reference to being "previously convicted" is meaningless and unnecessary. It seems to be appellant's position that if the conviction for which he was in prison immediately before he escaped is a previous conviction within the meaning of the section, then a defendant who is convicted of escape from a state prison would not be eligible for probation for the reason there would always be a previous conviction of a felony, namely, the conviction for which he was in prison immediately before he escaped. Section 1203 provides that probation shall not be granted with respect to several crimes designated therein, unless the court shall be satisfied that the defendant has never been previously convicted of a felony. One of the several crimes so designated is escape from a state prison. It is to be assumed that the Legislature in specifying escape from state prison as one of the crimes as to which probation should not be granted considered such an obvious situation as that suggested in appellant's argument, that is, that the crime of escape from state prison would necessarily be committed after a defendant had been convicted of the felony for which he was in prison immediately before he escaped. If the Legislature had intended that the conviction for which a defendant was in prison immediately before he escaped was not a previous conviction within the meaning of section 1203, it is to be assumed that such an exception would have been made in the section. The authority of a court to grant probation and to suspend the execution of a sentence is wholly statutory, and "the statute itself furnishes the measure of the power which may thus be exercised." People v. O'Donnell, 37 Cal.App. 192, 197, 174 P. 102, 104. Probation is not a matter of right, but is an act of grace and clemency. People v. Hainline, 219 Cal. 532, 533, 28 P.2d 16. In People v. Superior Court, 118 Cal.App.2d 700, 258 P.2d 1087, the defendant pleaded guilty to a charge of escape from a prison forestry camp. In that case the defendant, at the time of his escape, was under commitment to a state prison following a conviction of a felony.

Over the objection of the People, the defendant therein was granted probation, and the People appealed from that order. The defendant therein contended that the escape from the forestry camp was not an escape from state prison as the expression "escape from a state prison" is used in section 1203 of the Penal Code. It was held therein that the escape was from a state prison within the meaning of said section 1203. The question as to whether the conviction for which that defendant was under commitment when he escaped was a previous conviction within the meaning of section 1203 was not discussed therein, but the order granting probation was reversed. In the present case, the record before the trial judge revealed that the defendant had been previously convicted of a felony, that is, the issuance of checks without sufficient funds. It was not a requirement that the previous conviction be alleged in the accusatory pleading. People v. Leach, 22 Cal.App.2d 525, 527–528, 71 P.2d 594. In the case last cited, it was said, 22 Cal.App.2d at page 527, 71 P.2d at page 595: "It is not specified [in section 1203 of the Penal Code] that probation shall be denied to those formally charged with a previous conviction or to those proved to have been previously convicted, but rather it is required that the court be satisfied that the applicant's record be clear of conviction of felonies." In the present case, the conviction for which defendant was under commitment when he escaped was a previous conviction within the meaning of said section 1203 of the Penal Code.

[4] Appellant contends further to the effect that the court erred in revoking probation without evidence of a violation of the terms of probation. In re Martin, 82 Cal.App.2d 16, 185 P.2d 645, was a habeas corpus proceeding relative to an order revoking probation. In that matter it appeared that the petitioner (Martin) had pleaded guilty to driving a vehicle while he was under the influence of intoxicating liquor, and he admitted allegations that he had been previously convicted of three felonies. Probation for two years was granted on condition that he pay a fine of $500 and serve 30 days in jail. He paid the fine and served the time. Thereafter, on petition of the probation officer, defendant was found guilty of violating the terms of probation, and he was sentenced to prison. Petitioner therein (defendant) contended that the order granting probation was invalid, and that since he had paid the fine and served the time under the probation, he was entitled to be released from custody. The court said, 82 Cal.App.2d at page 18, 185 P.2d at page 646: "The petitioner was ineligible to probation since it appeared he had been previously convicted * * *. The court was authorized to revoke the probation for violation of its terms or because probation was unauthorized, and to thereafter sentence the prisoner to state prison * * *." It was also said therein, 82 Cal. App.2d at page 22, 185 P.2d at page 649: "The order for probation was properly revoked, not only because the petitioner violated its specific terms, but because it was wholly void since he was not eligible to probation on account of his prior convictions of other felonies." In the present case, the defendant was ineligible for probation, and it was not necessary to prove a violation of the terms of probation.

The order revoking probation and the "judgment" from which the appeal is taken are affirmed.

VALLÉE, J., concurs.

SHINN, P. J., concurs in the judgment.

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Joseph B. SULLIVAN, Jack R. Stone, Norris A. Melrose, Alvin A. Brumfield, Bert Abraham, Emile J. Moynier, Alfred Y. Enriquez, L. E. Elliott, J. M. Cripe, R. Disbrow, R. Inglehart, G. M. Crampton, H. B. Caswell, R. E. Kenner, R. C. Jackson, R. E. Nolind, R. M. Ford, H. W. Spendlove, John Kreman, Charles Horn, Robert Guggenmoss, Earl Reinbold, Clyde Brown, Gerald Constable, Lloyd Hilalel, William Garn, Richard Williams, Petitioners and Appellants,

v.

CITY OF SANTA MONICA, a municipal corporation, The City Council of Santa Monica, Russell K. Hart, Wellman B. Mills, Alys M. Drobnick, Ralph S. Frantz, Fred M. Judson, Rex H. Minter and William G. Thornbury, Defendants and Respondents.

Civ. 23537.

District Court of Appeal, Second District, Division 2, California.

Aug. 13, 1959.

Mandamus proceeding brought to compel respondents to amend contract to include for petitioners additional benefits of statute. The Superior Court of Los Angeles County, Orlando H. Rhodes, J., rendered a judgment of dismissal, and petitioners appealed. The District Court of Appeal, Ashburn, J., held that in view of specific statutory provision for an election to participate in additional benefits, Santa Monica was not required to amend contract to make additional statutory benefits available to its employees and former employees, notwithstanding charter provision adopting retirement law "as it now exists or may hereafter be amended".

Affirmed.

Municipal Corporations ⟹220(9)

In view of specific statutory provision for election to participate in additional benefits, Santa Monica was not required to amend contract to make additional statutory benefits available to its employees and former employees, notwithstanding charter provision adopting retirement law "as it now exists or may hereafter be amended".

Hays & McLaughlin, Hollywood, for appellants.

Robert G. Cockins, City Atty., Robert D. Ogle, Asst. City Atty., Robert H. Baida, Richard G. Berry, Deputies City Atty., Santa Monica, for respondents.

ASHBURN, Justice.

The City of Santa Monica, by contract with the State Board of Administration on April 5, 1944 elected to participate in the State Employees' Retirement System (Govt. Code, § 20000 et seq.), thus becoming a "contracting agency" in the state system (Id. §§ 20450–20495).

Petitioners are employees or retired employees (firemen and policemen) of the City and seek by writ of mandate to compel respondents to amend this contract to include for them the additional benefits of Government Code, § 21264, enacted in 1953, amended in 1955.

Petitioners appeal from judgment of dismissal entered upon the sustaining of respondents' demurrer.

Section 1200 of the city charter provides: "The 'State Employees' Retirement Act', as it now exists or may hereafter be amended, is hereby adopted for the City of Santa Monica, and plenary authority and power are hereby vested in said City, its City Council and its several officers, agents and employees to do and perform any act, or exercise any authority granted, permitted, or required under the provisions of said Retirement Act, to enable said City to become or continue as a contracting City participating in the State Employees' Retirement System; provided, however, that the City Council may terminate any contract entered into with the Board of Administration of the State Employees' Retirement System only under authority granted by ordinance adopted by a majority vote of the electors of the City of Santa Monica, voting on such proposition at an election at which such proposal is presented."

It is appellants' contention that because this charter provision adopts the retirement law "as it now exists or may hereafter be amended", and because of the plenary power given the City Council to do all things necessary to continue as a contracting party in the system, respondents have no discretion in the matter, but are required to amend the contract to make the benefits of § 21264 applicable to the petitioners.

Section 21264 provides special benefits for the surviving widow, children, or dependent parents upon the death of a "local safety member" after retirement. The last paragraph of said section provides: "This section shall not apply to any contracting agency nor to the employees of any contracting agency unless and until the agency elects to be subject to the provisions of this section by amendment to its contract made in the manner prescribed for approval of contracts, except that an election among the employees is not required, or, in the case of contracts made after the date this section takes effect, by express provision in such contract making the contracting agency subject to the provisions of this section."

Respondents fully agree that the City has become a member of the system and has adopted the state retirement system *in toto*, including all amendments, but they argue that § 21264 specifically provides for an election by a contracting party to participate in these additional benefits when it states: "This section shall not apply to any contracting agency * * * unless and until the agency elects to be subject to the provisions of this section by amendment to its contract * * *."

The City asserts in its answer that such requested action would cost $106,000 per annum, or an increase in the tax rate of .062¢ per $100; that it is the duty of respondents to so conduct the affairs of the City as to maintain the tax rate at the minimum amount commensurate with the effective operation of said City, and that said increase in the tax is unwarranted; that the only duty imposed by law upon said City is to remain a member of said system, which duty the City has discharged and will continue to discharge.

In an "Opinion of the Legislative Counsel No. 2746" of April 11, 1958, it is stated that under § 1200 of the Charter of the City of Santa Monica, the "city council may, but is not required, to take the action necessary to make the benefits of Section 21264 applicable." The opinion points out that an amendment to the contract must be "made in the manner prescribed for approval of contracts, except that an election among the employees is not required" (§ 21264), namely, by requesting from the Board of Administration a quotation of the approximate contribution of the City which would be necessary (§ 20451), the adoption of a resolution of intention if the city council desires to elect to make § 21264 applicable (§ 20457), and the adoption of an ordinance within 20 days thereafter by a two-thirds vote. However, an alternative is provided by § 20460: "Approval of the contract shall be by ordinance adopted by the affirmative vote of two-thirds of the members of the governing body, not less than 20 days after the adoption of the resolution of intention, or by ordinance adopted by a majority vote of the electorate of the public agency voting thereon." It seems obvious that a court cannot compel two-thirds of the city council to adopt an ordinance, for the function is legislative. See, Muchenberger v. City of Santa Monica, 206 Cal. 635, 646–647, 275 P. 803.

Appellants assert that the City is "authorized to procure the necessary funds therefor"—apparently referring to § 606 of the city charter which provides for the levy and collection of a property tax, limited to $1 per hundred dollars, which includes in subdivision (b): "A tax sufficient to meet all obligations of the City to the State Employes Retirement System * * due and unpaid or to become due during the ensuing fiscal year."

A similar question involving § 21264 was raised in Firemen's Benevolent Ass'n v.

City Council, 168 Cal.App.2d —, 336 P.2d 273 (Hearing Denied by Supreme Court, May 13, 1959). The charter of the City of Santa Ana authorized the City and its council and officers to do any act necessary to enable the City to continue as a contracting participant in the State Retirement System and contained this paragraph which petitioners therein contended was a mandatory directive: "The City Council is directed to comply with all the provisions of the State Employees' Retirement Law, as now enacted, or as it may hereafter be amended, including the levy of all necessary taxes." The court reviews various sections of the Act showing that certain benefits are optional, others are alternative in form, and concludes (168 Cal.App.2d at page —, 336 P.2d at page 276): "The terms 'elect' and 'election' mean to make a choice between two alternatives. Ordinarily, when a statute uses that terminology it means that the retirement plan or the particular provision which is spoken of may or may not be adopted within the sound judgment and discretion of the governing board required to exercise an election. Independent School Dist. of Cedar Rapids v. Iowa Employment Security Comm., 237 Iowa 1301, 25 N.W.2d 491, 495. We see no reason to make any exception to the general rule. There is nothing ambiguous in the paragraph quoted from said sections 21264 and 21337. In our opinion, the intent of the legislature in appending to sections 21264 and 21337 of the Government Code the clause hereinabove quoted was to give to the governing board the choice or option of adopting the benefits of said sections or not adopting them. When the city council has exercised its discretion in that respect it is our opinion that it has complied with the provisions of said section 1400 above quoted."

Judgment affirmed.

FOX, P. J., and HERNDON, J., concur.

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172 Cal.App.2d 188

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Fred PETTYJOHN, Defendant and Appellant.

Cr. 6493.

District Court of Appeal, Second District, Division 1, California.

July 21, 1959.

Defendant was convicted of illegal possession of narcotics and from a judgment and sentence of the Superior Court of Los Angeles County and an order denying a new trial, Ralph K. Pierson, J., the defendant appealed. The District Court of Appeal, White, P. J., held that the appeal from the sentence must be dismissed, that the failure to require the disclosure of the names of informers was not error; that the district attorney was not guilty of prejudicial misconduct; that the trial judge did not improperly express an opinion that defendant was guilty and that the search and seizure were not unreasonable.

Appeal from sentence dismissed.

Judgment and order denying defendant's motion for a new trial affirmed.

1. Criminal Law ⚷1023(10)

Attempted appeal from a sentence must be dismissed.

2. Witnesses ⚷216

In prosecution for illegally possessing narcotics where charge of possession did not involve participation by the informer therein, disclosure of the identity of the informer was not required. West's Ann. Health & Safety Code, § 11500.

3. Witnesses ⚷216

Where disclosure of the identity of the informer is not limited to the informer who participated in the crime charged, the information elicited from an informer must be relevant to the defense of the accused or essential to a fair determination of a cause.

4. Criminal Law 🔑1036(1), 1044

Where no appropriate objection was made with respect to nondisclosure of identity of informers, nor was any motion made to strike any testimony on that basis, complaint could not be made on appeal.

5. Criminal Law 🔑1036(1)

Admissibility of evidence with respect to alleged unlawful arrest or illegal seizure would not be considered on appeal where there was not a proper objection below.

6. Criminal Law 🔑1171(1)

In prosecution for illegal possession of narcotics, record did not establish that the district attorney was guilty of prejudicial misconduct.

7. Criminal Law 🔑1170½(3)

In prosecution for illegal possession of narcotics, asking officer whether he observed defendant's appearance particularly in the area of the arms was not prejudicial where the question was withdrawn by the prosecutor.

8. Criminal Law 🔑370, 372(1)

While generally, evidence of other crimes or of general propensity towards crime is not admissible, evidence of other crimes may be admissible to show the accused's knowledge of the narcotic nature of the substance which he is charged with having in his possession or to show a common plan, scheme or design.

9. Criminal Law 🔑404(4)

In prosecution for the illegal possession of narcotics where knowledge of the narcotic character of the article possessed was an essential ingredient of the possession charged, admitting an exhibit including codeine, Demerol, and morphine to prove defendant's knowledge of the character of the contraband he was charged with possessing was proper.

10. Criminal Law 🔑656(9)

Remarks of court which merely indicated a desire to clear up an ambiguity in an officer's testimony were not improper as an expression of opinion on the issue of the defendant's guilt.

11. Criminal Law 🔑1166½(12)

To warrant a reversal of judgment, the misconduct of a trial judge must be so definite and apparent as to leave little doubt that it resulted in depriving the accused of a fair and impartial trial.

12. Arrest 🔑63(4)

Reasonable cause for an arrest and seizure incident thereto may be based upon information supplied by a single informer who was known to the arresting officer and who has been found to be reliable.

13. Arrest 🔑63(4), 71

Evidence did not establish that subsequent search and seizure in narcotics prosecution was invalid and unreasonable on the ground that the defendant's arrest was based on information received from confidential informers regarding defendant's activity in using and selling narcotics which he was convicted of possessing. West's Ann.Const. art. 1, § 19.

14. Arrest 🔑63(4)

The term "reasonable and probable cause" as respects arrest is such a state of facts as would lead a man of ordinary caution or prudence to believe and conscientiously entertain a strong suspicion that the person accused is guilty. West's Ann. Const. art. 1, § 19.

See publication Words and Phrases, for other judicial constructions and definitions of "Reasonable and Probable Cause".

15. Searches and Seizures 🔑3(1)

In determining the validity of search and seizure the matter of time and opportunity to secure search warrant is not always determinative.

16. Arrest 🔑71

In prosecution for unlawful possession of narcotics where the arrest of defendant was lawful, the law did not inhibit the enforcement officers from conducting a reasonable search or seizure incident to a valid arrest.

17. Arrest 🔑71

Where arrest of defendant for illegal possession of narcotics was made solely by reason of information communicated by reliable informant, the search of defendant's premises and seizure of the contraband was not illegal.

◆

Fred Pettyjohn, appellant, in pro. per.

Stanley Mosk, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

The District Attorney of Los Angeles County filed an information wherein defendant was accused of violation of Section 11500 of the Health and Safety Code, in that he had in his possession certain narcotics, marijuana and amidone on or about March 13, 1958. Following entry of a plea of not guilty, trial by jury was duly waived, and by stipulation the cause was submitted to the court on the transcript of the testimony adduced at the preliminary examination, each side reserving the right to offer additional evidence, and to object to the introduction of any evidence contained in the aforesaid transcript. It was further agreed that all exhibits be deemed admitted in evidence subject to the rulings of the trial court on any objections made thereto.

[1] After reading the transcript of the preliminary hearing, hearing additional evidence and the arguments of counsel, defendant was adjudged guilty as charged. His motion for a new trial was denied and he was sentenced to state prison. From the judgment and sentence, and the order denying his motion for a new trial, defendant prosecutes this appeal. Since no appeal from a "sentence" is authorized, the attempted appeal therefrom must be dismissed (People v. Gallardo, 41 Cal.2d 57, 60, 257 P.2d 29).

We consider the following a fair epitome of the factual background surrounding this prosecution.

Edgar P. Brown, a police officer of the city of Los Angeles attached to the Narcotics Division, testified he was in the vicinity of 24019 South Avalon Boulevard, at Wilmington in the city of Los Angeles at about 2:45 p. m. on the afternoon of March 13, 1958. Officer Brown was accompanied by his working partners, Officers King and Trembly, and the three were located about a block east of defendant's residence. They observed the latter drive up in an automobile. "We—and by 'we' I am referring to Sergeant Trembly, my partner, and Sergeant King, also my partner, and we at this time proceeded to his dwelling and apprehended the suspect a short distance from his dwelling, approximately, oh, fifteen yards, I would say. At this time he was placed under arrest and returned to his address." Concededly, the arrest and ensuing search were made without warrants. As to the basis upon which the arrest and search was made Officer Brown testified:

> "Q. By Mr. Feldman (Deputy District Attorney): Now, you say you arrested this man outside of his residence? A. Yes.
>
> "Q. Why did you arrest him? A. We arrested him for suspicion of the Narcotic Act, a felony.
>
> "Q. And on what was this suspicion based? A. The reason was due to the fact that we had received information from confidential informers in the past regarding the defendant's activity in using and selling narcotics.
>
> "Q. And this source of information you had in the past, have you had other information from that source? A. We have had other information from two of the confidential informers.
>
> "Q. Did this information in the past prove to be reliable? A. In both instances. Yes, sir.
>
> "Q. And based on that information you made this arrest? A. We did.
>
> "Q. And it would be detrimental to the interests of the public to disclose such source of information at this time? A. Definitely.
>
> "Mr. Feder (Attorney for defendant): If your Honor please, I object

to that. That is the witness' right to claim the privilege.

"Mr. Feldman: Your Honor, if I may be heard on that. Under Section 1881—

"The Court: *No one has asked him for the identity of the informer. Why don't you wait until the question is asked.*

"Mr. Feldman: *I am sorry.*" (Emphasis added.)

As to the manner in which the search of defendant's residence was conducted, Officer Brown testified on cross-examination by Attorney Feder, defendant's counsel at the preliminary hearing:

"Q. Did you have a key? A. No, sir.

"Q. How did you gain entry? A. Force was used to gain entry through the door.

"Q. You broke the door down? A. Yes, sir. The door was broken down, yes, sir.

"Q. Now, you didn't have a warrant for the arrest of this defendant; is that correct, Officer? A. I did not.

"Q. And you didn't have a search warrant for the search of the house where this defendant resided; is that correct? A. I did not.

"Q. Or your fellow officers, so far as you know? A. To my knowledge, they did not."

Upon thus entering defendant's residence consisting of three rooms, the officers searched the same. Officer King called attention to a white rolled cigarette lying on a book case. He asked defendant what it was. The latter said he did not know. Officer Trembly removed two glass jars from a chair in the kitchen. One jar contained pills and the other a hypodermic outfit. The officers took the cigarette and jars into their possession and conducted defendant to the police station where he was interrogated. He denied knowledge of any of the items discovered in the house. He did state, however, that he lived there alone and that to his knowledge he had the only key.

The items were examined by an expert forensic chemist. In his opinion the cigarette contained marijuana. Various of the tablets or capsules contained amidone, and others contained morphine, Demerol, and codeine, all narcotics. Other items included with these were cigarette papers, an eye dropper, two hypodermic needles and small gauge wire.

Officer Brown, who had been attached to the narcotics division more than three and a half years, and as such had seen the arms and marks left by the use of hypodermic needles, examined defendant at the location of his address and at the police station. He observed such marks as those noted above on the arm of defendant.

Testifying more specifically with regard to the information which the police had obtained from confidential informers, Officer Brown stated that the first information concerning defendant was received approximately three months before the arrest. As Officer Brown remembered, he last received information concerning defendant two days before the arrest, on a Tuesday (the arrest occurring on the following Thursday). He received this latter information from one of the informers (sometimes referred to as informer number 4) personally. A second informer had given information periodically concerning defendant, and the last information the officer received from this informer was perhaps a week prior. Information from the informer who spoke with Officer Brown on Tuesday had been acted on in the past many times by Officer Brown and other officers. It had resulted in arrests, in the finding of narcotics, and in two convictions that he recalled. When this informer spoke with Officer Brown on Tuesday, he said that defendant was still living "back of a bar" (adjoining his residence) and that he had some drug store narcotics in his possession at that time. The informer also said he had "scored", that is, had purchased narcotics from defendant that day.

The informer who first gave information about defendant some three months prior to the arrest stated that the latter then lived at a different location, that when he (the informer) went in to "score" narcotics he would go up the alley and honk, defendant would come out, go back in, then in about ten minutes come out with the "stuff"; and that defendant sold heroin by the grams. The police "staked" on this position several times but did not observe "exactly what they wanted" for an arrest. At that time the officers were not interested in users but wanted positive knowledge that narcotics were in the location. The officers received positive knowledge when two other informers verified that defendant was selling narcotics. As aforementioned, there was a fourth and the most recent informer, who gave information on the Tuesday prior to the arrest. The reason the police did not arrest defendant on Tuesday was because there was more than one narcotic peddler in the area and there were only three officers; they could not "get on information immediately."

The earliest informer in point of time stated to the police that he based his information on having bought narcotics from defendant. The next informer stated that he did not purchase narcotics from defendant but had been in the latter's presence when sales took place. The third informer stated that he had purchased narcotics from defendant, as did the fourth informer.

Defendant did not testify in his own behalf nor offer any evidence in his defense.

As his first ground for reversal appellant urges that the trial court committed prejudicial error in not requiring disclosure of the names of the four informers referred to by Officer Brown when defense counsel requested the information.

In his brief appellant states that he "* * * is not so much contesting the fact of the other informers (1, 2, 3), since no arrest was made from that information, but rather the question is on informer number 4 * * *".

Appellant further urges that, "It is true that appellant is not charged with the selling of marijuana, but rather possession thereof; the point is that the arrest was due to the fact that informer number 4 had made a purchase and informed the arresting officers that Pettyjohn had in his possession narcotics. This made the informer a participant and therefore his identity should have been revealed."

[2, 3] We are satisfied that the charge of possession of narcotics of which appellant was convicted did not involve participation by the informer therein. In other words, we cannot perceive wherein informer number 4 could be a material witness on the issue of appellant's guilt of possessing narcotics. While it is true that disclosure is not limited to the informer who participates in the crime charged nevertheless, the information elicited from an informer must be "relevant and helpful to the defense of the accused or essential to a fair determination of a cause" (People v. McShann, 50 Cal.2d 802, 808, 330 P.2d 33, 36) and before the prosecution is compelled to disclose his identity. As was said in the case just cited, "A mere informer has a limited role. 'When such a person is truly an informant he simply points the finger of suspicion toward a person who has violated the law. He puts the wheels in motion which cause the defendant to be suspected and perhaps arrested, but he plays no part in the criminal act with which the defendant is later charged.' People v. Lawrence, supra, 149 Cal.App.2d [435] at page 450, 308 P.2d [821] at page 830. His identity is ordinarily not necessary to the defendant's case, and the privilege against disclosure properly applies. When it appears from the evidence, however, that the informer is also a material witness on the issue of guilt, his identity is relevant and may be helpful to the defendant. Non disclosure would deprive him of a fair trial."

As was said in People v. Williams, 51 Cal.2d 355, 333 P.2d 19, 21, the existence of the privilege of nondisclosure depends on the "materiality of the informer's identity to the defense".

Recently, the Supreme Court of the United States in a narcotic case (Roviaro v. United States, 353 U.S. 53, 62, 77 S.Ct. 623, 628, 1 L.Ed.2d 639) had this to say: "The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense". We are satisfied that in the instant case, the right of appellant to prepare his defense to the charge of possession of narcotics could not have been prejudiced by the nondisclosure of informer number 4.

Furthermore, the record reveals that no appropriate objection was made in connection with nondisclosure of the identity of the informers, nor was any motion made to strike any testimony on that basis. Priestly v. Superior Court, 50 Cal.2d 812, 819, 330 P.2d 39, 43, is authority for the statement that when the prosecution seeks to show reasonable cause for a search by testimony as to communications from an informer, his identity must be disclosed in proper cases when the defense seeks disclosure of such testimony "must be struck on proper motion of the defendant".

[4] At the preliminary examination no objection was made on the ground of unlawful arrest or illegal search and seizure when the narcotics exhibits were received into evidence. At the trial there was in effect a motion to suppress, but it was manifestly limited in nature. The grounds were that the arrest had occurred at a distance from the dwelling and that the information received by the police was ambiguous. "The courts have held that even as to matters having to do with searches and seizures, the admissibility of evidence will not be considered on appeal unless there has been a proper objection in the trial court." People v. Close, 154 Cal.App.2d 545, 552, 316 P.2d 1019, 1024. And, in Coy v. Superior Court, 51 Cal.2d 471, 334 P.2d 569, 570, we find the following language:

"In the present case no motion to strike the officer's testimony was made after the identity of the informer was refused, and neither in his objection to the introduction of the narcotics in evidence nor by argument elsewhere in the record did defendant indicate that he was relying on the refusal to identify the informer to establish the illegality of the arrest and search. * * * No undue burden is placed on the defendant by requiring him to make a motion to strike when the basis for excluding evidence theretofore properly admitted becomes apparent, and there is no basis for departing from the settled rule requiring such a motion * * * in the present situation."

[5] Appellant next contends that the district attorney was guilty of prejudicial misconduct. This charge is predicated on the testimony of the chemist that in his examination of the package marked People's Exhibit 1 he found a marijuana cigarette, capsules of amidone, other tablets containing Morphine, Demerol, codeine, as well as other miscellaneous items including two hypodermic needles. At the preliminary examination appellant moved to strike out the testimony of the chemist regarding codeine, Demerol and morphine on the ground that, "The only allegation in the complaint is possession of marijuana and amidone". The motion was denied. When Exhibit 1 was offered into evidence, defense counsel objected to any part of the evidence, "except the marijuana and the amidone as alleged in the complaint". The court overruled the objection and stated, "It doesn't go to the materiality. It might go to the question of knowledge, that the defendant knew that the narcotics named were there with a collection of several others. The objection is overruled. The envelope heretofore marked People's 1 for identification together with its contents will be received in evidence."

[6] Appellant also challenges the good faith of the prosecutor in inquiring of Officer Brown whether the latter observed appellant's appearance, particularly in the area of the arms. The officer testified that he did, that he examined appellant at the

location of his address and at the detective bureau, that he (the officer) had been attached to the narcotics division over three and a half years and as such had seen the arms and marks left by the use of hypodermic needles, and that he observed such marks on the arm of appellant. Defense counsel objected to further questioning along this line on the ground it had nothing to do with the charge. The court overruled the objection, stating that the matter might go to the question of guilty knowledge. The officer then testified that from his prior experience he had seen similar marks and that he formed an opinion as to what the marks on appellant's arm were. There was a further objection and the judge inquired as to the purpose of the questioning. The deputy replied that it was to show the connection between the marks and the use of the hypodermic outfit which was found. The judge pointed out that appellant was merely charged with the possession of marijuana and amidone. The deputy district attorney said that because the evidence now showed a possibility of addiction he would withdraw the pending question.

[7, 8] While it is the rule that, generally, evidence of other crimes, or of general propensity towards crime, is not admissible, nevertheless, it is equally true that evidence of other crimes may be admissible to show the accused's knowledge of the narcotic nature of the substance which he is charged with having in his possession, or to show a common plan, scheme or design (People v. Peete, 28 Cal.2d 306, 319, 169 P.2d 924; People v. Sykes, 44 Cal.2d 166, 170, 280 P.2d 769; People v. MacArthur, 126 Cal.App.2d 232, 237, 271 P.2d 914). As heretofore pointed out, it was upon the theory of knowledge on the part of appellant as to the narcotic character of the article with the possession of which he was charged that the court received in evidence the exhibit which included codeine, Demerol and morphine. Since "knowledge of the narcotic character of the article possessed is an essential ingredient of the offense (possession) charged." (People v. Winston, 46 Cal.2d 151, 160, 293 P.2d 40, 44), the evidence was admissible on the theory of proving appellant's knowledge of the character of the contraband he was charged with possessing.

As to appellant's objection to testimony concerning the marks on his arms, as heretofore noted, the question in that regard was withdrawn by the prosecutor. It might be noted, however, that in People v. Gin Hauk Jue, 93 Cal.App.2d 72, 74, 208 P.2d 717, 718, the court held that in a charge of possession of narcotics, where evidence of an examination of the arms of the accused revealed evidence of the use of needles, "This evidence was clearly admissible as a circumstance showing 'possession' by defendant of the opium there found by the officers".

[9, 10] Appellant next contends that "Before the trial ended the trial judge was in the opinion that appellant was guilty and so stated his opinion, this was prejudicial and error". This complaint has to do with what occurred when appellant was reiterating his objection to the order of the court reopening the case for further evidence. During the ensuing argument the trial judge said, "I think, Mr. Umann (attorney for appellant), that the Court is for the purpose of ascertaining and determining the truth. Here we have a situation where they had information, so stated in the preliminary transcript, regarding the defendant's use and sale of narcotics. *Now, to me that would mean that he was using and selling narcotics.* At least that was the information given. Now, it is probably true that that is all the officer was asked, and nothing further was asked of him at the preliminary hearing either by the District Attorney or by the Public Defender, but I think that these proceedings are here for the purpose not of being unduly technical but for the purpose of trying to find out what the facts are; so I see no reason in this case why the motion should not be granted. Had you requested permission to reopen, I would have granted you that permission." (Emphasis added.) Appellant takes exception to the above itali-

cized remarks of the court. We fail to perceive any expression of opinion on the issue of appellant's guilt in the foregoing remarks of the trial judge. They merely indicate a desire on the part of the court to clear up an ambiguity in the officer's testimony. As the court stated, "It seems to be a little bit ambiguous, and I think the Court should have the facts". To warrant reversal of a judgment, the misconduct of a trial judge must be so definite and apparent as to leave little doubt that it has resulted in depriving the accused of a fair and impartial trial. The record in this case certainly discloses no such conduct.

[11–13] Finally, appellant asserts that the judgment and order must be reversed because his arrest and the subsequent search and seizure were unreasonable and in violation of Section 19, Article I of the Constitution of the State of California. He directs our attention to the testimony that he was arrested for "suspicion of the Narcotic Act", and that his arrest was "* * * based on information received from confidential informers regarding the defendant's activity in 'using and selling' narcotics". Appellant argues that, "there is no actual proof that appellant was actually using or selling narcotics and so where there was no evidence that would justify an implication that appellant was in the business of using and selling narcotics, there can be no probable cause for his arrest and where an arrest is illegal, the search is unreasonable". In this contention appellant cannot be sustained because reasonable cause for an arrest and seizure incident thereto, may be based upon information supplied by a single informer who is known to the arresting officer and who has been found to be reliable. In the instant case, in view of the established past reliability of the informers, there was reasonable cause for the arrest and search (People v. Richardson, 51 Cal.2d 445, 334 P.2d 573; People v. Soto, 144 Cal.App.2d 294, 299, 301 P.2d 45). As was said in People v. King, 140 Cal.App.2d 1, 6, 294 P.2d 972, 975, "The term, reasonable or probable cause, has been defined: 'By "reasonable or probable cause" is meant such a state of facts as would lead a man of ordinary caution or prudence to believe, and conscientiously entertain a strong suspicion, that the person accused is guilty.' In re McCarty, 140 Cal.App. 473, 474, 35 P.2d 568". The information relied upon by the officers has heretofore been set forth in detail and it is unnecessary to here repeat it. Suffice it to say that it meets the test of the rule just quoted.

[14, 15] It is next contended by appellant that since the information was received by the officers two days prior to their acting upon it and the consequent arrest of appellant, the officers had ample time within which to secure the issuance of a search warrant. That it must therefore, be assumed that, "The only reason that can be seen why they did not issue a warrant is that they did not have 'probable cause', but rather made the arrest wholly in the assumption and suspicion that appellant had two days later possession of said narcotics". The matter of time and opportunity to secure a search warrant is not always determinative. Since, as we have held, the arrest of appellant was lawful, the law, in such cases, does "not purport to inhibit the right of law enforcement officers to conduct a *reasonable* search or seizure incident to a valid arrest" (People v. Coleman, 134 Cal.App.2d 594, 599, 286 P.2d 582, 585) (See also People v. Winston, 46 Cal.2d 151, 162, 163, 293 P.2d 40; Trowbridge v. Superior Court, 144 Cal.App.2d 13, 23, 300 P.2d 222).

[16, 17] Appellant's final contention that, "there was no reasonable and probable cause for an arrest for possession of narcotics where the officers did not see the narcotics, and had no reasonable cause to know that appellant had in his home any narcotic until after they arrested and searched the premises" is unavailing because since an arrest may be made solely by reason of information communicated by a reliable informant, the search of appellant's premises and the seizure of the contraband was not illegal. People v. Montes, 146 Cal.App.2d 530, 532, 533, 303 P.2d 1064.

Appellant's reliance upon the case of People v. Harvey, 156 Cal.App.2d 516, 521, 319 P.2d 689, 692, does not aid him because its factual background is easily distinguishable from the evidentiary features of the case now engaging our attention. In the case just cited, there was a total absence of any evidence other than "of a very vague nature" received from a reliable informant, and the testimony of the officer relating to the arrest was as follows: "Well, we observed him for a few moments to see what he was up to. We saw that he was waiting for something or somebody, possibly a contact and we thought we would place him under arrest". This is a far cry from the evidence presented in the instant prosecution.

The unauthorized appeal from the "sentence" is dismissed. The judgment and the order denying defendant's motion for a new trial are, and each is affirmed.

FOURT and LILLIE, JJ., concur.

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173 Cal.App.2d 112

Juanita OWEN and Grace Sawyer, Plaintiffs and Appellants,

v.

BOARD OF DIRECTORS OF ROSICRUCIAN FELLOWSHIP, Defendants and Respondents.

Civ. 6109.

District Court of Appeal, Fourth District, California.

Aug. 17, 1959.

Hearing Denied Oct. 7, 1959.

Action by expelled members of church corporation for writ of mandamus to compel church corporation's board of directors to reinstate expelled members and permit them to examine mailing list of membership of corporation. The Superior Court, San Diego County, Clarence Harden, J., denied petition and discharged alternative writ of mandamus theretofore entered, and expelled members appealed. The District Court of Appeal, Mussell, J., held that, where members of church corporation had been suspended and then expelled in accordance with church corporation's bylaws, rules and regulations, superior court lacked jurisdiction to order their reinstatement.

Judgment affirmed.

1. Mandamus 🔑168(4)

In action by expelled members of church corporation for writ of mandamus to compel church corporation's board of directors to reinstate expelled members and permit them to examine mailing list of membership of corporation, evidence was sufficient to establish that board had suspended and then expelled the members in accordance with church corporation's bylaws, rules, and regulations.

2. Religious Societies 🔑7

Where members of church corporation had been suspended and then expelled in accordance with church corporation's bylaws, rules and regulations, superior court lacked jurisdiction to order their reinstatement.

3. Religious Societies 🔑7

Person who joins church expressly or impliedly covenants that, in consideration of benefits which result from such union, he will submit to control and be governed by church's laws, usages, and customs, regardless of whether they are of an ecclesiastical or temporal character.

4. Religious Societies 🔑5

Formal evidence of contract of person who joins church is contained in canons of church, constitution, articles, and bylaws of the society, and customs and usages which have grown up in connection with such instruments.

5. Religious Societies ⚷7

Right to membership in church corporation was subject to church corporation's bylaws, rules, and regulations.

6. Religious Societies ⚷14

General rule that courts will not interfere in religious societies with reference to their ecclesiastical practices stems from separation of church and state, but has always been qualified by rule that civil and property rights would be adjudicated.

7. Religious Societies ⚷7

Members of church corporation have right to inspect membership list of such corporation.

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Holliday & Folsom, San Diego, for appellants.

Wm. L. Murphey, Los Angeles, for respondent.

MUSSELL, Justice.

Juanita Owen and Grace Sawyer, as members of the Rosicrucian Fellowship, a church corporation, seek a writ of mandamus to compel the defendant members of the board of directors of the corporation to reinstate petitioners as members thereof and to permit them to examine the mailing list of membership of the corporation. The trial court rendered judgment denying plaintiffs' petition and discharging the alternative writ of mandamus theretofore entered. Plaintiffs appeal from the judgment.

As stated in the pretrial order herein, petitioners contend that they were unlawfully expelled from membershp in the Rosicrucian Fellowship corporation and were illegally denied the right to inspect the membership list. The respondents contend that the petitioners were first suspended and then expelled in accordance with the by-laws and rules and regulations of the church corporation and that by reason of the suspension and expulsion, any right of petitioners to examine the corporate records expired, and that, in any event, the demand of petitioners was not reasonably related to their interests as members of said corporation.

There is no serious dispute as to the material facts involved. They are set forth in a written stipulation attached to the pretrial order and in the findings of the trial court. Summarized, they are as follows:

The Rosicrucian Fellowship is a church corporation and at all times here involved its by-laws provided for the suspension and expulsion of members in rules and regulations duly and regularly adopted for such suspension and expulsion. These rules and regulations provide, in substance, that upon receipt of a written complaint signed by a member in good standing of the church corporation, against another member, the board of directors shall have the power by majority vote to suspend the accused member pending a hearing of the charges at a subsequent meeting; that notice of said hearing and charges be given by mail to the accused member; that at the subsequent meeting, the board of directors, after hearing evidence for and against the accused, has the power by majority vote to reprimand, exonerate or expel said member.

Prior to January 26, 1958, petitioners Juanita Owen and Grace Sawyer were members of the church corporation. On January 25, 1958, they delivered to defendants a written demand for inspection of the membershp records of the Rosicrucian Fellowship, and on February 22 the said board of directors adopted a resolution denying petitioners the right to inspect the membership register. On January 25 the board of directors received from a member of the corporation letters complaining of certain acts of Juanita Owen and Grace Sawyer and on January 26, 1958, the board of directors adopted resolutions expelling petitioners. At a special duly and regularly called meeting on February 22, 1958, the board passed resolutions revoking the resolutions of January 26 and reinstating petitioners. Resolutions were then adopted suspending each of said petitioners pending hearing of said letters of complaint at the next regular meeting of the board to be held on April 19, 1958. Written notice of this hearing was mailed to petitioners and, on April 19, 1958, the board heard evidence as to whether or not the petitioners should be exonerated, reprimanded, expelled or suspended as probationers and as members of the corporation. The board thereupon adopted separate resolutions expelling petitioners Owen and Sawyer as members of the church corporation.

The trial court found that the defendant board of directors had complied with each and every procedural requirement of the by-laws, rules and regulations of said church corporation; that the defendant board had exclusive jurisdiction to expel the petitioners by said resolutions adopted on April 19, 1958; that any right of petitioners to inspect the mailing list of membership or the corporate records of the church corporation existed only so long as petitioners were members thereof; that any such right expired and terminated with the adoption of the resolutions on April 19, 1958, expelling petitioners. The court then concluded that since petitioners had been suspended and expelled by the board in accordance with the by-laws, rules and regulations of the corporation, the court had no jurisdiction to compel their reinstatement, and that petitioners, having been so suspended and expelled, had no right to inspect the mailing list or other corporate records of the church corporation. Judgment was then entered denying the petition and discharging the writ theretofore issued.

Petitioners appeal from the judgment, contending that they had a property right in the membership of the church corporation; that this property right was established by the decision in Rosicrucian Fellowship v. Rosicrucian Fellowship Non-Sectarian Church, 39 Cal.2d 121, 245 P.2d 481, and that the trial court therefore had jurisdiction to try the issue of the propriety of their ouster and the good faith of respondents in expelling appellants.

[1, 2] The evidence shows that the board of directors of the church corporation suspended and expelled the petitioners in accordance with the by-laws and rules and regulations of the church and the trial court properly held that it had no jurisdiction to order their reinstatement.

[3, 4] As is said in Rosicrucian Fellowship v. Rosicrucian, etc., Ch., 39 Cal.2d 121, 132, 245 P.2d 481, 488:

> "'* * * A person who joins a church covenants expressly or impliedly that in consideration of the benefits which result from such a union he will submit to its control and be governed by its laws, usages and customs whether they are of an ecclesiastical or temporal character to which laws, usages, and customs he assents as to so many stipulations of a contract. The formal evidence of such contract is contained in the canons of the church, the constitution, articles, and by-laws of the society, and the customs and usages which have grown up in connection with these instruments.' American Church Law, Zollman, § 328."

[5, 6] The right to membership in the corporation here involved is subject to the by-laws, rules and regulations of the church corporation. There is no evidence in the record before us that the suspension and expulsion of petitioners was not in accord with the by-laws, rules and regulations of the corporation. In Rosicrucian Fellowship v. Rosicrucian, etc., Ch., supra, 39 Cal.2d 121, 131, 245 P.2d 481, 487, the following rule is stated:

> "The general rule that courts will not interfere in religious societies with reference to their ecclesiastical practices stems from the separation of

> the church and state, but has always been qualified by the rule that civil and property rights would be adjudicated. [Citations.]"

The case does not hold that membership in a church corporation is not subject to the by-laws, rules and regulations of the corporation.

In Dyer v. Superior Court, 94 Cal.App. 260, 269, 271 P. 113, it is held that civil authorities cannot disregard the decisions of the church tribunals; that whenever the question of discipline, or of faith, or ecclesiastical rule, custom, or law has been decided by the highest of the church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them.

In Church of Christ of Long Beach v. Harper, 83 Cal.App. 41, 46–47, 256 P. 476, 478, the court said:

> "Civil courts in this country have no ecclesiastical jurisdiction. They cannot revise or question ordinary acts of church discipline (White Lick Quarterly Meeting of Friends [by Hadley] v. White Lick Quarterly Meeting of Friends [by Mendenhall], 89 Ind. 136; Ferraria v. Vasconcellos, 31 Ill. 25), or properly interfere with that part of church management which concerns the spiritual welfare and discipline of the members, but only when rights of property are involved (Prickett v. Wells, 117 Mo. 502, 24 S.W. 52; State, Livingston v. Rector, Wardens and Vestrymen of Trinity Church, 45 N.J.L. 230)."

In Erickson v. Gospel Foundation of California, 43 Cal.2d 581, 585, 275 P.2d 474, 477, the court said:

> "The courts have recognized different rules of law relating to review of the action of an organization in expelling a member, depending on the nature of the particular group involved and the character and extent of the member's interest. For example, it has been held that one may not be expelled from an organization such as a labor union or a mutual benefit society, where property rights are attached to membership, without notice and a reasonable opportunity to defend against the charges made. [Citations.] The courts have always been reluctant to interfere with actions taken by religious organizations with respect to their internal affairs, and it has been commonly held that the expulsion of a member by a proper tribunal of such an association will not be reviewed where no property right is involved. [Citations.]"

In the instant case a hearing was had on notice and petitioners had a reasonable opportunity to defend against the charges made.

[7] Petitioners no doubt had a right to inspect the membership list involved so long as they were members of the church corporation. However, counsel for petitioners and respondents admitted that this property right was coextensive with membership in the corporation.

The trial court was correct in ruling that it did not have jurisdiction to order the reinstatement of petitioners under the facts shown by the record herein.

The judgment is affirmed.

GRIFFIN, P. J., and SHEPARD, J., concur.

Hearing denied; PETERS, J., dissenting.

171 Cal.App.2d 635

Nick W. PATAPOFF and June Patapoff, Plaintiffs and Appellants,

v.

The CITY OF LOS ANGELES, a municipal corporation, Department of Water and Power of the City of Los Angeles, et al., W. J. Schworer, Marie L. Schworer, John P. Tolmsoff and Nellie Tolmsoff, Defendants,

Department of Water and Power of the City of Los Angeles, Respondent.

Civ. 23487.

District Court of Appeal, Second District, Division 1, California.

July 1, 1959.

Action was brought for trespass and damage to realty. The Superior Court of Los Angeles County, Walter C. Allen, J., entered judgment dismissing the action under Section 583 of the Code of Civil Procedure dealing with dismissal of action for lack of prosecution and for failure to bring action to trial, and the plaintiffs appealed. The District Court of Appeal, White, P. J., held that action should not have been dismissed under any provisions of the statute, and that such dismissal was an abuse of discretion on part of Superior Court.

Judgment reversed.

1. Dismissal and Nonsuit 🔑60(2)

Where first action, which was an action for trespass and damage to realty, was consolidated with second action, determination in second action of extent of interest of one of the plaintiffs in the first action in the realty involved in both actions constituted a partial "trial" of the first action, so as to toll with respect to the first action that section of the Code of Civil Procedure dealing with dismissal for lack of prosecution and for failure to bring action to "trial." West's Ann.Code Civ.Proc. § 372.

See publication Words and Phrases, for other judicial constructions and definitions of "Trial".

2. Dismissal and Nonsuit 🔑60(1)

Intention of the Legislature in enacting statute dealing with dismissal of action for lack of prosecution and for failure to bring action to trial was to prevent unnecessary and unfair delays on part of plaintiffs. West's Ann.Code Civ.Proc. § 372.

3. Evidence 🔑83(1)

As all departments and levels of government grow and grow, and especially when governmental departments are involved on both sides of a court action, it becomes difficult if not impossible to apply the presumption that official duty has been regularly performed.

4. Evidence 🔑82

Where seven different judges participated in some phase of proceedings, and at least as many different deputy clerks and reporters worked in the case, and court minutes, which showed appointment of Supervisor of Guardianships of Department of Mental Hygiene as guardian ad litem of one of the plaintiffs, stated that copy of minutes was to be mailed to Department of Mental Hygiene, with nothing to indicate who would mail such copy, that it was mailed, or that it was received, it was far-fetched to presume that giving of notice of appointment to Supervisor of Guardianships was an official duty regularly performed. West's Ann.Welfare & Inst.Code, § 6660.

◆

Youngblood & Gross, Beverly Hills, for appellants.

Roger Arnebergh, City Atty., Los Angeles, Gilmore Tillman, Chief Asst. City Atty., Los Angeles, for Water and Power, O. M. Lloyd, Deputy City Attorney, Los Angeles, George K. Whitworth, Deputy City Atty., San Francisco, for respondent.

WHITE, Presiding Justice.

Plaintiffs Nick W. Patapoff and June Patapoff, husband and wife, appeal from a minute order dated May 19, 1958, entered May 21, 1958, reading as follows: "Nature of Proceedings: Motion of Defendant, Department of Water and Power of the City of Los Angeles, to dismiss action pursuant to provisions of Section 583 of the Code of Civil Procedure. Motion Granted." Walter C. Allen, Judge.

The motion for dismissal was made on each of the following grounds: (1) "For want of prosecution, in that plaintiffs have failed, for more than two years after the action was filed, to bring said action to trial"; and (2) "Said action was not brought to trial within five years after the plaintiffs filed said action".

The record on appeal discloses that said motion, together with a notice that it would be made May 19, 1958, an affidavit of Deputy City Attorney George K. Whitworth, one of the attorneys for defendant Department of Water and Power, in support of said motion, and a memorandum of points and authorities in support thereof, was on May 8, 1958, served by mail on the "Department of Mental Hygiene of the State of California by Gordon Hamilton, as Supervisor of Guardianships, as Guardian ad Litem of said Nick W. Patapoff in the within action, plaintiff in said action" and upon the plaintiffs by mailing a copy of said papers addressed to Attorneys N. E. Youngblood and Marvin Gross, who, on July 19, 1957, at the request of the Department of Mental Hygiene and upon the signed statement of Nick W. Patapoff and June Patapoff, had been substituted as plaintiffs' attorneys "in the place and stead of Nick W. Patapoff in propria persona".

Because of appellants' contention that the trial of action No. 600463, entitled W. N. Schworer, et ux., v. Nick W. Patapoff, et ux., consolidated with the instant action for the purpose of trial on May 4, 1954, was a partial trial of the instant action, and respondent's insistence that "no issue of fact" in the instant action has been tried, we have carefully examined the entire record on appeal for the purpose of determining what were the issues in the instant action, No. 612867.

The record includes a copy of the original "Complaint for Property Damage and Trespass" filed April 22, 1953, but no copy of the Amended Complaint referred to in the Joint Statement for Pre-Trial, and no copy of any answer, although the Pre-Trial Conference Order, dated April 23, 1958, states that "the pleadings are sufficient and the parties are ready for trial".

From the minute orders included in the record, it appears that, on May 4, 1954, upon motion of W. N. Schworer, et ux., defendants in the instant action and plaintiffs in said action No. 600463, the actions were consolidated for trial and transferred by Judge Richards from Department 1 to Department 24; and that on the same day, in the presence of attorneys for all parties to both actions, in Department 24, Judge Robert Scott stated that "the above actions heretofore consolidated for trial and transferred from Department One are called for trial (listing attorneys for all parties to both actions as present). The Court declares that the two actions will not be tried together, and that action No. 600463 will be tried first and when completed, the trial of Action No. 612867 will proceed. It is stipulated that the description of the property set forth in the complaint in action No. 600463 is the correct description * * *."

May 5, 1954, the two actions were transferred to Department One because of the desire of Nick W. Patapoff to change his lawyer and his claim that "he is not ready for trial, either with his attorney Jesse Bach Porter, or otherwise".

On the same day, in Department One, the instant action "Consolidated with 600463" was continued to July 22, 1954, "due to congested calendar".

July 22, 1954, "on motion of defendant", plaintiff Patapoff appearing "pro. per.", the instant action (consolidated with 600463) was continued to November 17, 1954.

Notice signed by Attorney Whitworth to the effect that trial "will be had" on November 17, 1954, was served personally upon Nick W. Patapoff and June Patapoff on July 28, 1954. On the same day, served upon said plaintiffs at the same time, was Attorney Whitworth's "Notice Requiring Plaintiffs to Appoint an Attorney or to Appear in Person", reciting as the reason for such requirement that Jesse Bach Porter "by order of Court heretofore was permitted to withdraw and did withdraw from the case and has ceased to act as your attorney herein".

November 17, 1954, the instant action ("Counsel for Plaintiff: Jesse Bach Porter") (Consolidated with 600463) "on motion of plaintiff" was continued to March 7, 1955.

December 2, 1954, Attorney Whitworth's "Notice Requiring Plaintiffs to Appoint an Attorney or to Appear in Person" and his "Notice of New Trial Date" for trial on March 7, 1955, was served upon said plaintiffs Patapoff.

The minutes of Department 6, on March 8, 1955, Hon. John Gee Clark, Judge, show the following proceedings were had in actions 600463 and 612867.

"Causes consolidated for trial are transferred from Department One" (listing attorneys appearing for other parties to both actions, "Nick W. Patapoff appears in propria persona as defendant in 600463, and as plaintiff and cross defendant in 612867", and showing no appearance for or by June Patapoff in either case). "The court announces that the order of trial will be to proceed on 600463 first, and Nick W. Patapoff is affirmed and testifies, and William J. Schworer is sworn and testifies, both for plaintiffs and cross-defendants; Nick W. Patapoff testifies in his own behalf." Plaintiffs' exhibits were received in evidence; defendants' exhibit marked for identification only. "Both parties rest. The court declares that Patapoff is owner of ¼ interest in the property, subject to a lien of $1705.92 in favor of Schworer. Certain matters then coming to the attention of the court, the court declares a Mistrial as to 600463, and appoints the Department of Mental Hygiene-Gordon Hamilton as Supervisor of Guardianships as Guardian ad Litem of Nick W Patapoff, pursuant to Welfare and Institution Code § 6660, and the cause is continued to May 2, 1955 at 10:00 a. m., for the purpose of permitting the Guardian herein appointed to take such steps as may be necessary. The exhibits introduced are ordered to be returned to the party who produced them, and plaintiffs' exhibits are all returned to James B Ogg, counsel; the defendants' exhibit A, marked for identification only, is ordered turned over to the Guardian ad Litem herein appointed.

"As to 612867, the court makes the same appointment, namely, the Department of Mental Hygiene-Gordon Hamilton as Supervisor of Guardianships, as Guardian ad Litem of Nick W. Patapoff, and the cause is ordered off calendar, subject to being reset on 30-days' notice. A copy of these minutes is to be sent to the Department of Mental Hygiene, 1320 K Street, Sacramento, California."

December 10, 1957, at the first appearance of plaintiffs Patapoff by their attorneys Young and Gross, Judge Kincaid set the instant action alone for Pre-Trial Conference on April 17, 1958 and for trial May 20, 1958.

May 8, 1958, in addition to the notice of motion for dismissal, affidavit and authorities in support of that motion, there were likewise served upon said guardian ad litem and attorneys for the plaintiffs the following papers: Notice of Motion to Amend Pre-Trial Conference Order, Points and Authorities, Affidavit, and Motion to Amend Nunc Pro Tunc Pre-Trial Conference Order.

The amendments to said Pre-Trial Conference Order sought by defendants included the striking of the second sentence from the following paragraph thereof: "It is impossible to bring this case to trial within a period of five years after the filing of the complaint on the 22nd day of April, 1953. However trial was commenced on two prior occasions, indicating that the effect of Section 583 of the C.C.P. has been tolled".

The other amendment to said Pre-Trial Conference Order also sought "for the purpose of correcting clerical errors therein" consisted of the addition thereto of the following paragraphs: "By order of Court herein made March 8, 1955, the Department of Mental Hygiene of the State of California, by Gordon Hamilton as Supervisor of Guardianships, was appointed Guardian ad Litem herein of Nick W. Patapoff, one of the plaintiffs in this action, which said appointment has not since been revoked and still continues in full force and effect.

"It is hereby ordered that the entitlement of the within action shall be amended nunc pro tunc March 8, 1955 by striking the name 'Nick W. Patapoff' as a party plaintiff herein and substituting therefor 'Nick W. Patapoff by Department of Mental Hygiene of the State of California, by Gordon Hamilton as Supervisor of Guardianships, his Guardian ad Litem' and the clerk of said Court is hereby ordered to amend the entitlement of the within action upon the records and files of this Court accordingly".

The Affidavit of George K. Whitworth in Support of Defendant's Motion to Amend Pre-Trial Conference Order is as follows: "That at all times herein mentioned he has been and now is one of the attorneys of record for defendant Department of Water and Power of The City of Los Angeles in the above entitled action. That said action has not heretofore been brought to trial, that is to say, that the trial of any question of fact therein has not heretofore been had or commenced and that there has not been any partial trial of any question of fact. That said action is one to recover damages for trespass and one of the issues raised by the pleadings was the extent of plaintiffs' interest in the subject property which issue was already the subject of a pending quiet title action (W. J. Schworer et al., Plaintiffs, vs. Nick W. Patapoff et al., Defendants, civil action No. 600463 in the above entitled court and county) between said W. J. Schworer et ux., two of the defendants in this action, and said Nick W. Patapoff et ux., the plaintiffs in this action. That in order to assure that plaintiffs' title would be determined in the prior action (No. 600463) before this action (No. 612867) should come to trial, the said defendants W. J. Schworer et ux., by their attorney James B. Ogg, moved that the two actions be 'consolidated' for trial, which motion was granted May 4, 1954 as appears by the minute order of that date in the file. That said actions were not in fact 'consolidated' for trial, for on each of the two occasions, to wit, the first on May 4, 1954 and the second on March 8, 1955, the Court declared, as appears by the minute order made on each occasion, that the two actions would not be tried together but that the quiet title action, No. 600463, would be tried first and when the trial thereof was completed that the within action, No. 612867, would be tried. That all proceedings heretofore had by way of trial of said action No. 600463 pertained to that action alone and none of the testimony adduced nor exhibits offered in any trial of that action were in anywise made applicable to this action, No. 612867."

Attached to, and by reference made a part of, said Pre-Trial Conference Order dated April 23, 1958, signed by Judge Irwin, is a Joint Statement for Pre-Trial, dated November 8, 1957, signed by Attorneys Gross and Whitworth for their respective clients, from which we quote the following excerpts:

"2. * * * the issue as to title having been determined in another action (Sup. Ct. No. 600463), this action as to them (defendants other than the Department of Water and Power) may be dismissed * *.

* * * * * *

"5. At the times the acts complained of were committed, insofar as they were committed, that is, during the months of January and March 1952, the plaintiffs were the owners of only an undivided one-fourth interest in said Parcels 1 and 2, and never thereafter acquired or owned any greater right or interest in any of said parcels. * * * Plaintiffs ceased to be the owners of any interest in said Parcels 1 and 2 upon the sale of said parcels made pursuant to order of Court in said action No. 600463 * * * and their entire interest in Parcel 3 was terminated on or about the 13th day of November, 1953 * * *.

"6. If the plaintiffs be entitled to recover in this action for any of the damage complained of, the amount of their recovery as to Parcels 1 and 2 is not to exceed one-fourth of the total damage to those parcels, and the amount of their recovery as to Parcel 3 is not to exceed one-half of the total damage to that parcel."

Said Pre-Trial Statement further indicates that said Parcel 1 along its westerly boundary is contiguous to the Department's electric transmission line right of way, 160 feet in width, over which it maintains a high-tension steel tower double circuit electric transmission line; that one of its steel towers is approximately 225 feet northerly of the most northerly corner of said Parcel 1 and another about 100 feet westerly from the most westerly corner of said Parcel 1; that during January and March, 1952, without plaintiff's consent and without payment of any compensation to plaintiffs, defendant did enter upon said Parcel 1 with bulldozers and move and displace sand, gravel and rock thereon, and erect thereon an embankment of rock, sand, gravel and detritus.

The Pre-Trial Conference Order and Statement in the instant action is dated April 23, 1958, filed April 30, 1958, and shows a line through the sentence therein which reads as follows: "However trial was commenced on two prior occasions, indicating that the effect of Section 583 of the C.C.P. has been tolled." Opposite said sentence is the following marginal notation: "A.N.I./J. on motion 5/19/1958". The record on appeal includes no other indication that the motion for amendment of the Pre-Trial Conference Order was actually made.

"When filed, the pretrial conference order becomes part of the record in the case, and, where inconsistent with the pleadings, controls the subsequent course of the case." 48 Cal.Jur.2d 98; Rule 8.8, 47 Cal. 2d 7. "A pre-trial conference order, and any proceeding to correct or modify such order, may be reviewed on appeal from a final judgment in the case." (Rule 8.10)

Relevant to appellants' contention that the trial of Action No. 600463 was a partial trial of the instant action are the following portions of the record on the appeal now engaging our attention:

(1) "Joint Statement for Pre-Trial" signed by Gross and Whitworth, as counsel for Patapoff, and the Department of Water and Power, respectively, and forming a part of the Pre-Trial Order in the instant action, wherein it is said that, the issue of title having been determined in Action No. 600463, plaintiffs' interest in the real property involved at the time of the commission of the acts of trespass complained of and thereafter until terminated by court sale of Parcels 1 and 2 in said Action No. 600463 and a trustee's sale of Parcel 3, was one-fourth of Parcels 1 and 2 and one-half of Parcel 3, and, if appellants are entitled to recover for damages to those properties, any judgment in their favor shall be limited to those fractions of the amounts of damages found to have been caused to the respective parcels;

(2) The order of Judge Richards in Department One on May 4, 1954, that the two cases be consolidated for trial;

(3) The order made in Department 24 on the same date by Judge Scott "that action No. 600463 will be tried first and when completed, the trial of Action No. 612867 will proceed;

(4) The fact that the two actions were carried in the court records as consolidated for trial from May 4, 1954 to and including March 8, 1955, when, in Department 6, Judge John Gee Clark again called the two actions for trial;

(5) Judge Clark's announcement on March 8, 1955, "that the order of trial will be to proceed on 600463 first", the completion of the trial of 600463, his decision as to Patapoff's ownership of a one-fourth interest in Parcels 1 and 2 of the real property involved in both cases, after which he stated that "certain matters then coming to the attention of the court, the court declares a mistrial as to 600463", appointed a guardian ad litem in action 600463 for Patapoff, continued that action to a date certain for trial, appointed the same guardian

ad litem in the instant action, 612867, for Patapoff, and ordered the instant action off calendar to be reset for trial; and

(6) The statement made by Attorney Whitworth in his affidavit in support of the Department's motion to amend the pre-trial conference order that "one of the issues raised by the pleadings (in the instant action) was the extent of plaintiffs' interest in the subject property which issue was already the subject of a pending quiet title action (600463) * * *."

The California Supreme Court, in the Tregambo case, next herein cited, said that "When a court hears and determines any issue of fact or of law for the purpose of determining the rights of the parties, it may be considered a trial". Tregambo v. Comanche Mill & Mining Co., 57 Cal. 501, 505; Smith v. City of Los Angeles, 84 Cal.App.2d 297, 301–302, 190 P.2d 943; Bice v. Stevens, 129 Cal.App.2d 342, 353, 277 P.2d 106.

[1] One of the issues to be proved in an action for trespass and damage to real property is the interest of the plaintiff in that property. Consequently, the determination in action 600463 of the extent of the interest of Patapoff in the real property involved in both actions constituted a partial trial of the instant action, "indicating that the effect of Section 583 of the C.C.P. has been tolled", as stated by Judge Irwin in the pre-trial order before its amendment. City of Los Angeles v. Superior Court, 15 Cal.2d 16, 18, 20–21, 98 P.2d 207; Krasnow v. Superior Court, 15 Cal.App.2d 141, 59 P.2d 442; Clements v. Ragghianti, 155 Cal.App.2d 188, 190–191, 317 P.2d 706.

[2] While it has long been the law of this state that the court, either upon motion of defendant or upon its own motion, is required by the provisions of section 583 of the Code of Civil Procedure to dismiss actions not brought to trial within five years after the filing of the complaint therein, there are certain well recognized exceptions. Those exceptions have been determined by the courts from time to time on the basis of the intention of the legislature when enacting that statute. The intention was obviously to prevent unnecessary and unfair delays on the part of plaintiffs. Unquestionably such delays could seriously prejudice defendants by making it difficult for them to produce witnesses, and even documents, which were easily available during the first few years of the pendency of the action.

The statute's requirement that the duration of the defendant's absence from the state or concealment therein to avoid service is to be excluded from the statutory period warranting or requiring such dismissal, the provision that by written agreement of the parties the action may be tried after the end of such period prevents such dismissal, the court decisions that the unfair conduct of a defendant which misleads plaintiff to his prejudice may prevent such dismissal, that a partial trial of an action within the statutory period or the existence of facts, circumstances or conditions making trial of an action impossible or impracticable for any appreciable time during the statutory period are exceptions to the operation of said Section 583, indicate that said Section 583 and the other statutes and rules of court enacted and enforced to enable the business of the courts to proceed in an orderly manner do not relieve the courts of the obligation to see that plaintiffs, as well as defendants, are fairly treated.

From the record and briefs in the instant appeal, it appears that the Patapoffs owned real property, concerning which they were defendants in action 600463 instituted by the Schworers; that the Department of Water and Power without their consent entered upon their property and built a dike across it; that they brought the instant action 612867 for damages for trespass; that promptly the instant action had been set for trial, but on the day so set it was consolidated with action 600463 upon the motion of the Schworers; that when the court had declared that action 600463 would be tried first and the trial was about to start the Patapoff's and their attorney requested a continuance for the reason that their attorney desired to withdraw and Patapoffs would need time to get another attorney and prepare for the two trials; 10 months and 4 days later, on March 8, 1955, Patapoff appeared in propria persona for the trial of the two cases; the court announced that 600463 would be tried first and then the instant action; action 600463 was tried, the decision announced, and then a mistrial declared, a guardian ad litem appointed for Patapoff in both actions, action 600463 reset for trial, the instant action ordered off calendar, and the following statement included in the minutes of the court: "A copy of these minutes is to be sent to the Department of Mental Hygiene, 1320 K Street, Sacramento, California". Two years, 4 months and 10 days later, on July 18, 1957, plaintiffs present attorneys were substituted for plaintiffs in pro. per.

The minutes of the court on March 8, 1955, recite as the reason for the declaration of a mistrial as to action 600463 and the appointment of a guardian ad litem for Patapoff in that action and the instant action "certain matters then coming to the attention of the court". In Patapoff's opening brief it is stated that after the court rendered its decision in action 600463 on March 8, 1955, the trial court discovered "that plaintiff Nick W. Patapoff, who was appearing in pro per had recently been discharged from a California State Mental Institution", whereupon the court declared the mistrial and appointed a guardian ad litem for Patapoff in each of the consolidated cases. It further appears from the affidavit of Attorney Gross in opposition to the motion to dismiss that Patapoff "was and still is an out-patient-ward of the California Department of Mental Hygiene; that on or about July 1, 1957 affiant was requested by the Department of Mental Hygiene to represent plaintiff in this action.

"That one of the administrators of the Department of Mental Hygiene was personally appointed said plaintiff's guardian ad litem so the above case could be reset on calendar and proceed to trial.

"That the trial court ordered this matter off calendar until such time as the Quiet Title Action, No. 600463, could be concluded, thus establishing plaintiffs' interest in the subject property.

"That until said Quiet Title Action was concluded, it was legally futile and impossible for plaintiffs to bring this action to trial again.

"That affiant's file reflects that the original Summons was issued in June, 1953, which is less than five years past; that at the pre-trial hearing in this matter affiant learned for the first time that the complaint had actually been filed on April 22, 1953, which is more than five years past.

"That trial in this matter is set for May 20, 1958 and plaintiffs are ready, willing and able to proceed therewith."

The affidavit of Attorney Whitworth in support of the motion to dismiss contains nothing other than facts stated hereinbefore and shown by the minutes of the court.

Respondent, in its brief, states that "It is respondent's opinion the two actions were not actually susceptible of consolidation, as was ordered in Department One, but the attempted consolidation is of no importance here in view of the order made in Department 24 immediately thereafter: 'The court declares that the two actions will not be tried together, and that action No. 600463 will be tried first * * *', which in effect vacated the order of 'consolidation' theretofore made."

Whether or not the two actions were "susceptible of consolidation", according to the record on the instant appeal, the actions seem to have been treated by the superior court as "consolidated cases" for a period of ten months and four days, during which not only were the cases set for trial before the same judge, but the order was that action 600463 would be tried before the instant action 612867. Since such orders consolidating cases for trial and regulating the order in which they shall be tried are not appealable orders, it seems highly improbable that the instant action could have been brought to trial during the ten months and four days between May 4, 1954 (the trial date for the instant action procured by Patapoff's then attorney, when the Patapoffs and their attorney were ready for trial until, upon motion of the plaintiffs in action 600463, the two actions were consolidated and the court ordered that action 600463 would be tried first) and March 8, 1955 (the trial date set for both actions, when Patapoff appeared in pro. per. and ready for the trial of both actions, action 600463 was tried, the decision announced, a mistrial declared and a guardian ad litem appointed for Patapoff in both cases, a new trial date set for 600463 and the instant action ordered off calendar). We are convinced that that period of ten months and four days must be excluded from the period during which it was practicable to try the instant action.

From the record it appears that the trial judge declared said mistrial and made the appointments of guardian ad litem in both cases upon his own motion. Code of Civil Procedure, § 372. This was his duty if the plaintiff appeared to be incompetent to handle his own affairs. Respondent urges, however, that even though Patapoff had "recently" been discharged from the California State Mental Institution and "was and still is an out-patient-ward of the California Department of Mental Hygiene", and "if legal disability because of mental incompetency were to be presumed to exist from the fact of appointment of the guardian ad litem, the appointment of the guardian removed it as a factor in the case and there is nothing to show, or from which it may fairly be inferred, that it existed for even as long as 27 days (the time beyond the five year period between filing and dismissal) prior to the appointment of the guardian".

While the record on appeal now being considered contains proofs that the Department's notices, supporting affidavits and authorities, and motions for amendment of pre-trial order and for dismissal were served in May, 1958 upon the guardian ad litem of Patapoff, the affidavit of Attorney Gross that he was asked in July, 1957 by the guardian ad litem to represent Patapoff, and the statement in the March 8, 1955 minutes of the trial court that "a copy of these minutes is to be sent to the Department of Mental Hygiene, 1320 K Street, Sacramento, California", there is no indication that Gordon Hamilton as Supervisor of Guardianships of said department was notified of his appointment as guardian ad litem of Patapoff. However, respondent in its brief states that "The presumption is, of course, that official duty was regularly performed (C.C.P., sec. 1963(15)) and consequently that the guardian was promptly notified. Although the Department of Mental Hygiene or the Supervisor of Guardianships never formally appeared in this action, the notice of motion to dismiss and related papers were served upon that Department. Over three years elapsed after appointment of the guardian ad litem, and over ten months elapsed after the quiet title action was disposed of, before this action was dismissed."

[3] As all departments and levels of government grow and grow, and especially when governmental departments are involved on both sides of a court action, it becomes difficult if not impossible to apply the presumption that "official duty has been regularly performed".

The record on the instant appeal, which is merely an incomplete clerk's transcript, discloses that the two actions were consolidated by *Judge Richards,* separated by *Judge Scott* who also ordered that action 600463 which had not theretofore been set for trial be tried first and then continued both actions. *Judge Richards* again set both actions for trial together and instructed the witnesses, and twice more continued said actions for trial together. *Judge Clark* ordered that 600463 be tried first and proceeded to try it, announce his decision, declare a mistrial, appoint a guardian ad litem for Patapoff in each action, continue for retrial action 600463, and order the instant action off calendar. *Judge Kincaid* set the instant action for pre-trial and for trial. Judge Irwin acted at the pre-trial conference. *Judge Allen* granted the motion to dismiss from which this appeal was taken. *Judge Irwin,* from the marginal notation appearing on the pre-trial order, on the same day as the dismissal, ran the line through the following sentence included in the order made before the five year period had elapsed: "However trial was commenced on two prior occasions, indicating that the effect of Section 583 of the C.C.P. has been tolled".

[4] Seven different judges are shown by the record on appeal in the instant action to have participated in some phase of the proceedings therein. The record shows that at least as many different deputy clerks and reporters worked in the case, not to mention the personnel of the clerk's office handling mailing and filing. Where, as here, the minutes of the court state that a copy is to be mailed to the Department of Mental Hygiene at Sacramento, with nothing to indicate who would mail such copy, that it was mailed, or that it was received, it seems far-fetched to presume that the giving of notice of his appointment to the guardian ad litem for Patapoff was an official duty regularly performed.

Notwithstanding the Department's motion to amend the pre-trial order by adding thereto paragraphs changing nunc pro tunc as of March 8, 1955, the date of the appointment of said guardian ad litem, the title of the action to show that Patapoff was appearing by his guardian ad litem, noticed to be made on the same day as the Department's motion for dismissal, the title of the instant action has not been changed.

Regardless of whether the guardian ad litem appointed by the court in the instant action was notified or appeared in the action, and regardless of whether the title of the action shows that Patapoff appears by his guardian ad litem, immediately upon his appointment, the control of the action was taken from the hands of Patapoff and given to the guardian ad litem. From that time on, the guardian ad litem so appointed had exclusive control of Patapoff's participation in the litigation. Assuming that Patapoff appeared to the court to be incompetent to handle his own affairs in the trial of the two actions, one of which 600463 had just been completed and the other, the instant action 612687, was next, he could not be relied upon to notify the guardian ad litem of his appointment and/or to see that his interests were protected by such guardian.

Assuming that the clerk of the court, pursuant to the court's statement in its minutes of March 8, 1955, that "a copy of these minutes is to be sent" proceeded to mail a copy thereof to the "Department of Mental Hygiene, 1320 K Street, Sacramento, California", can we assume that such minutes so mailed constituted notice to Gordon Hamilton, as Supervisor of Guardianships of the Department of Mental Hygiene, that on page 3 of said minutes he had been appointed guardian ad litem of Nick W. Patapoff in the two actions, titles of which appear on page one thereof. It is within the general knowledge of the public and of this court that the Supervisor of Guardianships of the Department of Mental Hygiene does not open, or supervise the handling of, mail addressed to the "Department of Mental Hygiene", and it seems to us just as probable that a copy of the minutes of the court bearing the name of a ward and patient of the department in the titles of the two cases on page one would be placed in the file of such ward, as that they would be referred to the Supervisor of Guardianships mentioned in the body of the minutes well down on page three.

In the instant action, from the date of the appointment of such guardian ad litem to the date of the first appearance of an attorney requested by such guardian to protect the ward's interests, there elapsed two years, four months and ten days. During all this time Patapoff's hands were tied. The trial court had taken away from him his power to control his own action. The action grew out of the acts of the Department of Water and Power of the City of Los Angeles in building a dike across Patapoff's real property without his consent.

The State Department of Mental Hygiene failed to do anything about protecting his interests until too late to bring the action to trial in the crowded courts of Los Angeles.

From the record on the appeal now before us, it appears that, during less than the two year statutory period between the filing and dismissal would it have been possible for Patapoff to bring the instant action to trial.

Therefore, we are convinced that this action should not have been dismissed under any of the provisions of Section 583 of the Code of Civil Procedure, and that such dismissal was an abuse of discretion on the part of the trial court.

The judgment is reversed.

FOURT and LILLIE, JJ., concur.

* * *

172 Cal.App.2d 776

**PEOPLE of the State of California,
Plaintiff and Respondent,
v.
William Washington PRICE, Defendant and
Appellant.
Cr. 6658.**

District Court of Appeal, Second District,
Division 2, California.
Aug. 10, 1959.

Defendant was convicted of selling heroin. The Superior Court of Los Angeles County, William E. Fox, J., entered judgment, and the defendant appealed. The District Court of Appeal, Ashburn, J., held that where plain-clothes police investigator was walking along street with alleged informer when they saw defendant, and alleged informer asked defendant if he had any heroin, and defendant replied that he did not but that he could get some, and police investigator asked the price, and defendant, after making telephone call, informed police investigator and alleged informer what cost would be, and subsequently defendant obtained heroin for them, there was no "entrapment" which would be a defense in prosecution for selling heroin.

Judgment affirmed.

1. Criminal Law 🔑**37**

Where plain-clothes police investigator was walking along street with alleged informer when they saw defendant, and alleged informer asked defendant if he had any heroin, and defendant replied that he did not but that he could get some, and police investigator asked the price, and defendant, after making telephone call, informed police investigator and alleged informer what cost would be, and subsequently defendant obtained heroin for them, there was no "entrapment" which would be a defense in prosecution for selling heroin. West's Ann.Health & Safety Code, § 11500.

See publication Words and Phrases, for other judicial constructions and definitions of "Entrapment".

2. Criminal Law 🔑**37**

It is essential to defense of entrapment that criminal intent originate with one who is alleged to have entrapped defendant and that crime be induced by such person through persuasion or the like, and his mere furnishing the occasion for defendant engaged in illegal activities to ply his trade does not amount to "entrapment."

3. Criminal Law 🔑**1115(1)**

Where proceedings before Grand Jury were not part of record on appeal by defendant to District Court of Appeal from judgment of conviction, they could not be considered.

4. Poisons 🔑**9**

In prosecution for sale of heroin, wherein plain-clothes police investigator testified how police investigator and alleged informer met defendant and bought heroin from him, prosecution was not required to corroborate testimony of police investigator with testimony of alleged informer, where identity of alleged informer was disclosed, and there was no showing that prosecution knew and refused to disclose whereabouts of alleged informer, or that police department caused alleged informer to leave town, and police investigator testified to the contrary. West's Ann.Health & Safety Code, § 11500.

5. Criminal Law ⚷1031(1)

Defendant could not claim for the first time in the District Court of Appeal on appeal that he was not seasonably brought before a magistrate after being arrested. West's Ann.Pen.Code, § 825.

6. Poisons ⚷9

In prosecution for selling heroin, credibility of testimony of plain-clothes police investigator, who testified concerning sale of heroin by defendant, was a matter for determination of trial court sitting without a jury. West's Ann.Health & Safety Code, § 11500.

◆

William Washington Price, appellant in pro. per.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., Marvin L. Part, Deputy Atty. Gen., for respondent.

ASHBURN, Justice.

By an indictment defendant was charged with violation of Health and Safety Code § 11500, in that he did sell and furnish a narcotic, to wit, heroin. He was tried without a jury and found guilty as charged. The trial court denied defendant's motion for a new trial and application for probation, and sentenced him to State prison. From the judgment he appeals, the principal contention being that the evidence—the heroin—was illegally obtained, based upon the defense of entrapment.

The People's witness was William Hollingsworth, a plain-clothes police investigator, who testified that on the afternoon of July 22, 1958, he and one Albert Landry were walking on the 5500 block of South Central Avenue. They saw the appellant on the street and Landry asked him if he had any "smack," a slang term for heroin. Appellant said he did not but he could get some. The officer asked how much the price of a half spoon would be and the appellant said $15. When the officer said that he had only $10.89, appellant made a phone call to see if he could get it at that price. After making the call, appellant informed the two men that it would cost $13 but that he would make up the difference. The three men got into the officer's car and drove to a service station where appellant made another phone call. They then drove to West 20th and Normandie. The officer gave his $10.89 to appellant who got out of the car and stood on the corner. Approximately 10 or 15 minutes later a car pulled up and appellant got in. This car drove south on Normandie a short distance and then returned. Appellant got out of that car and reentered the officer's automobile. He had a small balloon containing a white powder. He slit the balloon and poured a portion of the white powder onto a piece of paper, which he kept for himself, and he gave the remaining powder in the balloon to the officer. The contents proved to be heroin. The officer had not known or talked to the appellant before the date of the above transaction.

A Grand Jury indictment was filed on September 4, and the arrest was made on September 6.

Appellant testified in his own defense, denying any involvement in the foregoing transaction, or that he ever saw Officer Hollingsworth prior to the arrest, or that he was on Central Avenue at the time in question. He testified that he did not know a man by the name of Albert Landry.

[1, 2] The contention that appellant was unlawfully entrapped is without merit. "It is essential to such a defense that the criminal intent originate with the one who is alleged to have entrapped defendant and that the crime be induced by him through persuasion or the like. His merely furnishing the occasion for one engaged in illegal activities to ply his trade does not amount

to entrapment. People v. Braddock, 41 Cal. 2d 794, 802, 264 P.2d 521, 525: 'The many decisions in this state which define the defense of entrapment were reviewed in People v. Lindsey, 91 Cal.App.2d 914, 205 P.2d 1114, and the law stated as follows: "Where the doing of an act is a crime, regardless of the consent of anyone, the courts are agreed that if the criminal intent originates in the mind of the accused and the offense is completed, the fact that an opportunity was furnished, or that the accused is aided in the commission of the crime in order to secure the evidence necessary to prosecute him therefor, constitutes no defense. [Citations.] If the officer uses no more persuasion than is necessary to an ordinary sale, and the accused is ready and willing to make the sale, there is no entrapment." 91 Cal.App.2d at page 917, 205 P.2d at page 1115. More recently it was held: "It is not the entrapment of a criminal upon which the law frowns, but the seduction of innocent people into a criminal career by its officers is what is condemned and will not be tolerated. Where an accused has a preexisting criminal intent, the fact that when solicited by a decoy he committed a crime raises no inference of unlawful entrapment."' People v. Terry, 44 Cal.2d 371, 372, 282 P.2d 19, 20: 'As to the first contention, "entrapment 'is a positive defense imposing upon an accused the burden of showing that he was induced to commit the act for which he is on trial' [citing cases]. Entrapment as a matter of law is not established where there is any substantial evidence in the record from which it may be inferred that the criminal intent to commit the particular offense originated in the mind of the accused."'" People v. Bowlby, 135 Cal.App.2d 519, 529–530, 287 P.2d 547, 554, 53 A.L.R.2d 1147.

There is no intimation in appellant's own testimony that he was lured or persuaded to make the sale. To the contrary, his testimony was inconsistent with such defense for he denied the specific act charged. See, People v. Schwartz, 109 Cal.App.2d 450, 455, 240 P.2d 1024; People v. Tillman, 142 Cal.App.2d 404, 407, 298 P.2d 631; People v. Johnson, 99 Cal.App.2d 559, 562, 222 P. 2d 58. And the testimony of the officer does not establish trickery, persuasion or fraud on his part, but rather that he merely created the opportunity for a sale and that appellant was a willing seller. These statements from People v. Neal, 120 Cal.App.2d 329, 333, 261 P.2d 13, 15 appear pertinent: "There was evidence that appellant had ready access to the contraband heroin; * * * Appellant's obvious familiarity with the narcotics trade, coupled with his ability to produce a substantial quantity of heroin on short notice, all indicate beyond a reasonable doubt that he was not an innocent person who was induced to commit the crime charged by the trickery, persuasion or fraud of the officer."

[3] Appellant makes numerous references, in broad generalities, to the denial of his constitutional rights of due process and equal protection of the law. The first contention is that these rights were denied him by the Grand Jury, but the proceedings before that body are not part of the record on appeal and therefore cannot be considered. People v. Ruiz, 103 Cal.App.2d 146, 149, 229 P.2d 73.

[4] There is no merit to appellant's contention that it was the People's duty to have Mr. Landry in court to corroborate the testimony of Hollingsworth. In People v. McCrasky, 149 Cal.App.2d 630, 634, 309 P.2d 115, 118, the court states: "As his first ground for reversal of the judgment appellant contends that 'The court was guilty of abuse of discretion in not permitting the informer to testify where the court relied upon the sole testimony of Officer Greene.' This contention cannot be sustained because, first of all, neither side was required to produce all witnesses who might be able to testify so long as there is fairly presented to the court the material evidence bearing upon the charge for which the accused is on trial. There is no requirement in either the federal or state constitution that all witnesses or persons who may have knowledge of the crime be produced in court or called to testify [citations]. * * *

It was not necessary that the prosecution call a corroborating witness to support the testimony of Officer Greene because this is not the type of case in which the law requires corroboration [citations]." In the instant case the identity of the informer (if such he was) was disclosed, and the record does not support appellant's intimations that the prosecution knew and refused to disclose the whereabouts of Landry, or that the Police Department caused Landry to leave town. Hollingsworth testified to the contrary. See, People v. Alexander, 168 Cal.App.2d 753, 336 P.2d 565.

[5] Appellant asserts that he was arrested without a warrant on September 5, 1958, and was not taken before a judge or magistrate until September 12, 1958, in violation of his rights under Penal Code, § 825, which provides that "[t]he defendant must in all cases be taken before the magistrate without unnecessary delay, and, in any event, within two days after his arrest, excluding Sundays and holidays; * * *." There is no mention in the record as to whether there was a warrant. According to appellant's testimony, he was arrested on September 6, 1958. This was after the Grand Jury indictment of September 4, 1958; appellant was arraigned on September 12. The record does not disclose that this point was ever raised in the court below, and "defendant cannot claim for the first time on appeal, as he attempts here, that he was not seasonably brought before a magistrate. [Citations]." People v. Wein, 50 Cal.2d 383, 411, 326 P.2d 457, 473. "Moreover, the violation of appellant's rights because of failure to observe the provisions of Penal Code, § 825, does not require a reversal unless there is a showing that such wrongful conduct resulted in an unfair trial. There is no such showing here. We are not here confronted with a case wherein an accused during the interim between his arrest and the claimed delay in bringing him before a magistrate, made any confessions, or that during such period anything occurred which militated against appellant at his trial. In these circumstances the violation of his constitutional and statutory rights immediately after his arrest cannot be said to have affected the outcome of his trial [citations]." People v. McCrasky, supra, 149 Cal.App.2d 630, 637, 309 P.2d 115, 118.

[6] Other alleged grievances are equally without merit. The record does not indicate that bail was refused, or even that an application therefor was made. With regard to the credibility of the officer's testimony, this was a matter for the determination of the trial court. People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778; People v. Shafer, 101 Cal.App.2d 54, 59, 224 P.2d 778. An examination of the record shows that appellant was accorded a fair trial and there are no irregularities in the proceedings warranting a reversal.

The judgment is affirmed.

FOX, P. J., and HERNDON, J., concur.

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172 Cal.App.2d 539

Mary Ellen OLSON, Plaintiff and Appellant,

v.

Robert Norris JONES, Monte Stuart Minugh and C. G. Minugh, Defendants,

Monte Stuart Minugh, Respondent.

Civ. 9509.

District Court of Appeal, Third District, California.

July 31, 1959.

Hearing Denied Sept. 22, 1959.

Action for injuries sustained by passenger in defendant's automobile when he drove that vehicle into collision with oncoming vehicle. The Superior Court, Merced County, R. R. Sischo, J., rendered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Schottky, J., held that evidence was insufficient to take case against defendant to jury on theory that he had been guilty of wilful misconduct.

Affirmed.

1. Appeal and Error ⟹927(3)

On appeal from judgment of nonsuit, it is duty of reviewing court to consider evidence and inferences which reasonably may be drawn therefrom in light most favorable to plaintiff, and all conflicts in evidence and in inferences which may reasonably be drawn therefrom must be resolved in favor of plaintiff, and court must accept as true all evidence adduced, direct or indirect, which tends to sustain plaintiff's case.

2. Automobiles ⟹245(24)

In action for injuries sustained by passenger in defendant's automobile when he drove that vehicle into collision with oncoming vehicle, evidence was insufficient to take case against defendant to jury on theory that he had been guilty of wilful misconduct. West's Ann.Vehicle Code, §§ 510, 527.

3. Evidence ⟹265(11)

In action for injuries sustained by passenger in defendant's automobile when he drove that vehicle into collision with oncoming vehicle, no inference that defendant had been driving faster than prima facie speed limit of 55 miles per hour arose from evidence that he had pleaded guilty to violating the Code section proscribing unreasonable speeds. West's Ann.Vehicle Code, § 510.

4. Evidence ⟹265(11)

A plea of guilty to a claimed violation of Vehicle Code section proscribing unreasonable speeds might be some evidence in support of finding that motorist was guilty of negligence, but it would not support finding that he was guilty of wilful misconduct, for guest statute purposes. West's Ann.Vehicle Code, § 510.

5. Automobiles ⟹181(1)

Mere failure to perform statutory duty is not alone wilful misconduct, for guest statute purposes. West's Ann.Vehicle Code, §§ 510, 527.

6. Automobiles ⟹181(1)

A guest may not recover against her host unless conduct of host amounted to "wilful misconduct", and that means intentional, wrongful conduct, done either with knowledge that serious injury to guest will probably result or with wanton and reckless disregard of possible results.

See publication Words and Phrases, for other judicial constructions and definitions of "Wilful Misconduct".

7. Evidence ⟹318(4)

In automobile collision case, it may have been error for trial court to state that police officer was not qualified to express an opinion as to safe speed at place of accident, but there was no error in sustaining objection to introduction in evidence of officer's report of his investigation of accident.

8. Automobiles ⟹245(24)

Whether there was wilful misconduct depends upon facts of particular guest statute case.

9. Automobiles ⟹245(24)

If, under facts as shown by evidence in guest statute case, reasonable inferences may be drawn upon which finding of wilful misconduct may be based, nonsuit may not properly be granted.

◆

C. Ray Robinson, by Charles E. Goff, Merced, for appellant.

Hansen, McCormick, Barstow & Sheppard, by R. A. McCormick, Fresno, for respondent.

SCHOTTKY, Justice.

This is an appeal from a judgment of nonsuit in favor of defendants Minugh following a trial in the Merced County Superior Court arising out of an automobile collision.

On the afternoon of December 9, 1956, Monte Minugh, in the company of plaintiff, Mary Olson, and a Mr. and Mrs More-house, was driving his automobile west on Hornitos Road in Mariposa County and collided with the other defendant, Robert Jones, who was driving his automobile east on Hornitos Road. Plaintiff, Mary Olson, was seated in the front seat of Minugh's car at the time of the accident and received injuries growing out of the accident.

Thereafter, Mary Olson brought suit against Robert Jones alleging negligence and against Monte Minugh alleging wilful misconduct. C. G. Minugh was joined as the registered owner of the auto driven by Monte Minugh. Plaintiff recovered judgment against Robert Jones for $20,000, but a nonsuit was entered as to the defendants Minugh.

Since plaintiff was riding as a guest with defendant Monte Minugh she must, of course, predicate her case against him on wilful misconduct (there is no claim of intoxication), and the trial court ruled that a nonsuit should be entered in favor of Minugh because there was no evidence of any wilful misconduct.

[1] Upon an appeal from a judgment of nonsuit it is the duty of an appellate court to consider the evidence and the inferences which reasonably may be drawn therefrom in the light most favorable to the plaintiff. All conflicts in the evidence and in the inferences which may reasonably be drawn therefrom must be resolved in favor of the plaintiff, and the court must accept as true all evidence adduced, direct or indirect, which tends to sustain plaintiff's case. Lashley v. Koerber, 26 Cal.2d 83, 84, 156 P.2d 441. In the light of this well-established rule, and after a careful study of the entire record, we have concluded that the court did not err in granting respondent's motion for a nonsuit.

The circumstances of the collision were as follows: Defendant Monte Minugh and his party were driving west on Hornitos Road on a dry, clear, sunny, Sunday afternoon. The testimony of defendant Monte Minugh was that his speed was about 25 or 30 miles per hour as he approached the place of the accident. He further testified as follows: "I wasn't driving too fast for the road. We were in no hurry. We were merely enjoying a sunny afternoon ride, * * * I was merely driving what I felt was the safe speed for that road."

The defendant Jones estimated the speed of the Minugh car at about 30 miles an hour when he saw it; he stated, "He wasn't exceeding any speed limit."

The plaintiff testified that she never noticed the speedometer on Minugh's car and never formed any estimate as to the speed of the car at any time that day; she never made any protest or comment to defendant Minugh about his driving; and as far as she was concerned he was driving in a satisfactory manner.

The prima facie speed limit at the place of the accident was 55 miles per hour.

Both Minugh and Jones testified that the speed of the Jones car as it approached the accident scene was about 25 to 30 miles per hour. Minugh could not tell whether or not Jones reduced his speed before the collision, as the accident happened too rapidly.

The accident occurred just after the Minugh car came over a rise at a point where the road curved to the right. There was a gradual slope to the crest of the rise and a somewhat steeper slope as Minugh started down the other side. The Minugh car was headed downhill and the Jones automobile was coming uphill when the accident happened.

On the north side of the road, to Minugh's right, there was a bank about six feet high, just high enough to conceal an automobile approaching the curve from the opposite direction.

Defendant Minugh testified that the Jones car was about 50 to 75 feet from his automobile when he first saw it. He saw the Jones car as soon as it was visible. Mr. Minugh further stated: "* * * I saw him as soon as I cleared the corner where I could see down the road."

The testimony of defendant Jones was substantially the same. He was about 50 to 60 feet from the Minugh car when he first saw it. That was when it first came into Jones's line of vision from around the corner. Jones was positive that he saw the Minugh automobile "when it first showed up."

Miss Olson, the plaintiff, testified that she saw the Jones automobile as it came around the curve and that was "The instant before we hit it."

Mr. Minugh's testimony was that Jones was on his right side of the road when Minugh first saw the car; that the Jones car appeared to be over to its right farther than it actually was, but it seemed to be cutting the corner and coming across to Minugh's side of the road.

With reference to the time when he first saw the Minugh automobile, the defendant Jones testified: "* * * the left side of my automobile was very close to the center of the road. It could have been a foot to the left or it could have been a little the other way but there is no line there, but I was very, very close to the center road with the left of my car."

Mr. Jones further stated that his car pulled farther to the left as he approached the point of impact, although he tried to turn it to the right. Defendant Jones conceded that his automobile was some two to four feet over on the wrong side of the road at the time of impact.

In a statement to Officer Maybee, defendant Minugh stated: "We had been on a picnic and were coming back this way so that we could go by that big lake (Merced Falls). I wasn't overdoing the speed limit as I came over the hill, I wasn't going so fast but what I stayed in my own lane. I guess I was going 25. I saw this other car coming toward me, and he was cutting the corner. I didn't slow down right then because I thought he had plenty of time to get back over. When I saw that he was coming straight towards me, I hit my brakes, and then we hit."

Minugh's car left 42 feet of skid marks commencing right at or just over the crest of the rise, and the vehicles were then no more than 50 to 75 feet apart. The collision occurred just over the rise, as Minugh started down. There were no skid marks left by the Jones car.

Defendant Minugh testified: "Well, naturally, when you go around a corner, especially a blind corner, you have your foot on the brake, and I believe something flashed through my mind that this fellow was going to run into me, and I also at the same time, I thought that perhaps he might have time to turn back. I was wondering why he wouldn't turn back. This probably took maybe a tenth of a second or so, and then I immediately hit my brakes. It all flashed through my mind together, and I can't remember whether I hit my brakes first and was thinking this while I was skidding, or whether I thought and then skidded. But it happened very fast and it is hard to get all these facts in the proper order, I believe."

Defendant Jones testified: "It all happened very sudden; just almost unavoidable. When they said accident in this case, they really mean accident. There was nothing intentional."

The California rule as to what constitutes wilful misconduct is set forth in the recent case of Gillespie v. Rawlings, 49 Cal.2d 359, 317 P.2d 601. The facts of that case as stated on page 363 of the opinion in 49 Cal.2d, on page 604 of 317 P.2d were as follows:

> "The circumstances of the collision were as follows: The weather was clear and sunny. Defendant was driving north on a two-lane highway which curved slightly toward her left. Defendant's husband (who was fatally injured in the collision) was in the rear seat. Plaintiff was asleep in the front seat. Jean Novobilsky, who was driving ahead of defendant at about 50 to 55 miles an hour, saw defendant in his rear view mirror. As defendant came behind the Novobilsky car she turned to her left, out of her lane of traffic, and collided almost 'head on' with a southbound car. There is no evidence of tire or skid marks at-

tributable to defendant's car on the highway after the collision."

The court stated at page 367 of 49 Cal.2d, at page 606 of 317 P.2d:

> "On the issue of wilful misconduct, the evidence is insufficient to support a determination favorable to plaintiff. The jury were instructed as follows on this issue:
>
> "'The words "wilful misconduct" have a meaning in the law, additional to that which they have in common usage. If we were to use the words in their ordinary sense, they would mean simply the indulging in wrongful conduct by conscious choice. Such conduct might consist of doing something that ought not to be done or in failing to do something that ought to be done. But in order to be a basis for liability to a guest under our law, the misconduct must be something more than intentional and wrongful; it must be done under circumstances which show either knowledge that serious injury to the guest probably will result, or a wanton and reckless disregard of the possible results.
>
> "'Wilful misconduct means something different from and more than negligence, however gross the negligence may be. A guest may not recover against her host unless the conduct of the host amounted to wilful misconduct, and that means intentional, wrongful conduct, done either with knowledge that serious injury to the guest probably will result, or with a wanton and reckless disregard of the possible results. * * *
>
> "'[I]f you should find that defendant was negligent, and if you should find that she intentionally did something that was wrongful and which was a proximate cause of injury to plaintiff, still a case of willful misconduct is not established unless you further find that such conduct was done with knowledge that serious injury to the plaintiff probably would result, or with a wanton and reckless disregard of the possible results.'
>
> "The law stated in these instructions accords with the law as developed in the cases, among others, of Meek v. Fowler, 1935, 3 Cal.2d 420, 425–426, 45 P.2d 194; Parsons v. Fuller, 1937, 8 Cal.2d 463, 468, 66 P.2d 430; Weber v. Pinyan, 1937, 9 Cal.2d 226, 230–235, 70 P.2d 183, 112 A.L.R. 407; Porter v. Hofman, 1938, 12 Cal.2d 445, 447–448 [1, 2], 85 P.2d 447; Cope v. Davison, 1947, 30 Cal.2d 193, 198–199, 180 P.2d 873, 171 A.L.R. 667; Mercer-Fraser Co. v. Industrial Acc. Com., 1953, 40 Cal.2d 102, 116–118 [8–14], 251 P.2d 955; Hawaiian Pineapple Co. v. Industrial Acc. Com., 1953, 40 Cal. 2d 656, 662–663 [2–10], 255 P.2d 431; and Lynch v. Birdwell, 1955, 44 Cal.2d 839, 847–848 [8], 285 P.2d 919. On the evidence defendant could not properly be found guilty of that wanton and reckless disregard of possible consequences, or that knowledge of probable injury, which characterizes wilful misconduct. Viewing the evidence most favorable to plaintiff it appears that defendant's pulling into the southbound lane and into an oncoming car was a culpable error of judgment which amounted to negligence only."

[2] Appellant makes a vigorous and lengthy attack upon the judgment of nonsuit. She contends that it is fairly inferable from the evidence that respondent Minugh was driving at an excessive rate of speed on a narrow serpentine road; that he intentionally risked a head-on collision with Jones by holding his course although Jones approached him straddling the center line; that he knew or reasonably should have known that to continue headlong on his course toward Jones without reducing his speed would probably result in serious injury to Mary Ellen, his guest; that his decision to continue heading toward Jones' vehicle also shows "wanton and reckless disregard of the possible result" of his act.

Appellant's argument is unconvincing because it is not supported by the record. The fallacy in appellant's argument is well illustrated by the following quotation from her opening brief:

> *"Yet despite the risks of driving on this narrow country road there is evidence that Minugh drove over it faster than 55 miles per hour! As was shown above at page 11, the only speed restriction placed before the jury was the prima facie speed limit at the point of the accident which was 55 miles per hour. As was also shown above at pages 11 and 12, Minugh was cited for and pleaded guilty to violation of California Vehicle Code, Section 510 which is speeding, and also to violation of California Vehicle Code, Section 527, which is driving over the center line of a road. From this a jury could infer that Minugh was driving on this section of road in excess of 55 miles per hour. The above description of the road is such that the jury could further reasonably infer that Minugh's speed was so far in excess of a reasonable speed under all of the circumstances as to constitute wilful misconduct."*

[3–5] We do not believe that any inference that Minugh was driving 55 miles per hour can be drawn from the fact that he pleaded guilty to a violation of section 510 of the Vehicle Code, which reads as follows: "No person shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent having due regard for the traffic on, and the surface and width of, the highway, and in no event at a speed which endangers the safety of persons or property." A plea of guilty to a claimed violation of section 510 might be some evidence in support of a finding that Minugh was guilty of negligence, but it would not support a finding that he was guilty of wilful misconduct. For as stated in Porter v. Hofman, 12 Cal.2d 445, at page 448, 85 P.2d 447, at page 448: "The mere failure to perform a statutory duty is not alone, willful misconduct. It amounts only to simple negligence." And as stated in Flannery v. Koch, 103 Cal.App.2d 55, at page 57, 228 P.2d 580, at page 582; " 'The mere failure to perform a statutory duty is not, alone, willful misconduct.' [Citation.] Hence Miss Liberto's failure to stop before entering 14th Street did not constitute willful misconduct * * *."

[6] None of the evidence pointed to by appellant will support a finding of wilful misconduct, for as stated in Gillespie v. Rawlings, supra, "A guest may not recover against her host unless the conduct of the host amounted to wilful misconduct, and that means intentional, wrongful conduct, done either with knowledge that serious injury to the guest probably will result, or with a wanton and reckless disregard of the possible results."

[7] Appellant makes the further contention that Officer Keyser's opinions of the safe speed on this road and Minugh's actual speed were admissible evidence; that the safe maximum speed of a vehicle at a particular place is a proper subject of expert testimony; and that Officer Keyser is qualified to give expert testimony regarding speeds. The record shows that Officer Keyser testified that he had had 9 years experience as a highway patrol officer; that he was familiar with the roadway at the scene of the accident and had been over it many times; and that he had tested the safe speed for an automobile at that particular corner. He was then asked if he had filed his report of his investigation of the accident and replied that he had. Counsel for appellant then offered the report in evidence. Counsel for respondent objected and the court properly sustained the objection. In Witkin on California Evidence it is stated at page 328: "The requirement of personal knowledge as the basis of a record is the chief barrier to the introduction of a police report of an accident. The report is a 'record of an act, condition or event' (see supra, sec. 286), but is often made by an officer who did not see the accident and includes both hearsay statements of others and opinions of the

officer. If so, it is inadmissible. * * *" And in Hoel v. City of Los Angeles, 136 Cal.App.2d 295, at page 309, 288 P.2d 989 at page 997, the court said: "Not all official reports and not all business records are made competent by the cited sections of the code. Essentially accident reports, especially those compiled by police at the scene of an accident,—based on statements of participants, bystanders, measurements, deductions and conclusions of their own,—fail to qualify as admissible official records or business records. [Citations.] That accident reports are not admissible under statutes such as our Uniform Business Records as Evidence Act, Code Civ.Proc., §§ 1953e–1953h, was held in Palmer v. Hoffman, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645, [144 A.L.R. 719] * * *."

The following appears in the record:

"Q. And did you place upon your report the safe speed limit at this point? A. I did.

"Mr. McCormick: Now just a moment, I will object again, your Honor, counsel is indirectly attempting to do what your Honor has already sustained.

"The Court: Yes, that is the opinion of the officer again. That is a question for the jury to determine in this suit from all the evidence in the case, what a safe speed was on a turn upon that mountain on that day.

"Mr. Coshow: Very well, your Honor. I have no further questions."

It thus appears that counsel for appellant did not ask Officer Keyser the direct question as to what his opinion was as to a safe speed at that corner, nor did he make an appropriate offer of proof.

The trial court was evidently of the opinion that Officer Keyser's opinion as to what was a safe speed was not admissible, and if the direct question had been asked of the officer, it would have been error to sustain an objection to such a question. For as stated in Enos v. Montoya, 158 Cal.App.2d 394, at page 399, 322 P.2d 472, at page 475: "Where, as was here the case, the jury's knowledge of the roadway must be limited to that shown by the evidence, it would seem to be an unrealistic position to insist that what was a prudent speed on the subject curve was a matter exclusively within the jury's fact finding power which should not be 'invaded' by opinion evidence. The proper rule would appear to be to allow such opinion evidence to assist the jury, if the jury, applying proper instructions, such as were here given, deems such evidence to be helpful. As was said in People v. Cole, 47 Cal.2d 99, at page 105, 301 P.2d 854, at page 857, 56 A.L.R.2d 1435: 'The jurors, of course, were not bound by the opinion of the witness but were free to determine the weight to which it was entitled and to disregard it if they found it to be unreasonable, and they were so instructed.'" See also Risley v. Lenwell, 129 Cal.App.2d 608, 631, 277 P.2d 897.

Even though the trial court may have been in error in stating that the officer was not qualified to express an opinion as to a safe speed at the place of the accident, there was no error in sustaining an objection to the introduction in evidence of the officer's report.

[8, 9] We have hereinbefore stated the California rule as to what constitutes wilful misconduct. Whether there was wilful misconduct depends upon the facts of the particular case, weighed in the light of the well-settled rule. If under the facts as shown by the evidence reasonable inferences may be drawn upon which a finding of wilful misconduct may be based, a nonsuit may not properly be granted. But where as in the instant case there is no reasonable basis in the evidence for a finding that respondent Minugh was guilty of wilful misconduct the granting of a nonsuit was proper. At most, respondent was guilty of negligence only.

The judgment is affirmed

VAN DYKE, P. J., concurs.

172 Cal.App.2d 349

Hattie M. WRIGHT, a widow, Plaintiff and Respondent,

v.

Alan ROGERS and Gersha Rose Rogers, his wife, Warrog, Inc., a corporation, doing business as Majestic Homes, Title Insurance and Trust Company, a corporation, Canoga Park Savings and Loan Association, Consolidated Escrow Company, a corporation, Fannie Freedman, a widow, Josef S. Noble, Olympia Mortgage Company, a corporation, Defendants,

Alan Rogers and Gersha Rose Rogers, his wife, Warrog, Inc., a corporation, doing business as Majestic Homes, Fannie Freedman, a widow, Josef S. Noble, and Olympia Mortgage Company, a corporation, Appellants.

Civ. 23112.

District Court of Appeal, Second District,
Division 3, California.
July 27, 1959.

Suit to cancel a grant deed and deeds of trust and for other relief. The Superior Court, Los Angeles County, Arthur Crum, J., entered judgment for plaintiff, and certain of the defendants appealed. The District Court of Appeal, Vallée, J., held that the evidence was sufficient to show that plaintiff's signature to grant deed was procured by fraudulent representations and trick and device.

Judgment affirmed as modified in respect to certain amounts.

1. Pleading 🔑252(2)

Where the cause went to trial on the third amended complaint, the prior complaints ceased to have any effect as pleadings or as basis for judgment and could not be looked to for the issues tried, and any inconsistencies between the allegations of the third amended complaint and the allegations of the prior complaints furnished no basis for reversal of the judgment. West's Ann.Code Civ.Proc. § 469 et seq.

2. Appeal and Error 🔑1010(1)
Fraud 🔑58(1)

The rule that fraud must be established by "clear and convincing evidence" is a rule of evidence directed to the trial court, and if that court finds that fraud is established by a preponderance of the evidence, a reviewing court must accept that determination as conclusive if there is substantial evidence to support it.

3. Deeds 🔑211(3)

In suit to cancel grant deed, evidence supported finding that plaintiff's signature to the deed was procured by fraudulent representations and trick and device.

4. Deeds 🔑45

Where a person who has no intention of selling his property is induced by some trick or device to sign a paper having such effect, believing that paper to be a substantially different instrument, the paper so signed is a "forgery".

See publication Words and Phrases, for other judicial constructions and definitions of "Forgery".

5. Appeal and Error 🔑1050(1)

In action involving fraud, forgery and disparagement of title by recording of grant deed and deeds of trust, there was no prejudicial error in permitting the plaintiff to prove by record of the real estate commissioner that on another occasion a defendant had forged three promissory notes and three deeds of trust securing them and by fraud had sold them to an innocent purchaser and that in the proceeding before the commissioner such defendant had admitted the facts.

6. Liens 🔑7

Where plaintiff executed note and deed of trust to the defendant in reliance on false and fraudulent statements and defendant at a later date sold note to third person at a discount, the third person's equitable lien was properly computed on basis of original amount of note and not amount paid by third person, and on basis of interest from date of third person's purchase of note and not on basis of interest from date of note.

7. Fraud 🔑59(1)
Libel and Slander 🔑130

In a case of fraud, forgery and disparagement of title by the recording of grant deed and deeds of trust, the measure of damages is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not. West's Ann.Civ.Code, §§ 1709, 3333.

8. Damages ⚷1

For a tortious act damages will be awarded to the extent that the injured party will be restored to the position he would have occupied had the tort not occurred.

9. Fraud ⚷60

A party may recover consequential damages resulting from his acts in reliance on the other party's misrepresentations.

10. Fraud ⚷59(1)
Libel and Slander ⚷139

The damage to which the plaintiff was entitled for fraud, forgery and disparagement of title by recording of grant deed and deeds of trust was the difference between the amount of the valid liens that were on the lots prior to the forgery and the amount of the equitable liens arising out of such deeds of trust.

11. Libel and Slander ⚷132

The act of wrongfully filing for record an unfounded claim to the property of another is actionable.

12. Libel and Slander ⚷139

In an action for disparagement of title the plaintiff may recover as damages the expense of legal proceedings necessary to remove a cloud on plaintiff's title.

13. Evidence ⚷14

In action for disparagement of title, where there was no express testimony as to the amount of damages for inconvenience and time suffered by plaintiff in removal of the recorded cloud on his title, the trial court could call on his general knowledge of their amount.

14. Fraud ⚷61
Libel and Slander ⚷139

In action involving fraud, forgery and disparagement of title by recording of grant deed and deeds of trust, there was no abuse of discretion in award of exemplary damages notwithstanding that the complaint prayed for actual damages and punitive damages in the event that the grant deed and deeds of trust were not cancelled and decreed to be void and of no effect and that the judgment did cancel such instruments, in view of fact that the award of exemplary damages was embraced within the issues raised. West's Ann.Code Civ.Proc. § 580.

15. Cancellation of Instruments ⚷55

The court in a deed cancellation action may grant any relief consistent with the case made by the complaint and embraced within the issues although not specifically prayed for, and the court may grant any monetary relief necessary to do complete equity between the parties.

16. Judgment ⚷252(2)

When an answer is filed, the case becomes one in which the court is authorized regardless of the prayer to grant any relief consistent with the plaintiff's averments.

17. Judgment ⚷252(1)

The jurisdiction of the court to grant any particular relief depends not on the prayer but on the issues, that is, the scope of the complaint and the issues made or which might have been made under it, and any relief consistent with the issues raised may be granted regardless of the prayer.

18. Appeal and Error ⚷151(6)

In action involving fraud, forgery and disparagement of title by recording of grant deed and deeds of trust, where the trustee named in the deeds of trust was made a defendant and damages were not made against trustee and the judgment quieted title in the plaintiff subject to the equitable liens arising out of the deeds of trust and that judgment would be affirmed, the trustee had no ground of appeal.

19. Appeal and Error ⚷151(6)

In action involving fraud, forgery and disparagement of title by recording of grant deed and deeds of trust, where the only participation of wife defendant in the transactions was that she joined in the grant deed to her husband for purpose of vesting title in him as his separate property and damages were not awarded against her, wife defendant had no ground of appeal from the judgment.

◆

Ivan R. Wainer, Beverly Hills, for appellants.

Daniel G. Marshall, Los Angeles, and Stanley Moffatt, South Gate, for respondent.

VALLÉE, Justice.

This is a suit to cancel a grant deed and three deeds of trust, to quiet title to two parcels of realty, for damages and other relief. The judgment was for plaintiff canceling the grant deed and the three deeds of trust, quieting her title to the two parcels of realty, and awarding her $2,000 compensatory damages and $2,000 punitive damages against certain defendants.

The defendants are: Alan Rogers; his wife, Gersha Rogers; Josef S. Noble; Warrog, Inc., a corporation, doing business as Majestic Homes, called Warrog or Majestic; Olympia Mortgage Company, called Olympia; Canoga Park Savings and Loan Association, called Canoga; Fannie Freedman; Consolidated Escrow Company, a corporation; and Title Insurance and Trust Company.

Alan Rogers was president of Warrog; Jack Warnick, its secretary. They were its only stockholders. Olympia was a licensed broker engaged in procuring loans. Noble was office manager of Olympia.

Since 1950 plaintiff, a widow, with insignificant business experience, has been the owner and in possession of two lots: 60 and 61. Lot 61 was at all times improved with a residence in which plaintiff resided. Prior to January 1957 lot 60 was unimproved. On April 1, 1956 lots 60 and 61 were encumbered with a first deed of trust in favor of Orange Savings and Loan Association in the approximate amount of $1,736.80, payable $42 a month, and with a second deed of trust in favor of Gubiotti in the approximate amount of $5,333.55, payable $48.50 a month. Plaintiff worked at the county hospital. Her take-home pay was about $200 a month.

About April 1, 1956 a man named Anthony, an employee of Warrog whom plaintiff did not know, called on her at her home. Anthony told plaintiff he was with Majestic Homes and asked her if she would be interested in buying a house for lot 60. Anthony told her Majestic was in the business of finding vacant lots on which to move houses from the freeway. He told her the offer was "with 100 per cent financing," she would not have to have any money to pay down on the property, and when the house was "put in" she could pay for it out of the rent she collected. Plaintiff told Anthony she was not interested, she owed too much money on the property and did not care to go into it.

About a week later Anthony again called on plaintiff. He asked her if she had thought over what he had said. Plaintiff told him she had but she did not "want to go into getting the house," that she was tired, had just come from work, her son had recently been killed, her mother had died, and she was too worried to be bothered with anything. Anthony told her she would not have to do "too much worrying about it"; they knew how to arrange the deal for her; all she would have to do was sign the papers; the necessary arrangements would be made; she would get it with 100 per cent financing; and she could pay for it with payments as low as rent.

About two weeks later Anthony telephoned plaintiff and asked her if she would "like to go and look" at some houses, perhaps if she saw one she liked "maybe" she would think about getting one. About May 1, 1956 Anthony showed her "A court of houses." Plaintiff told him, "I don't like any of these houses and I still can't see how I could get a house anyway, I owe too much for my present property." Anthony then took her to the office of Majestic Homes and introduced her to Warnick, who showed her photographs of houses. She saw one she thought she would like. Warnick told her that if she liked it they could make arrangements "for getting it." The next day Anthony drove her to Tarzana to see that house. On the trip Anthony told her she could not go wrong in getting a home; Majestic was a very reliable company; he had known them quite a while; they had helped him invest his money; he had been a tailor and had only been able to save a certain amount of money; and since he had been with Majestic they had enabled him to invest his money so that he was now the owner of five houses. Plaintiff told him she liked the house but did not see how she could get it.

Plaintiff and Anthony returned to Majestic's office and plaintiff saw Warnick. Anthony said plaintiff "liked the house and she wants to see if she can make some kind of a deal about the house." Warnick told her: "The house would cost you about $6,000"; "For $1500 we could move the house in on your lot and complete it." Plaintiff testified: "I said, 'All right.' I thought that that would be O.K. I told him that I had never entered in any legal matters before, that I didn't know anything about buying real estate, and he told me that I didn't have to worry about it, that they were a reliable company, that he would see to everything for me and that I would just have to sign the papers."

The next day Warnick went to see plaintiff's property. He said to her: "Mrs. Wright, I came to look over your place and to see how large the lot was and everything"; "You have got a gold mine here"; "It would be foolish not to put a house on the lot. You could be making money out of it."

The following day an escrow was opened for the purpose of obtaining a loan. On May 24, 1956 plaintiff signed an instrument in which Majestic Homes, a partnership, agreed to sell and she agreed to buy the house she had seen at Tarzana. The agreement provided plaintiff would pay Majestic Homes, a partnership, $7,692; the parties would open an escrow for the consummation of the agreement; and plaintiff would deposit in the escrow a promissory note covering the deferred balance of the purchase price ($7,692) with interest at 7.2 per cent per annum, a deed of trust on lots 60 and 61 as security for the note, and a chattel mortgage on the house. The agreement also contained this provision: "Tree Service 270$^{\underline{00}}$ 1500$^{\underline{00}}$ for completion to be added to note Majestic Homes guarantees financing Price includes escrow, sales tax, bond, Bldg permit Insp, Fire Insurance." It recited that Alan Rogers and Jack Warnick were the partners in Majestic Homes, a partnership, and that it would not be valid or binding on the seller unless signed by either Rogers or Warnick. It was not signed by either of them. Plaintiff understood that under the agreement Majestic Homes would refinance her property "100 per cent," the two encumbrances on the property would be paid, and she would then pay Majestic. On May 25, 1956 plaintiff signed escrow instructions, a note payable to Warrog, doing business as Majestic Homes, in the amount of $9,462, payable on or before December 1, 1956 with interest at 7.2 per cent payable at maturity, a deed of trust covering lots 60 and 61 securing the note, and a chattel mortgage on the house. The escrow instructions provided that the deed of trust securing the $9,462 note should be a third deed of trust, and contained this provision: "Majestic guarantees refinancing for amount of principal balance at maturity provided there are no additional liens against property and provided first & second trust deeds have been paid up to date, and provided notice of completion has been filed."

On August 3, 1956 the note for $9,462 was delivered by the escrow holder to Warrog and a bill of sale of the Tarzana house was mailed to plaintiff. The Tarzana house was moved onto lot 60 in September 1956 and was ready for occupancy about the middle of January 1957. On October 12, 1956 Warrog sold the note to Fannie Freedman for $8,515.80 and assigned the deed of trust executed by plaintiff on May 25, 1956 to her. In November 1956 plaintiff asked Warnick when she should start making payments to Majestic. He told her not to worry about it, that he would let her know, just to continue making payments on the prior deeds of trust.

In the first week of January 1957 Warnick told plaintiff to go to Olympia Mortgage Company and see Noble "to make an application for the loan for the refinancing of the house." Plaintiff saw Noble, who prepared an application for a loan which she signed. Noble told her the monthly payments would be $160 or less and that the interest would be 7 per cent. About January 19, 1957, at Noble's request, plaintiff again went to Olympia. Plaintiff testified: "Q. What was said by each of you in that conversation? A. Mr. Noble said that he had some more papers for me to sign. I said, 'I have signed so many papers already.' I said I didn't know there were so many papers to sign. He said these were the usual legal papers to be signed in matters dealing—dealings like this, and— * * * And I told Mr. Noble, as I said before, that I was a widow and that I hadn't had any business dealings before, and that I didn't know too much about real estate. He told me that his company, too, was a reliable company, that he wouldn't lead me wrong, and that his mother was a widow, too, and that she had been cheated out of some property which, while it didn't just leave them poverty-stricken, they had to do without quite a few of the luxuries that they had been able to have before. * * *

"Q. Now, did you sign certain papers on that occasion? A. Yes, I signed four or five papers there.

"Q. And did Mr. Noble show you where you were to sign those papers? A. Yes." Noble told her Rogers would make an application for the loan on her property. He did not tell her Rogers would take the title in his name for her. Plaintiff signed a "Statement of Information" and three applications for loans on real estate, all dated January 19, 1957. At the time plaintiff signed them they were one above the other and in between them there was a grant deed conveying lots 60 and 61 from plaintiff to Rogers. In signing the statement and the loan applications plaintiff unknowingly also signed the grant deed. She did not read any of the papers. The deed also bears the signature of Gersha Rogers, wife of Rogers, and recites she joined in its execution for the purpose of vesting title in Rogers as his separate property. It was signed by Gersha Rogers without the knowledge of plaintiff. The deed bears the date January 19, 1957, an acknowledgment of the subscriptions of plaintiff and Gersha Rogers before Noble as a notary public, and a notarial certificate. Noble was not a notary at the time. It was stipulated the deed conveyed the legal title to lots 60 and 61 to Rogers. Plaintiff testified further: "Q. So far as you know, on that date or any other date, did you ever sign a grant deed to your property? A. No, I did not.

"Q. Did you intend on that date or any other date to sign a grant deed to your property? A. No, I did not.

"Q. Were you willing to sign a grant deed to your property on that date or any other date? A. No, I was not."

The deed of January 19, 1957 from plaintiff to Rogers was recorded at the request of Majestic Homes on April 8, 1957.

On April 23, 1957 Rogers executed a note for $7,200 payable to Canoga Park Savings and Loan Association and a deed of trust securing it covering lot 60. The same day he executed a second note for $7,300 payable to Canoga and a deed of trust securing it covering lot 61. On May 6, 1957 Freedman requested a conveyance of the deed of trust executed by plaintiff on May 25, 1956, and the trustee reconveyed. On May 7, 1957 Rogers executed a third note for $4,950 payable to Freedman and a deed of trust securing it covering lots 60 and 61. This deed of trust recited it was subject to those to Canoga. The deeds of trust in favor of Canoga and Freedman were purportedly acknowledged by Rogers before Noble as a notary public at a time when Noble was not a notary. They were recorded May 14, 1957. On May 14, 1957, in an escrow with Consolidated

Escrow Company through which Rogers obtained the loan from Canoga, he paid the Orange and Gubiotti deeds of trust in full ($1,359.25 and $5,176.73) and paid Freedman $5,932.38, principal and interest. From June 14, 1957 to and including November 15, 1957 Warrog paid Freedman $360 in installments of $60. Five of the checks were signed by Warnick; one, by Rogers. On June 24 and July 25, 1957 Warrog paid Canoga a total of $258 by checks signed by Warnick.

In late April or early May 1957 plaintiff learned she had conveyed the property when her fire insurance agent asked her if she had sold her home. Apparently she then consulted a lawyer and proceeded as he advised.

In May 1957 plaintiff telephoned the office of Majestic Homes and asked for Warnick. She was told Warnick was too busy to see her. Plaintiff and James Elam, a friend, then went to Majestic's office and saw Rogers. Plaintiff testified: "Q. * * * What was said by each of you, as nearly as you can recall, in that conversation? A. I said to Mr. Rogers that I wanted to see Mr. Warnick but he is busy, so Mr. Rogers said that he could help me. He said he knew, he was familiar with the details and he could tell me about it. I said, 'Well, someone in this office claims that I have deeded my property away.' * * * Mr. Rogers replied yes, I had, that I had signed my property—deeded it over to him. And I told him no, that I hadn't. And he said, 'Oh, yes, you did, Mrs. Wright.' He said, 'You had not been making your payments. Therefore I had to take the property over.' I replied that I had been making my payments, that I had been making my payments all along to Orange Building & Loan and to the Gubiottis, and I had never stopped. So he said, oh, well, I don't know. He said, 'You will have to see Mr. Alan Noble about it.' Then—* * * A. Mr. Alan—Mr. Joseph Noble about it. So he telephoned Mr. Noble. Mr. Noble began talking to me on the phone. I told Mr. Noble that I was too upset and couldn't understand what he was saying, would he please speak to Mr. Elam, which he did, and Mr. Elam couldn't understand too well, so we said we would go over to Mr. Noble's office. So we went directly over to Mr. Noble's office.

"Q. All right. When you got there did you see Mr. Noble? A. Yes, we did.

"Q. And you had a conversation with him? A. Yes, I did.

"Q. And who was present at that conversation? A. Mr. Noble was there.

"Q. Will you please tell us what was said in that conversation? A. I gave him some statement sheets in an envelope that Mr. Rogers had given me to give to Mr. Noble. * * * A. And I asked him about what had happened, why did he say that I had signed my property over to Mr. Rogers when I knew that I hadn't. Mr. Noble said that I had signed my property over to him, that I couldn't get the credit, and he had to have a co-signer, and that Mr. Rogers had agreed to stand for it, and that was why the property was in Mr. Rogers' name. And then Mr. Elam asked about the statement sheets and the papers. We wanted to see and get as much as it was possible so we could understand what was going on, but Mr. Noble said the papers weren't ready, that he would have them ready in a day or so."

The next day plaintiff and Mr. Elam again went to see Rogers. Plaintiff asked Rogers if he would deed the property back to her and make the payments less. Rogers said: "he didn't want it, and he says no, he couldn't do that." Rogers then told them he would have a paper drawn showing that plaintiff "would be in complete possession" of her property, all she had to do was make the payments. Rogers telephoned Noble and asked him "to draw up this paper." Plaintiff and Mr. Elam then went to Noble's office. Noble told them he would draw the paper, to come back the next day and it would be ready.

Plaintiff and Mr. Elam returned to Noble's office the next day. Noble gave them a document captioned "Lease Form."

This instrument, dated May 18, 1957, was between Rogers as lessor and plaintiff as lessee; it leased lots 60 and 61 to plaintiff for 36 months commencing May 15, 1957 at a monthly rental of $189 commencing June 15; and provided that if the rent was not paid Rogers could re-enter and all rights of plaintiff would cease. The instrument provided that should plaintiff desire to purchase the property during faithful performance of the lease Rogers would sell it to her for $19,450, subject to the amounts then unpaid on the Canoga and Freedman deeds of trust. Plaintiff and Mr. Elam then went to Rogers' office. Plaintiff handed Rogers the document and asked him to sign it. Rogers telephoned Noble and asked if he should sign; Noble said "yes"; Rogers signed and gave it back to plaintiff. Rogers gave plaintiff a check of Consolidated Escrow Company for $65.10 payable to Rogers, endorsed by him, stating "it was the money left over." Rogers told plaintiff to start making her payments with the check. Plaintiff told Rogers she could not start making payments on something that was not hers. The "Lease Form" was not signed by plaintiff. If plaintiff had signed this "Lease Form" and had exercised the option, she would have paid the purchase price of $19,450 and taken the property subject to the amounts then unpaid on the Canoga and Freedman deeds of trust executed by Rogers.

At the taking of plaintiff's deposition, counsel for Rogers tendered plaintiff a grant deed to lots 60 and 61 subject to "Trust Deeds of Record." The tender was rejected. If plaintiff had accepted the deed, she would have taken title subject to the Canoga and Freedman deeds of trust.

The court found: until about May 14, 1957 lots 60 and 61 were encumbered by two deeds of trust, one in favor of Orange Savings and Loan Association, the other in favor of Gubiotti; these deeds of trusts were never in default at any time; the representations made to plaintiff by Noble, Rogers, and Warnick were material, false and fraudulently made, known by them to be false and fraudulent, made with intent to induce plaintiff to enter into the transactions and to execute any and all documents presented to her by them for the purpose of cheating her of her realty; plaintiff relied solely and in good faith on the statements and representations, believed them to be true, and acted on them until she discovered their falsity; in reliance on the representations, plaintiff signed all documents presented to her by them for her signature.

The court further found: Rogers, Noble, and Warnick "intended to procure and induce plaintiff, by artifice, trick and device, and did procure and induce her by artifice, trick and device, to sign" the grant deed to Rogers; the "artifice, trick and device was accomplished by Noble by means of manipulating and shuffling a sheaf of papers which were presented to plaintiff by him in such a manner that plaintiff unknowingly placed her signature on said grant deed, believing said document to be an entirely different instrument; said deed was without consideration to plaintiff and is and was void from the date and inception thereof; said deed was maliciously caused to be recorded by Warrog, Majestic, Rogers, Warnick, Olympia and Noble"; the three deeds of trust executed by Rogers were, and are, void; title to lots 60 and 61 remains in plaintiff; Canoga and Freedman are not, and never have been, innocent encumbrancers for value.

The court also found: by reason of the fraud and as a proximate result thereof plaintiff has been injured by Rogers; Noble; Warrog; Majectic Homes, a partnership; and Olympia in the sum of $2,000 compensatory damages and she is entitled to an additional sum of $2,000 "for the sake of example and by way of punishment against said defendants."

Additional findings were: on October 12, 1956 Fannie Freedman paid Warrog $8,515.-80 for its assignment bearing that date to her of the note and deed of trust for $9,462 dated May 26, 1956 with interest at 7.2 per cent executed by plaintiff granting lots 60 and 61 in trust as security for the payment of the note; plaintiff executed the note and deed of trust in reliance on the false and fraudulent statements made to her as previiously found; on May 14, 1957 Freedman was paid $5,932.38 on account of the note from "the proceeds of said trust deed loans wherein Canoga is the beneficiary"; the net amount expended by Freedman is $2,583.42 —$8,515.80 minus $5,932.38; Freedman requested full reconveyance of the deed of trust of May 26, 1956, and the trustee thereupon reconveyed lots 60 and 61; on May 14, 1957 Canoga expended $12,041.25 and has been paid interest to July 25, 1957 on the deeds of trust in which it is the beneficiary.

The court concluded: (1) the grant deed from plaintiff to Rogers and the deeds of trust wherein Canoga and Freedman are beneficiaries are, and have been since the inception of each of them, null and void; (2) plaintiff is entitled to a decree that she is the owner of lots 60 and 61 and quieting her title thereto subject to specified equitable liens; (3) Canoga is entitled to an equitable lien in the sum of $6,020.60 on each of lots 60 and 61, together with interest thereon from July 25, 1957 at 6.6 per cent on the unpaid balance, payable $62.50 a month, interest included; (4) subject and subordinate to the equitable liens of Canoga, Freedman is entitled to an equitable lien in the sum of $1,470.60 on each of lots 60 and 61, together with interest from May 14, 1957 at 7.2 per cent on the unpaid balance, payable $22.50 a month, interest included; (5) plaintiff is entitled to judgment for the damages found. Judgment was rendered accordingly.

All defendants except Majestic Homes, a partnership, Canoga, and Title Insurance and Trust Company have appealed. The appealing defendants will be referred to as defendants. Defendants concede that the part of the judgment quieting plaintiff's title in lots 60 and 61 subject to the equitable liens of Canoga and an equitable lien in favor of Freedman should be affirmed.

[1] The cause went to trial on the third amended complaint. Defendants' first contention is that the judgment should be reversed because there are inconsistencies between the allegations of the third amended complaint and the allegations of the prior complaints. The point is untenable. We need not state the argument in this respect because it runs counter to the principle contained in the Code of Civil Procedure § 469 et seq., which liberally permits amendments. The third amended complaint furnished the sole basis of the cause of action, and the former ones ceased to have any effect as pleadings or as a basis for judgment. The prior pleadings cannot be looked to for the issues tried. "It is well established that an amendatory pleading supersedes the original one, which ceases to perform any function as a pleading. * * * It is generally recognized, however, that a superseded pleading may be given some evidentiary effect, although the courts are not in accord as to the circumstances under which it may be considered. See IV Wigmore on Evidence (3d ed. 1940) 61, § 1067. By a long line of decisions, it is established in this state that such a pleading is not admissible as direct evidence to establish a fact in issue. [Citations.] The reason for this view is that the use of superseded pleadings to such extent as to embarrass the amending party is in derogation of the policy of liberality in permitting amendments to pleadings. [Citation.] However, where the party has testified in the action, a superseded pleading may be offered for the purpose of impeachment." Meyer v. State Board of Equalization, 42 Cal.2d 376, 384–385, 267 P.2d 257, 262. The record shows that the claimed inconsistencies were used by defendants in an attempt to impeach plaintiff. Assuming possible inconsistencies in the complaints, they form no basis for reversal of the judgment.

[2, 3] The next specification of error is that there is "a total lack" of evidence to support the findings. The claim is obviously without merit. Defendants say "the oral testimony of the plaintiff on these issues lacks *legal* verity and it cannot be legally relied upon in support of the decree against the defendants-appellants." They argue that the findings are based on plaintiff's "unrealistic oral story," on "evanescent inferences," and that the evidence of fraud and

forgery was not clear or convincing. The expression sometimes found in the decisions to the effect that fraud is to be established by "clear and convincing evidence" states nothing more than a rule of evidence directed to the trial court; and if that court finds that fraud is established by a preponderance of the evidence, a reviewing court must accept that determination as conclusive if there is substantial evidence to support it. Baines v. Zuieback, 84 Cal.App.2d 483, 487–489, 191 P.2d 67; Chung v. Johnston, 128 Cal.App.2d 157, 164, 274 P.2d 922. The testimony and exhibits fully support the findings.

In April 1956 plaintiff was the owner of lots 60 and 61. The lots were encumbered by deeds of trust: one to Orange Savings and Loan Association, and one to Gubiotti. The total amount unpaid on the encumbrances was about $7,070.35. Plaintiff was then, and at all times has remained, in open possession of the property. Anthony and Warnick, agents of Warrog, repeatedly assuring plaintiff of their honesty and experience, persuaded her to buy a house, to have it moved to vacant lot 60, and to execute another deed of trust of $9,462 covering both lots in favor of Warrog. In October 1956 Rogers sold this deed of trust to Freedman for $8,515.80. The obligation on this deed of trust was due December 1, 1956. Rogers did not pay Orange or Gubiotti with this money. The Tarzana house was moved onto lot 60 in November 1956. It was not ready for occupancy until January 1957. In the meantime Warnick repeatedly told plaintiff not to worry about paying Majestic (the note to Warrog), to keep paying on the Orange and Gubiotti encumbrances; and assured her the property would be refinanced "100 per cent."

[4] In January 1957, when the house was ready for occupancy, Warnick sent plaintiff to Olympia to see Noble to apply for a loan for refinancing. Noble, by working a "document switch," caused her to sign the grant deed conveying her property to Rogers. The procuring of plaintiff's signature to the grant deed by fraudulent representations and trick and device constituted a forgery. Where a person who has no intention of selling his property is induced by some trick or device to sign a paper having such effect, believing that paper to be a substantially different instrument, the paper so signed is a forgery. People v. Nesseth, 127 Cal.App.2d 712, 718–720, 274 P.2d 479. Noble, without a notary's commission, acknowledged plaintiff's signature without telling her he was doing so. The grant deed was not recorded until some three months later. Rogers then executed two deeds of trust to Canoga covering lots 60 and 61, totaling $14,500. With the proceeds of this loan he paid the original encumbrances to Orange and Gubiotti and paid $5,932.38 to Freedman, leaving a balance on that encumbrance of $4,190. Rogers and Freedman then shifted this $4,190 to a new deed of trust for $4,950 in favor of Freedman.

At the time Rogers obtained the loan from Canoga the encumbrances on lots 60 and 61 in favor of Orange and Gubiotti amounted to about $6,487.93 and the encumbrance in favor of Warrog which it had assigned to Freeman amounted to $9,462, a total of about $15,949.93. After Rogers had fraudulently obtained the grant deed from plaintiff and obtained the loans from Canoga, the encumbrances totaled $19,450. The result of the manipulations of Rogers, Noble, and Warnick was that plaintiff no longer owned the property; Rogers was the record owner through a forged deed; the unimproved lot was now improved; and there were deeds of trust against both lots in the amount of some $19,450. A reasonable inference from the evidence is that, without the fraud, plaintiff on May 14, 1957 would have been the owner of the property; the unimproved lot would have been improved; and both lots would have been encumbered by total loans of about $14,179.93.

[5] Over the objection of defendant Noble, the court permitted plaintiff to prove by a record of the real estate commissioner that about October 1, 1954 Noble had forged three promissory notes and three

deeds of trust securing them, and by fraud had sold them to an innocent purchaser, and that in the proceeding before the commissioner Noble had admitted the facts. Defendants assert prejudicial error. There was no error. "Cases of fraud are exceptions to the general rule that other offenses of the accused are not relevant to establish the main charge. Where fraud is charged, evidence of other frauds or fraudulent representations of like character, committed by the same parties at or near the same time is admissible to prove intent." Atkins Corporation v. Tourny, 6 Cal.2d 206, 215, 57 P.2d 480, 485; Janisse v. Winston Investment Co., 154 Cal.App.2d 580, 588, 317 P.2d 48.

[6] Defendant Freedman attacks the trial court's computation of the equitable lien awarded her. The court's computation and that claimed by Freedman are set out in the margin.[1] The court computed the lien by taking the amount Freedman paid for the deed of trust. It awarded her interest from October 13, 1956 only. Freedman states the court should have taken the face amount of the note secured by the deed of trust and should also have given her interest from May 25, 1956. On May 14, 1957 no part of the principal of, and no part of the interest on, the note of May 25, 1956 for $9,462 owned by Freedman and secured by the deed of trust, had been paid. The interest rate was 7.2 per cent. On May 14, 1957 accrued interest was $660.38. Thus, $10,122.38 was owing to Freedman. On May 14 she received $5,932.38 from Rogers, leaving a balance of $4,190 owing to her. There was no evidence that Freedman was a party to the fraud or the forgery. The assignment of the $9,462 note and trust deed to her was not attacked. As stated by the trial court in its memorandum opinion, it "constituted a valid claim upon plaintiff for the full amount thereof." The court in its memorandum computed the equitable lien as follows:

"Principal on May 25, 1956	$ 9,462.00
Interest at 7.2% from May 25, 1956 to May 14, 1957	660.38
Total owing on May 14, 1957	10,122.38
Less credit by payment from Canoga Park Savings and Loan Association	5,932.38
Balance of principal owing Fannie Friedman on May 14, 1957	$ 4,190.00"

We think this is the correct computation. The fact that Freedman purchased the note and deed of trust at a discount did not reduce plaintiff's obligation to her. We see no reason, and none is suggested, why her

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[1] The court computed the amount of Freedman's equitable lien as follows:

October 12, 1956—paid by Freedman to Warrog, Inc., doing business as Majestic Homes as beneficiary for assignment to her of deed of trust in the amount of $9,462, dated May 25, 1956, executed by plaintiff	$ 8,515.80
May 14, 1957—received by Freedman from Rogers through deed of trust loans from Canoga in payment of above deed of trust assigned to her (plus a junior deed of trust of same date executed by Rogers in the sum of $4,950)	$ 5,932.38
	$ 2,583.42
Interest at 7.2 per cent from October 13, 1956 to May 14, 1957 on $8,515.80	357.77
Freedman equitable lien (1/2 against each lot)	$ 2,941.19

Freedman contends the amount of her equitable lien should have been computed as follows:

Original principal of May 25, 1956, deed of trust described above	$ 9,462.00
Interest at 7.2 per cent from May 25, 1956 to May 14, 1957	660.38
	$10,122.38
Received on account from Rogers	5,932.38
Balance due May 14, 1957 plus interest at 7.2 per cent from May 14, 1957	$ 4,190.00

equitable lien should not be for $4,190 plus interest at 7.2 per cent per annum from May 14, 1957, less the $360 she received from Warrog between June 14 and November 15, 1957. This is the only relief defendant Freedman seeks. She does not complain that her lien is made subordinate to Canoga's lien.

[7–9] Defendants attack the findings of damages on the ground they are without evidentiary support. The point has no merit. This is a case of fraud, forgery, and disparagement of title by the recording of the grant deed and the deeds of trust to Canoga and Freedman. "One who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers." Civ.Code, § 1709. The measure of damages "is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not." Civ. Code, § 3333; Gudger v. Manton, 21 Cal.2d 537, 555, 134 P.2d 217. For a tortious act damages will be awarded to the extent that the injured party will be restored to the position he would have occupied had the tort not occurred. Alphonzo E. Bell Corp. v. Listle, 74 Cal.App.2d 638, 650, 169 P.2d 462. A party may recover consequential damages resulting from his acts in reliance on the other party's misrepresentations. Gagne v. Bertran, 43 Cal.2d 481, 490, 275 P.2d 15; 9 Cal.Jur.2d 635, § 48.

[10] Plaintiff is damaged in the difference between the amount of the valid liens that were on lots 60 and 61 prior to the forgery and the amount of the equitable liens. The court found that defendants fraudulently represented to plaintiff that the total cost to be paid by her for the Tarzana house, moving, and relocating it onto lot 60 would be $7,500, and the funds to pay the same could and would be obtained by increasing the existing liens on plaintiff's property in that amount; that plaintiff would continue to be the owner of lots 60 and 61, and would become the owner of the Tarzana house subject to a new encumbrance in an amount sufficient to pay and discharge the existing encumbrances and the cost of the Tarzana house. The court further found that plaintiff executed the $9,462 note to Warrog in reliance on the false and fraudulent statements made to her by Anthony and Warnick. At the time Rogers obtained the loans from Canoga the encumbrances on lots 60 and 61 in favor of Orange and Gubiotti amounted to about $6,487.93, and the falsely represented cost of the house, moving, and relocating it was $7,500, a total of about $13,987.93. After Rogers had obtained the grant deed from plaintiff by fraud and forgery and had obtained the loans from Canoga, the encumbrances totaled $19,450. The court reduced the Canoga encumbrances to equitable liens totaling $12,041.20. We have held that the Freedman equitable lien should be $4,190. Thus the total of the equitable liens is $16,231.20. The difference between the liens of $13,987.93 at the time the grant deed was obtained and $16,231.20, the amount of the equitable liens, is $2,243.27.

[11–13] The law is well settled that the act of wrongfully filing for record an unfounded claim to the property of another is actionable. Fearon v. Fodera, 169 Cal. 370, 379, 148 P. 200; Coley v. Hecker, 206 Cal. 22, 27, 272 P. 1045; Gudger v. Manton, 21 Cal.2d 537, 541–543, 134 P.2d 217; Ezmirlian v. Otto, 139 Cal.App. 486, 34 P. 2d 774; Davis v. Wood, 61 Cal.App.2d 788, 143 P.2d 740; Kalajian v. Nash, 148 Cal.App.2d 495, 306 P.2d 921; Rest., Torts, § 624; Prosser on Torts, 2d ed., 760, § 108. In an action for disparagement of title the plaintiff may recover as damages the expense of legal proceedings necessary to remove a cloud on the plaintiff's title. Prosser on Torts, 2d ed., 766, § 108. Cf. Reachi v. National Automobile & Cas. Ins. Co., 37 Cal.2d 808, 812–813, 236 P.2d 151. The Restatement says the publisher of disparaging matter is liable for "the expense of litigation reasonably necessary to remove the doubt cast by the disparagement upon the other's property in the thing or upon the quality thereof." (Rest., Torts, § 633(b).) Broadway Federal Savings & Loan Ass'n v. Howard, 133 Cal.App.2d 382, 285 P.2d 61, 73, says one of the elements of damage is "the cost of clearing title from the disparaging claim." Holding that a cause of action was stated by allegations that the defendant maliciously filed of record an abstract of judgment purporting to constitute a lien against the plaintiff's real estate at a time when the defendant knew the judgment had been suspended by an appeal bond, the court, in Coley v. Hecker, 206 Cal. 22, 272 P. 1045, said that the allegation that the malicious recordation decreased the value of the real estate and rendered it less marketable was obviously true, and that it was not necessary that the plaintiff show the wrongful act interfered with some specific opportunity to sell or deal with the land, as might be true if the utterance complained of were oral. It has been held that in an action for disparagement of title, damages may be awarded for the inconvenience and time suffered by the plaintiff in the removal of a recorded cloud on his title. Frega v. Northern New Jersey Mortg. Ass'n, 51 N.J.Super. 331, 143 A.2d 885, 890. There is no express testimony of the amount of damage as a result of these matters, but their character is such that the trial judge could call on his general knowledge of their amount. See In re Estate of Reinhertz, 82 Cal.App.2d 156, 160, 185 P.2d 858, 186 P.2d 755; Merrill v. Dustman, 97 Cal.App.2d 473, 477, 217 P.2d 998; Johnson v. Snyder, 99 Cal.App.2d 86, 90, 221 P.2d 164. "One whose wrongful conduct has rendered difficult the ascertainment of the damages cannot escape liability because the damages could not be measured with exactness." Zinn v. Ex-Cell-O Corp., 24 Cal.2d 290, 297–298, 149 P.2d 177, 181; Smith v. Mendonsa, 108 Cal.App.2d 540, 542–545, 238 P.2d 1039. The record fully supports the finding as to compensatory damages.

[14] With respect to damages the complaint prayed for judgment "Against all defendants, except Title Insurance and Trust Company, Canoga Park Savings and Loan Association and Consolidated Escrow Company, in the event said grant deed and deeds of trust are not cancelled and decreed to be void and of no effect, actual damages in the sum of $11,000.00 and punitive damages in the sum of $10,000.00." There was also a prayer for general relief; but there was no other specific prayer for damages. Defendants assert that in view of the quoted prayer it was error to award plaintiff damages. The point is without merit.

[15–17] "The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint; but in any other case, the Court may grant him any relief consistent with the case made by the complaint and embraced within the issue." Code Civ. Proc. § 580. The court in a cancellation action may grant any relief consistent with the case made by the complaint and embraced within the issues although not specifically prayed for. And the court may grant any monetary relief necessary to do complete equity between the parties. (9 Cal.Jur.2d 633, § 48.) Thus, when an answer is filed, the case becomes one in which the court is authorized regardless of the prayer to grant any relief consistent with the plaintiff's averments. The jurisdiction of the court to grant any particular relief depends not on the prayer but on the issues—that is, on the scope of the complaint and the issues made or which might have been made under it—and any relief consistent with the issues raised may be granted regardless of the prayer. Nathan v. Dierssen, 164 Cal. 607, 611, 130 P. 12; Johnson v. Polhemus, 99 Cal. 240, 244–245, 33 P. 908; De Leonis v. Hammel, 1 Cal.App. 390, 393–394, 82 P. 349; Murphy v. Stelling, 8 Cal.App. 702, 707, 97 P. 672; Pedro v. Soares, 18 Cal.App.2d 600, 606, 64 P.2d 776.

Section 3294 of the Civil Code authorizes exemplary damages "in an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud or malice * * *." "Courts award exemplary damages to discourage oppression, fraud, or malice by punishing the wrongdoer. [Citations.] Such damages are appropriate in cases like the present one, where restitution would have little or no deterrent effect, for wrongdoers would run no risk of liability to their victims beyond that of returning what they wrongfully obtained." Ward v. Taggart, 51 Cal.2d 736, 336 P.2d 534, 538. The record discloses no abuse of discretion in the award of exemplary damages.

[18, 19] Defendant Consolidated Escrow Company was the trustee named in the deeds of trust executed by Rogers to secure the Canoga loans. Damages were not awarded against it. Since it is conceded the judgment quieting title in plaintiff subject to the equitable liens should be affirmed, Consolidated has no ground of appeal. The only participation of defendant Gersha Rogers in the transactions was that she joined in the deed to Alan Rogers, her husband, for the purpose of vesting title in him as his separate property. Damages were not awarded against her. She has no ground of appeal.

In defendants' closing brief, it is claimed for the first time that Majestic Homes, a partnership, was not named as a defendant and consequently that the court erroneously awarded damages against it. Since Majestic Homes, a partnership, did not appeal, we do not decide the point.

The judgment is modified by striking from paragraphs (6) (c) and (6) (d) the figures and words "$1470.60, with interest thereon from May 14, 1957, at 7.2% per annum on the unpaid balance," and inserting in lieu thereof in each of said paragraphs the following: "$2095, with interest thereon from May 14, 1957, at 7.2 per cent per annum on the unpaid balance less the sum of $180"; as thus modified, it is affirmed. Plaintiff shall recover her costs of appeal from defendants other than Fannie Freedman. Costs are not awarded Fannie Freedman since they are *de minimis.*

SHINN, P. J., and WOOD, J., concur.

John Laurance KING and Beverly B. King, Plaintiffs and Appellants,
v.
Donald E. LENNEN and Helen E. Lennen, Defendants and Respondents.*
Civ. 23230.

District Court of Appeal, Second District, Division 3, California.
July 24, 1959.

Rehearing Denied Aug. 12, 1959.

Hearing Granted Sept. 16, 1959.

Action for death of plaintiffs' one and one-half year old child who drowned in defendants' private swimming pool. The Superior Court of Los Angeles County, Alfred E. Paonessa, J., rendered judgments for defendants and plaintiffs appealed. The District Court of Appeal, Shinn, P. J., held that a private swimming pool which was maintained on residential property, which had no extraordinary features not found in the ordinary swimming pool, which was not being maintained in an abnormal condition, and which presented nothing to attract children except water was not an "attractive nuisance".

Affirmed.

1. Negligence ⟹39

A private swimming pool is not, as matter of law, an "attractive nuisance".

See publication Words and Phrases, for other judicial constructions and definitions of "Attractive Nuisance".

2. Negligence ⟹39

A private swimming pool which was maintained on residential property, which had no extraordinary features not found in the ordinary swimming pool, which was not being maintained in an abnormal condition, and which presented nothing to attract children except water was not an "attractive nuisance".

3. Negligence ⟹32(4)

The fact that homeowners' daughter had, on prior occasions, acted as "babysitter" for plaintiffs' one and one-half year old child and had, on such occasions, taken child to the home where there was a swimming pool on the premises, could not make such child an invitee when she wandered on the premises, on a day when she was not in care of the daughter, and drowned in the swimming pool.

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* Opinion vacated 1 Cal.Rptr. 665, 348 P.2d 98.

4. Negligence ⚷112

Allegations, in action for death of plaintiffs' one and one-half year old daughter who drowned in defendants' private swimming pool, which were insufficient to show negligence in maintaining pool were likewise insufficient to show that defendants were guilty of willful misconduct in maintaining pool in highly dangerous condition.

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Hirson & Horn, George Zucker, Los Angeles, for appellants.

Belcher, Kearney & Fargo, Lester E. Olson, Los Angeles, for respondents.

SHINN, Presiding Justice.

Action for damages for the wrongful death by drowning of plaintiffs' son, Boyd, aged one and one-half years, in a private swimming pool owned and maintained by defendants. A demurrer to the amended complaint having been sustained without leave to amend, judgment was entered adverse to plaintiffs and they appeal.

The amended complaint attempts to state two causes of action. Count I contains the following allegations: Plaintiffs and their two minor children lived on the southeast corner of Superior Street and White Oak Avenue in Northridge; defendants and their three minor children lived on the northwest corner, diagonally opposite to plaintiffs' house. There were no sidewalks on either street: On the White Oak (easterly) side of defendants' lot there was a wood rail fence, so constructed that small children could climb between the railings and enter the premises. On the southerly side fronting on Superior there was a partially completed cement block wall having a four foot opening intended eventually to accommodate a door or gate.

April 20, 1956, the body of plaintiffs' son, Boyd, was discovered at the bottom of defendants' swimming pool. The southerly edge of the pool was 30 feet north of Superior Street. The pool was 20 feet wide and 40 feet long and was filled with water to a depth of 3½ feet on its southerly end and 9 feet on its northerly end. There was a sudden drop from shallow water to deep water near the center of the pool. A tubular metal pipe and connecting rubber hose extended out of one side of the pool onto the curbing and a diving board extended over the deep end. The walls and bottom of the pool were lined with a slippery plastic material. There were no steps, ladders, rails or other fixtures attached to the sides of the pool. On the date of the accident, the water was dirty, stagnant and opaque, its depth could not be ascertained visually and a child under water could not be seen from the surface of the pool.

Defendants owned a cow, two dogs and three horses and permitted them to roam at large in the vicinity of the pool. The pool and the animals could be seen by small children on Superior Street. Many of the neighborhood children became attracted to the premises and often entered them in order to play with the pets beside the pool. It is alleged that although defendants were employed full-time and were away from the premises on weekdays, including the day of the accident, they knew or in the exercise of ordinary care should have known of these facts, and it is also alleged that the children came onto the premises by virtue of an implied invitation from the Lennens to do so.

For five months prior to the accident defendants' teenage daughter, Carol, had been acting as a baby-sitter for plaintiffs' children pursuant to arrangements for compensation agreed upon by the respective parents. When plaintiffs' son, John, was taking a nap, Carol would bring Boyd to her parents' home and allow him to play with the family pets in the vicinity of the pool. As a result, Boyd became attracted to the pool and to the animals, having no knowledge of any danger. Plaintiffs allege: "[B]y reason of the frequent occurrence of said baby-sitting arrangement * * *, said relationship up to and on the date of the death of the said minor * * * was a continuing one, and by reason thereof the said minor * * * on the date of his death was on the premises of said defendants at the express invitation of said defendants and said defendants received compensation therefor."

It is finally alleged that the swimming pool was a dangerous condition containing hidden and unrecognizable dangers to small children and involving an unreasonable risk of harm, that its usefulness was slight in comparison to the risk, and that the pool constituted a trap whose perils they could not reasonably be expected to appreciate. Plaintiffs allege that defendants were negligent in failing to enclose and barricade the pool, in failing adequately to enclose the premises and in failing to exercise reasonable supervision over the pool and the surrounding area.

Count II incorporates by reference the factual allegations of the first count and alleges that defendants intentionally maintained a dangerous condition on the premises with a reckless and wanton disregard for the lives and safety of small children.

The question for decision is whether the amended complaints states the substance of a cause of action for negligence, as alleged in the first count, or for wilful misconduct, as alleged in the second count. We are of the opinion that the complaint does not state a cause of action against defendants and that the demurrer was properly sustained.

In urging that the demurrer should have been overruled as to Count I, plaintiffs contend that they have alleged sufficient facts to state a cause of action upon three distinct theories of negligence, namely, that the pool was an artificial condition highly dangerous to trespassing children, that it was a trap, and that Boyd was an invitee to whom defendants owed a duty of due care.

[1] The first two theories may be considered together. A private swimming pool is not, as a matter of law, an attractive nuisance. Lake v. Ferrer, 139 Cal.App.2d 114, 293 P.2d 104; Wilford v. Little, 144 Cal.App.2d 477, 301 P.2d 282; Reynolds v. Willson, 51 Cal.2d 94, 331 P.2d 48. However, it was held in the Reynolds case that under section 339 of the Restatement of Torts, the manner of the maintenance and use of a private swimming pool may impose upon the owner the duty of ordinary care toward trespassing children of tender years, and also that the physical condition of a pool may be such as to constitute a trap. Plaintiffs rely heavily on Reynolds. They contend that the factors giving rise to the liability of the defendants in that case are likewise present here. In Reynolds, the plaintiff, a boy aged two, was found face downward in the water on the floor of a partially drained swimming pool having steps leading down to the bottom at the shallow end. Dirt, leaves and other materials had accumulated on the concrete surface beneath the water, causing it to become slippery when stepped on. The court said, at page 101 of 51 Cal.2d at page 53 of 331 P.2d: "In the present case the jury was entitled to find that when in December the defendants partially filled the pool with water nearly to the steps in an endeavor to make it safer for their own children they had in effect made it more attractive to young children such as the plaintiff and that by maintaining the pool in its then condition they were guilty of maintaining a trap as to the plaintiff and responsible to him under the doctrine of ordinary care."

[2] We cannot agree with plaintiffs that the holding in Reynolds is determinative of the case at bar. The facts of the Reynolds case were unique. The case law was exhaustively considered in the majority and dissenting opinions in the case and we deem it unnecessary for us to review it. We are convinced that the present case falls into the category of situations in which liability does not exist. In Reynolds the court was considering a combina-

tion of circumstances which created a condition not alleged to have existed in the present case and which do not usually exist in swimming pools. The primary holding in Reynolds was that the partially filled pool and the other conditions constituted a trap for young children. The fact that the pool was only partially filled had direct bearing upon the question whether the condition created an unreasonable risk. Another significant fact was that when the father of the Reynolds boy went into the pool to rescue his son, the bottom was so slippery that he was unable to carry him to the steps. The rule of the Reynolds case should not be held applicable to conditions that are not substantially identical with the unusual conditions which made the pool in that case unusually attractive and dangerous. The Lennens' pool had no extraordinary features not found in the ordinary swimming pool and it was not being maintained in an abnormal condition. There was nothing to attract young children except the water. Therefore, as stated in Reynolds, it was not within the rule of the Restatement. In our opinion, the facts pleaded in the amended complaint, if proved, would furnish no basis for the liability of the Lennens upon either the theory of the Restatement or the theory of a trap.

[3] As we have said, plaintiffs' remaining theory is that Boyd was an invitee on defendants' premises, and it is argued that that question is a factual one to be resolved upon a trial and not one of law to be decided on demurrer. We express no opinion whether the complaint would have been sufficient if it had alleged that Boyd was actually in the care of defendants' daughter at the time of the accident. The complaint does not so allege, and it is conceded by plaintiffs in their brief that on the day of the accident the child was not in her care. We must therefore presume that plaintiffs have stated their case as strongly as they can in their pleading.

Although it is alleged that the Lennens knew their daughter brought Boyd onto the premises when baby-sitting, it cannot be maintained that the child was an invitee on an occasion when he entered the premises without the baby-sitter and of his own volition. The Lennens say in their brief: "This theory would make an invitee of the lost and strayed child who wandered into an auto repair shop if its parent had, on a previous occasion, been at the shop for the purpose of having repairs done and happened to have the child along." We agree with the reasoning of defendants. In our opinion, the facts pleaded would furnish no basis for the liability of the Lennens upon a theory that Boyd was an invitee.

[4] In urging that the demurrer should have been overruled as to Count II, plaintiffs contend that they have alleged sufficient facts to state a cause of action for wilful misconduct upon a theory that defendants kept the pool in a highly dangerous condition with full knowledge and in reckless disregard of the safety of small children. The argument is untenable. We mentioned earlier that the second count incorporates the factual allegations of Count I; no additional facts are pleaded with the exception of an allegation that the conduct of the Lennens was intentional rather than negligent. The circumstances relied on to show the wilful misconduct of defendants in maintaining the pool are identical with those relied on to show their negligence in maintaining it, and, as we have seen, those facts are wholly insufficient to establish liability for the maintenance of a dangerous artificial condition.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

173 Cal.App.2d 48

Raymond A. LAIRD, Plaintiff and Appellant,

v.

Vernon S. MOSS et al., Defendants and Respondents.

Civ. 23580.

District Court of Appeal, Second District, Division 3, California.

Aug. 12, 1959.

Action against owner and driver of truck for injuries sustained by automobile passenger in collision with defendants' truck at blind street intersection, resulting in death of automobile driver and loss of memory by automobile passenger and truck driver as to circumstances surrounding collision. The Superior Court, Los Angeles County, Arthur Crum, J., entered judgment on a verdict for defendants, and plaintiff appealed. The District Court of Appeal, Shinn, P. J., held that refusal to give requested instruction as to presumptions under West's Ann.Code Civ.Proc. § 1963, subd. 4, that deceased automobile driver was exercising due care and obeying the law at the time of an immediately preceding collision constituted error prejudicial to plaintiff.

Judgment reversed.

1. Automobiles 🔑245(24)

In action against owner and driver of truck for injuries sustained by passenger in automobile when it collided with truck at blind street intersection, in arriving at conclusion as to whether truck driver was negligent, jury had to determine whether automobile driver was exercising ordinary care and obeying the law.

2. Automobiles 🔑242(1, 8)

Where driver of automobile was killed in collision with truck at blind street intersection and automobile passenger and truck driver suffered injuries resulting in complete loss of memory as to circumstances surrounding collision, statutory presumption that every person takes ordinary care of his own concerns and obeys the law was applicable to conduct of truck driver, automobile passenger, and deceased automobile driver. West's Ann.Code Civ.Proc. § 1963, subd. 4.

3. Automobiles 🔑246(60)

In action against owner and driver of truck for injuries sustained by automobile passenger in collision with defendants' truck, resulting in death of automobile driver and complete loss of memory by automobile passenger and truck driver as to circumstances surrounding collision, instruction that each party was entitled to presumptions that every person takes ordinary care of his own concerns and obeys the law was insufficient to instruct jury that automobile passenger was entitled to benefit of such presumptions with respect to conduct of deceased automobile driver. West's Ann.Code Civ.Proc. § 1963, subd. 4.

4. Trial 🔑261

In action against owner and driver of truck for injuries sustained by automobile passenger in automobile-truck collision, resulting in death of automobile driver and loss of memory by automobile passenger and truck driver as to circumstances surrounding collision, failure to name deceased automobile driver and use of a few redundant words in requested instruction as to statutory presumptions that deceased driver was exercising ordinary care and obeying the law were such imperfections as should have been corrected by trial court, and rule that court has no duty to rewrite instructions or correct those which contain misstatements of law did not justify refusal to give requested instruction, which correctly stated the law. West's Ann.Code Civ.Proc. § 1963, subd. 4.

5. Trial 🔑261

Trivial inaccuracies or clerical errors in instructions which are easily corrected do not justify refusal of an instruction, where the result will be to leave jury inadequately instructed on a material issue.

6. Appeal and Error ⚿1067
Death ⚿104(1)

Where action against owner and driver of truck for injuries sustained by automobile passenger in collision with truck at blind street intersection, resulting in death of automobile driver and loss of memory by automobile passenger and truck driver as to circumstances surrounding collision, could reasonably have been decided in favor of plaintiff and jury was instructed as to statutory presumptions that truck driver was exercising due care and obeying the law and opinion testimony of expert, contradicted by testimony of another expert, constituted only evidence that truck was traveling at excessive speed, refusal to give requested instruction applying such presumptions to conduct of deceased automobile driver was error prejudicial to injured automobile passenger. West's Ann.Code Civ.Proc. § 1963, subd. 4; West's Ann.Vehicle Code, § 511(a) (2).

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Frank W. Woodhead, Los Angeles, R. P. Reddingius, Pasadena, for appellant.

Jarrett & Morgan, Los Angeles, for respondents.

SHINN, Presiding Justice.

Plaintiff Laird was riding in a Chevrolet driven by Willard A. Jones when it came into collision with a Willys panel truck owned by defendant Brown and driven by defendant Moss. The Jones car was traveling south on Valjean in Los Angeles, the Moss truck east on Leadwell. The collision occurred in the intersection. Jones was killed. Laird and Moss each suffered injuries which resulted in complete loss of memory as to the circumstances surrounding the accident. In a jury trial verdict and judgment were in favor of the defendants and plaintiff appeals.

It had rained all day and was still raining at about 4 o'clock in the afternoon. Visibility was good. There was evidence that the Chevrolet left 50 feet of skid marks up to a point 17 feet south of the north curb line of Leadwell, or a little past the center line; the Willys skidded 18 feet to the point of impact. The Chevrolet was propelled to the southeast corner of the intersection; the Willys, struck on the left front section, veered to the right, proceeded down Valjean for 180 feet, knocked over a tree and came to rest beside a garage. Moss was not thrown out. There was a building at the northwest corner of the intersection by reason of which neither driver had a clear and unobstructed view, during the last 100 feet of his approach, of traffic on the other highway for a full 100 feet from the intersection. There was no eye witness to the accident. There was evidence of observations made showing that from a point on Leadwell 100 feet west of the intersection there was a view north on Valjean of 75 feet and from 100 feet north on Valjean a view to the west on Leadwell of 67 feet. These conditions gave each driver who may have been approaching this blind intersection at a speed consistent with traversing the intersection at 15 miles per hour (Vehicle Code § 511(a) (2) ample opportunity to see the other approaching vehicle and to stop his own in time to avoid a collision.

A 16 year old boy testified that he was riding a bicycle northward 150 or 200 feet north of Leadwell. He did not observe either car before the collision. He heard them come together and saw the Willys going south on Valjean at a speed he estimated at 30 or 40 miles per hour. Another witness gave testimony that he was driving south on Valjean and that at a point half or three quarters of a block north of Leadwell the Chevrolet passed him. He was paying no attention to his own speed which he estimated at 25 or 30 miles per hour. He estimated that the speed of the Chevrolet was from 5 to 10 miles faster. He did not notice either car again until after the collision.

Robert E. Snyder, a mechanical engineer, testified as an expert for plaintiff. He specializes in the examination of automobile accidents; he had examined some 2,000 accidents. He considered the evidence of skid marks and examined photographs of the damaged cars. From these he expressed the opinion that at about the point where Jones started to slow down the Chevrolet was traveling about 33 miles per hour; at the time of the impact it was going 15 miles per hour; at about the point where Moss started to slow down the Willys was traveling 40 miles per hour and at the point of the collision it was going 35 miles per hour.

Dr. Dino Morelli, another specialist, testifying from the same evidence as that considered by Snyder, expressed the opinion that when brakes were applied on the Willys it was traveling 15½ miles per hour and that at the time of impact from 0 to 5 or 5½ miles per hour. At the time of impact the Chevrolet was going 15 miles per hour.

There was no evidence whether the Willys was in gear with the motor running after the collision. Neither expert undertook to answer whether it was propelled for 180 feet under its own motive power or traveled south under its momentum at the time of the collision.

The only point on the appeal which requires decision is that the court erroneously refused plaintiff's instruction as to the application of the presumption of the exercise of due care. Since both Laird and Moss had lost memory of the occurrences surrounding the accident and Jones was dead, the case was one for application of the rule of section 1963, subdivision 4, Code of Civil Procedure, that it is presumed that every person takes ordinary care of his own concerns and obeys the law.

The critical issue was whether Moss was negligent in a manner which was a proximate cause of the accident. Contributory negligence of Laird was pleaded in the answer but there was no evidence which tended to support the plea. One or the other of the drivers was negligent, and the jury could have found with good reason that both were negligent. The verdict implies findings that Moss was not negligent and that the conduct of Jones was the sole cause of the accident.

[1] In reaching a conclusion whether Moss was negligent it was necessary for the jury to determine whether Jones was driving in the exercise of ordinary care and in obedience to law. Gigliotti v. Nunes, 45 Cal.2d 85, 286 P.2d 809.

[2] It was the duty of the court to instruct that the presumption of the use of care was applicable to the conduct of Laird, to the conduct of Moss and also to the conduct of Jones. Needless to say, the jury should have been so instructed as to leave no doubt in the minds of the jurors that the presumption ran to the conduct of Jones as well as to that of Laird and Moss.

[3] Defendants, while conceding that the jury should have been so instructed, contend that an instruction that was given at the request of plaintiff was adequate. (Defendants requested the same instruction, and it was refused.) This instruction reads as set out in the margin.[1] Plaintiff maintains that the instruction was intended and was so worded as to make the presumption applicable only to the conduct of Laird and Moss, that he submitted another instruction which stated that the presumption was applicable to the conduct of Jones and that the court refused to give it.[2] We agree that the court should have given this instruction.

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[1] "135-E. At the outset of this trial, each party was entitled to the presumptions of law that every person takes ordinary care of his own concerns and that he obeys the law. These presumptions are a form of prima facie evidence and will support findings in accordance therewith, in the absence of evidence to the contrary. When there is other evidence that conflicts with such a presumption, it is the jury's duty to weigh that evidence against the presumption (and any evidence that may support the presumption), to determine which, if either, preponderates. Such deliberations, of course, shall be related to and be in accordance with my instructions on the burden of proof."

[2] "135-A. The law presumes that * * now deceased the * * * in this action, in his conduct at the time and immediately preceding the accident here in question, was exercising ordinary care and was obeying the law. These presumptions are a form of prima facie

Instead of containing a simple, direct statement that the presumption was applicable to the conduct of Jones, the instruction that was given was couched in the cold, abstract wording of the statute. It singles out the parties to the action as being entitled to the presumption; it does not say so directly, but by the round-about method of saying that they are entitled to the presumption because it applies to the conduct of every person. Defendants say that "every person" would include Jones and that the jury would have so understood. We doubt that the jurors, hearing the words "every person" but once, would have understood that the court was employing those words for the purpose of instructing them to pass judgment on the conduct of Jones in the light of the presumption.

Defendants contend for a strict and literal application of the words "every person" to make them applicable to the conduct of Jones. But they would have to place a limitation upon their method of interpretation. To attribute to the instruction the meaning that each party was entitled to the presumption as applied to the conduct of third persons would lead to absurdity. In the present case it would mean that Moss was entitled to the presumption that Jones was proceeding with due care and obeying the law. But instead of theorizing as to deductions the jurors might have made from a critical analysis of the wording of the instruction we look only for the meaning it would have conveyed to them upon hearing it read.

In our inquiry into the meaning the jurors would have attributed to the instruction it is illuminating to notice the meaning the attorneys for the parties gave to it. Defendants' counsel requested the same instruction, understanding that it made the presumption applicable to the conduct of Moss. They made use of a form instruction which made the instruction applicable also to the conduct of Laird. But it could scarcely have been their intention to request an instruction that made it applicable to the conduct of Jones. They would not have considered it to be their duty to request such an instruction. And plaintiff's attorneys, understanding that another instruction was needed, submitted the one that was refused. There appears to be no good reason for assuming that the jurors would have given the instruction a meaning different from the one that was entertained by the attorneys in the case.

Practitioners should not make the mistake of assuming that all the law to be applied in jury trials can be found in a book of forms. Every case has its essential factual issues. As a rule there are only a few of these that are determinative of the controversy. Much of the value of instructions can be lost by the failure to draft specific instructions to fit these issues. The standard instructions which are in common use are intended to save time and effort. It is not their purpose to dispense with analysis of the issues in the case and the preparation of appropriate special instructions.

The foregoing remarks apply not only to the instruction that was given but also to the one that was refused. Realizing that their first instruction was inadequate plaintiff's attorneys set about furnishing one that would apply the presumption to the conduct of Jones. But following the labor saving practices that have invaded the legal profession, instead of preparing an instruction of their own, which might have taken as much as ten minutes of time and required very little effort, they pored through a book of forms and came up with the one known as 135–A which they submitted. It so happens that 135–A is apparently intended for use in a case in which a deceased person is either a plaintiff or a defendant, whatever sort of case that might be. It

evidence and will support findings in accordance therewith, in the absence of evidence to the contrary. When there is other evidence that conflicts with such a presumption, it is the jury's duty to weigh that evidence against the presumption and any evidence that may support the presumption to determine which, if either, preponderates. Such deliberations, of course, shall be related to and be in accordance with my instructions on the burden of proof."

is evident that the instruction was submitted without being carefully read.

[4, 5] Defendants point out that there is a blank space in the instruction that would have to be filled in with the name of Jones and that the words "the * * * in this action" are redundant. They contend that because of these imperfections the instruction was properly refused under the rule that the court has no duty to re-write instructions or to correct those which contain misstatements of law. The rule cannot be applied here. The instruction stated the law correctly; it referred to the "deceased", which could only have meant Jones. The few redundant words could have been crossed out with the stroke of a pen. The imperfections were on a par with clerical errors that are easily corrected. Such trivial inaccuracies do not justify the refusal of an instruction where the result would be to leave the jury inadequately instructed on a material issue in the case. The instruction should have been corrected by the court and given.

[6] The final question is whether the error in refusing the instruction was seriously prejudicial. We have concluded that the case was a close one which could reasonably have been decided in favor of the plaintiff, and that it is not improbable that the verdict would have been different had the jury been properly instructed. We believe that the presumption of the use of due care played an important part in the decision.

There was no evidence, except the opinion evidence of the experts, that either car was traveling at a high rate of speed. Snyder had the Willys approaching the intersection at 40 miles per hour and going into collision with the Chevrolet at 35 miles per hour. Dr. Morelli had the Willys going 15½ miles per hour when the brakes were applied and practically at a standstill when the collision occurred. Strange to say, both experts gave the Chevrolet a speed of 15 miles per hour at the time of impact.

These witnesses are no doubt among the best of the experts who specialize in studying skid marks and photographs of damaged cars and reconstructing in detail the manner in which accidents occur. It is apparent from their testimony that they believe themselves to be engaged in an exact science. They maintain that their conclusions are based upon established physical facts and scientific formulae which form the basis for irrefutable deductions. Their reasoning, especially that of Dr. Morelli, was carried through interminable hypothetical questioning and argument. After reading the testimony of these witnesses we are of the opinion that the soundness of the intricate factual deductions made from the evidence considered by the experts rested upon factors which the jurors could not intelligently evaluate. Their reliance upon assertions of facts which were claimed to be proved by the nature of the damage to the cars, such as the speed of each car, could only have been based upon the power of persuasion of the respective witnesses. Assuming that the jurors were influenced by the expert testimony we doubt that any juror, having chosen the opinion of one of the experts as to speed over the opinion of the other, would have been able to state any reason for his choice other than that one witness impressed him more favorably than the other. Since each of the experts appeared to be as well informed and as honest as the other one might suspect that the jurors may have concluded that the field of science in which the two are engaged has scarcely reached a stage of perfection.

The rule of the presumption of due care takes on great significance by reason of the absence of more persuasive evidence. The jury no doubt understood that it was presumed that Moss exercised due care and obeyed the law, but, as we have seen, the instructions failed to give Laird the benefit of the presumption as applied to the conduct of Jones. Moreover, some important facts stand out unchallenged: It was a blind intersection, each driver in the exercise of ordinary care could have seen the other in time to stop, and each failed to make the effort until it was too late. We are not persuaded that the verdict would have been the same if the jury had been properly instructed.

Other assignments of error need not be noticed.

The judgment is reversed.

VALLÉE, J., concurs.

PARKER WOOD, J., concurs in the judgment.

172 Cal.App.2d 574

Edith F. KOBUS, Plaintiff and Appellant,

v.

SAN DIEGO TRUST & SAVINGS BANK, a California banking corporation, as Special Administrator of the Estate of Edward Keller, Deceased, et al., Defendants and Respondents.

Civ. 5892.

District Court of Appeal, Fourth District, California.

Aug. 3, 1959.

Action by practical nurse to impose a constructive trust on property owned by decedent during his lifetime and to enforce alleged oral agreement of decedent to make will leaving to her all his real and personal property in return for her agreement to move into his residence, do all housework, and care for him for rest of his life. The Superior Court of San Diego County, C. M. Monroe, J., rendered judgment that nurse take nothing by her complaint, and she appealed. The District Court of Appeal, Mussell, Acting P. J., held that where services rendered by nurse were compensable in damages or quantum meruit, nurse was not entitled to have constructive trust imposed nor to have enforcement of the contract.

Affirmed.

1. Appeal and Error 🔑544(2)

Where appeal was on judgment roll, question of sufficiency of evidence was not open.

2. Specific Performance 🔑86
Trusts 🔑96

Where services rendered by practical nurse for decedent, who had allegedly orally agreed in consideration therefor to make will leaving to nurse all personal property, were compensable in damages or in quantum meruit, nurse was not entitled to have constructive trust imposed on property owned by decedent during his lifetime nor to have enforcement of the oral contract. West's Ann.Civ.Code, § 1624, subd. 6; West's Ann.Code Civ.Proc. § 1973, and subd. 6.

3. Frauds, Statute of 🔑103(1)

Where invalid will contained no reference to alleged oral agreement of decedent to make will leaving to practical nurse all his real and personal property in return for her agreement to move into his residence, do all housework, and care for him for rest of his life, will did not constitute sufficient memorandum to comply with statutory requirements for making valid agreement to make provision for person by will. West's Ann.Civ.Code, § 1624, subd. 6; West's Ann.Code Civ.Proc. § 1973, and subd. 6

4. Specific Performance 🔑86

Will which was merely instrument purporting to leave property and which made no reference to alleged oral agreement of decedent to make will leaving to practical nurse all his real and personal property in return for her agreement to move into his residence, do all housework, and care for him the rest of his life, was not contract within statutes relating to revision and enforcement of contracts. West's Ann.Civ. Code, §§ 3399, 3401, 3402.

Davies & Burch and Robert B. Burch, Jr., San Diego, for appellant.

Orfield & Thompson and David H. Thompson, San Diego, for respondents.

MUSSELL, Acting Presiding Justice.

[1] This is an action to impose a constructive trust on property owned by Edward Keller during his lifetime and to enforce an alleged oral agreement to make a will. The appeal herein is on the judgment roll and the question of the sufficiency of the evidence is therefore not open. White v. Jones, 136 Cal.App.2d 567, 569, 288 P.2d 913.

The facts as reflected by the findings are as follows: On or about August 1, 1954, plaintiff and Edward Keller entered into an oral agreement under the terms of which plaintiff, who was a practical nurse, agreed to move into the residence of said Edward Keller, do all of the housework and care for him for the rest of his life. He agreed in consideration therefor to make a will leaving to plaintiff all of his property, both real and personal, upon his death. Plaintiff fully performed her part of the agreement, moving into the decedent's residence, doing all his housework, and caring for him constantly from August 1, 1954, until his death on June 27, 1955. She received no compensation for her services during said period and Keller's income was such that he could not pay for such care in any other manner than by promising to compensate her with his remaining property. He intended to carry out his part of the agreement and for that purpose, on October 11, 1954, executed a will, signed by witnesses, to whom he stated that he was making the will to compensate plaintiff for caring for him the rest of his life. However, the will was denied admission to probate because it was improperly executed in that Keller's signature was improperly placed on said document. Apparently, this signature was placed at the top of this instrument instead of at the end because of decedent's ignorance of the law.

Keller had previously employed plaintiff and had released her because of his inability to pay for her services. Later, he reemployed her, promising that if she would care for him the rest of his life he would give her his remaining property. His property consisted of a residence at Oceanside, California, of the approximate value of $5,000 and what remained of a $2,000 note.

The court further found that Keller suffered from cancer and had been operated upon for removal of part of his stomach but that he nevertheless might have lived for several years; that the contract was not unreasonable; that "There was no family relationship between plaintiff and Edward Keller and the contract did not contemplate the giving of companionship and love and affection, such as could not be compensated for in money; however, it is true that plaintiff rendered unusual services; that it is true that the character of the services performed by plaintiff were capable of being compensated for in money; and it is true that the situation existed where both parties realized that deceased could not pay for such services in money and had no other way to secure them." Plaintiff appeals from the judgment that she take nothing by her complaint.

The sole question on appeal is whether under the circumstances shown by the record appellant is entitled to impose a constructive trust on real and personal property as against decedent's administrator and heirs to enforce the contract with the decedent.

Section 1624, subdivision 6, of the Civil Code provides that an agreement which by its terms is not to be performed during the lifetime of the promisor, or an agreement to devise or bequeath any property, or to make any provision for any person by will, is invalid, unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged or by his agent. Section 1973, subdivision 6, of the Code of Civil Procedure contains substantially the same provision.

The facts in the instant case are similar in many respects to those in Baker v. Bouchard, 122 Cal.App. 708, 10 P.2d 468. In that case the plaintiff sought to enforce an alleged trust in a parcel of land belonging to the estate of one Robert Price, deceased. The trust was alleged to have arisen by virtue of an oral contract between the appellant and decedent whereby decedent agreed, in consideration of appellant taking up her residence in decedent's home and furnishing him necessary food and care during his declining years, that he would make a will devising to her the property in question. There, as here, there was an invalid will and it was not contended that there was any written memorandum of the agreement other than the invalid will, and, the will in that case, as here, contained no reference to the alleged agreement. It was held that the will did not constitute a sufficient memorandum to comply with the provisions of section 1624 of the Civil Code and section 1973 of the Code of Civil Procedure. Citing Zellner v. Wassman, 184 Cal. 80, 193 P. 84.

Chahon v. Schneider, 117 Cal.App.2d 334, 256 P.2d 54, was an action for quasi-specific performance of an oral contract to transfer certain property by will in consideration of services rendered during the lifetime of the promisor. A demurrer presenting the bar of the statute of frauds was sustained without leave to amend and this ruling was affirmed on appeal. In that case plaintiff alleged that in 1943 she made an agreement with Marcelin Berge, then 60 years of age, to take him into her home and furnish him with board, room and laundry for $40 per month. In 1946 Berge fractured his leg and was hospitalized for about six months. He then returned to plaintiff's home and there went through an additional six months of convalescence, during which plaintiff furnished him with extensive nursing care and other services. Because of the increased burden plaintiff and her husband desired to terminate the relationship, but did not do so, and agreed to continue the relationship, because Berge orally promised plaintiff that if she would continue to care for him until his death, he would compensate her in his will, in that he would leave her a certain bank account. Plaintiff agreed to permit Berge to remain and to care for him and to render said services for him upon the terms proposed by him. In making this agreement the parties did not contemplate that the services appellant was to perform were to be compensated by the $40 per month or other pecuniary compensation. Upon the death of her husband in 1947, plaintiff decided to sell her home and discontinue her services to Berge. For these reasons, in the fall of 1948 she advised Berge he would have to find other quarters. He repeated his promise to will her the bank account, urged her not to sell, and requested her to continue caring for him. In reliance upon these promises, appellant was induced to continue to care for him until his death. Berge was again hospitalized in 1950 and while in the hospital made a will bequeathing plaintiff $1,000 and all the residue of his assets to the defendant. The court discussed the case of Monarco v. Lo Greco, 35 Cal.2d 621, 623, 624, 220 P.2d 737, where it was held that the doctrine of estoppel to assert the statute of frauds has been consistently applied by the courts of this state to prevent fraud that would result from refusal to enforce oral contracts in certain circumstances; that such fraud may inhere in the unconscionable injury that would result from denying enforcement of the contract after one party has been induced by the other seriously to change his position in reliance upon the contract [citations], or in the unjust enrichment that would result if a party who has received the benefits of the other's were allowed to rely upon the statute. [Citations.] It was further stated therein that those cases which have refused to find an estoppel have been cases where the court found either that no unconscionable injury would result from refusing to enforce the oral contract [citations], or that the remedy of *quantum meruit* for services rendered was adequate. [Citations.] After discussing the Monarco case and stating the facts summarized therein, the court, in the Chahon case, said (117 Cal.App.2d at page 339, 256 P.2d at page 57):

> "It does not appear to us that plaintiff made such a change of position or that the services she rendered were so peculiar that she could not be compen-

> sated in terms of money. Recognition of the invalidity of the contract and consequent denial of enforcement of its provisions, would neither unconscionably injure the plaintiff nor unjustly enrich the decedent, his estate, or his legatee, were plaintiff to pursue her legal remedy of recovering from the estate the reasonable value of her services, less such amount as may already have been paid her."

The court then discussed several cases dealing with the question involved and held generally that equity denies relief when the services are compensable in damages or in *quantum meruit.*

In DeHermosillo v. Morales, 146 Cal. App.2d 819, 304 P.2d 854, 860, the court approved the ruling stated in Walker v. Calloway, 99 Cal.App.2d 675, at page 678, 222 P.2d 455, at page 457, as follows:

> " '[T]he mere rendition of services is not usually such a part performance of a verbal agreement as will relieve the contract from the operation of the statute, but "if the services are of such a peculiar character that it is impossible to estimate their value by any pecuniary standard, and it is evident that the parties did not intend to measure them by any such standard, and if the plaintiff, after the performance of the services, could not be restored to the situation in which he was before the rendition of the services, it is such a part performance of the verbal agreement as will remove the contract from the rule, and equity, where other objections are not present, will decree specific performance. But in such cases the reason for the interposition of equity is quite obvious. Plaintiff has rendered services of extraordinary and exceptional character such service as, in contemplation of the parties was not to be compensated for in money, and, as in contemplation of law, cannot be compensated for in money. Therefore by no action at law could a plaintiff be restored to his original position. It would be in the nature of a fraud upon him to deny him any relief, and, the law failing by reason of its universality, equity, to promote justice, makes good its imperfections. [Citations.]" ' "

[2, 3] In the instant case there was no close family relationship such as would preclude plaintiff from securing adequate compensation in money for the services which she performed in caring for Mr. Keller and the court found in this connection that there was no family relationship between plaintiff and Edward Keller and that the contract did not contemplate the giving of companionship, love and affection, such as could not be compensated for in money. These findings cannot be set aside since the appeal is on the judgment roll. Since the services here involved were compensable in damages or in *quantum meruit*, plaintiff is not entitled to the equitable relief sought. It is not contended that there was any written memorandum of the alleged agreement other than the invalid will and there is nothing in the record indicating a reference in that document to the oral agreement involved herein. The will does not constitute a sufficient memorandum to comply with the requirements of section 1624 of the Civil Code and section 1973 of the Code of Civil Procedure. Baker v. Bouchard, supra, 122 Cal.App. 708 710, 10 P.2d 468.

[4] Appellant argues that the contract was a proper one to be reformed or revised and specifically enforced and relies upon Civil Code, sections 3399, 3401 and 3402. However, the purported will herein is not a contract such as is within the provisions of these sections. It is merely an instrument purporting to leave property and does not contain any reference to the oral agreement involved.

Judgment affirmed.

SHEPARD, J., concurs.

Marie WEBER, Petitioner,
v.
SUPERIOR COURT of the State of California, IN AND FOR the COUNTY OF LOS ANGELES, Respondent,
and
Paul D. Weber, Real Party in Interest.*
Civ. 23885.

District Court of Appeal, Second District, Division 1, California.
July 20, 1959.

Proceeding on petition of wife for writ of mandate to Superior Court directing it to hear and determine upon merits order to show cause why husband, who had obtained Nevada divorce decree, should not be required to pay alimony pendente lite, costs, and attorney's fees for prosecution of action by wife in state for divorce. The District Court of Appeal, Nourse, J., pro tem., held that trial court, by denying jurisdiction to hear evidence as to, and determine issue of, wife's right to funds pendente lite, in effect made final determination, not that original marriage was void but that Nevada decree was valid, and in so doing, court abused its discretion and thereby acted in excess of jurisdiction.

Writ issued.

1. Divorce ⚷393(1)

Wife's right to seek alimony after termination of marriage by ex parte foreign divorce decree rendered in action in which court did not have jurisdiction over her person is dependent upon whether law of state of her domicile makes right to support survive termination of marriage.

2. Divorce ⚷313

Right of party to marriage to support from other is limited to period when parties are husband and wife. West's Ann.Civ. Code, §§ 136, 137, 137.2, 139.

3. Divorce ⚷390(2)

Fact that dissolution of marriage destroys right to support does not destroy power of court to award alimony, costs, and attorney's fees pendente lite in action brought for divorce or separate maintenance in which validity of foreign ex parte divorce decree is challenged, and court in such action has jurisdiction to award alimony, attorney's fees, and costs pendente lite provided that marriage between parties is proven. West's Ann.Civ.Code, §§ 136, 137, 137.2, 139.

4. Divorce ⚷359(2)

Where husband had obtained Nevada divorce decree, wife who resided in California had right to bring action in California for divorce or separate maintenance and in that action to challenge bona fides of husband's domicile in Nevada and thus validity of Nevada decree. West's Ann. Civ.Code, §§ 136, 137, 137.2, 139.

5. Divorce ⚷390(2)

In action by wife for divorce, decision of trial court upon order to show cause why husband should not be required to pay alimony pendente lite, costs, nad attorney's fees for prosecution of the suit could not finally determine validity of prior Nevada divorce decree which husband had obtained.

6. Divorce ⚷390(2)

Where husband obtained Nevada divorce decree which, if valid, terminated right of wife to support, trial court in subsequent action by wife for divorce abused its discretion in refusing to hear evidence as to her necessity for support, attorney's fees, and costs in order that she might, in courts of state, protect her right to permanent support through attack upon validity of Nevada decree. West's Ann.Civ.Code, §§ 136, 137, 137.2, 139.

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Newell & Chester, Los Angeles, for petitioner.

Harold W. Kennedy, County Counsel, William E. Lamoreaux, Asst. County Counsel, and Edward A. Nugent, Deputy County Counsel, Los Angeles, for respondent.

Joslyn & Joslyn, Pasadena, for real party in interest.

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* Opinion vacated 2 Cal.Rptr. 9, 348 P.2d 572.

NOURSE, Justice pro tem.

Petitioner, hereinafter called "Marie", is the plaintiff in an action for divorce against real party in interest Paul D. Weber, hereinafter called "Paul."

In the divorce action Marie obtained an order requiring Paul to show cause why he should not be required to pay her alimony pendente lite, costs and attorney's fees for the prosecution of the action. When the order to show cause came on for hearing Paul offered in evidence a decree of divorce entered on August 16, 1956, in the First Judicial District Court of the State of Nevada in and for the county of Ormsby, purporting to grant Paul an absolute divorce from Marie. The respondent court limited the evidence to be received to that bearing upon the jurisdictional validity of the Nevada decree and thereupon entered its order reading as follows:

"For the purpose of this hearing, there is found to be a valid decree of divorce between the parties and there is no present marriage between the parties hereto. *The Court is without jurisdiction to grant relief prayed for.*

"Dated: April 1, 1959." (Emphasis added.)

The evidence received by the respondent court developed the following facts: Marie and Paul were married in the city of Los Angeles, state of California on October 4, 1940, and they remained residents of that county and state until early in 1950 at which time Paul was employed by the United States Corps of Engineers for work in North Africa. The parties then moved to Morocco and resided there together until some time in 1952 at which time Paul became infatuated with another woman and at his request Marie returned to the home which the parties owned in Los Angeles county. In 1956 Paul terminated his employment in North Africa. He brought his paramour to the United States and directly to Nevada. They took up residence in Reno, Nevada, and on the 43rd day after arrival there Paul filed his action for divorce. He did not establish bank accounts in Nevada, did not purchase any property in Nevada and did not register to vote there. On securing his decree of divorce he came to Los Angeles where he was married to the woman who had accompanied him from Morocco and he has continued to reside in Los Angeles since that time. Marie did not appear in the Nevada action and was not served with process in the state of Nevada.[1]

Marie asserts that as the Nevada court did not have jurisdiction over her person its decree did not terminate her right to support by Paul even assuming the Nevada decree was entitled to full faith and credit in California insofar as it terminated the marriage between the parties.

She bases her contention that the Nevada decree did not terminate her rights to support upon the decision of the United States Supreme Court in Vanderbilt v. Vanderbilt, 354 U.S. 416, 77 S.Ct. 1360, 1 L.Ed.2d 1456; and the decisions of our Supreme Court in Lewis v. Lewis, 49 Cal.2d 389, 317 P.2d 987. In Vanderbilt v. Vanderbilt, supra, the petitioner Cornelius Vanderbilt had established residence in Nevada and there brought an action for divorce against his wife who was domiciled in New York. He caused summons and complaint to be personally served upon the wife in New York. See 1 N.Y.2d 342, 153 N.Y.S.2d 1, 135 N.E.2d 553. Mrs. Vanderbilt did not appear in the Nevada action and a default decree was entered awarding Cornelius an absolute divorce and purporting to terminate any duty of Cornelius to support his wife.

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[1] The following facts which were not before the respondent court are alleged in the petition here and are not denied by Paul's answer to the petition or the return of the respondent court: Marie did not have any knowledge of the pendency of the Nevada action. Paul knew her address but did not cause a copy of the complaint and summons in the Nevada action to be served upon her nor did he cause her to be personally served in California. The first knowledge Marie had of the Nevada proceeding was in August 19, 1956, when she received through the mail a certified copy of the Nevada decree.

Thereafter Mrs. Vanderbilt instituted an action in the state of New York praying for alimony. This action was commenced pursuant to a statute of New York which in substance provides that in an action for divorce or separation maintained by a wife where the court refuses to grant such relief by reason of the fact that the husband had in a previous action in which the court had no jurisdiction over the person of the wife, obtained a decree of divorce, the court may nevertheless enter a decree of maintenance of the wife by the husband. § 1170–b, New York Civil Practice Act. The New York court held that the Nevada decree was valid and entitled to full faith and credit in New York insofar as it terminated the marriage but was ineffective insofar as it attempted to terminate Mrs. Vanderbilt's right to support as granted to her by the laws of her domicile, New York. The Supreme Court of the United States having granted certiorari upheld the judgment of the New York Court of Appeal saying in part:

"Since the wife was not subject to its jurisdiction, the Nevada divorce court had no power to extinguish *any right which she had under the law of New York to financial support from her husband.*" [354 U.S. 416, 77 S.Ct. 1362.] (Emphasis added.)

Lewis v. Lewis, supra, involved an action brought in this state to establish and enforce in this state a decree for separate maintenance rendered by a court of the state of Illinois. The facts in that case briefly stated were: The parties were husband and wife domiciled in Illinois; the husband brought an action for divorce in an Illinois court; the wife answered and cross-complained for separate maintenance. After answering the cross-complaint the husband established domicile in Nevada and brought an action in that state for divorce. He secured a decree which granted him a default divorce (the wife not appearing), the decree purported to release the husband from all obligations of support. Thereafter the Illinois court entered judgment for the plaintiff on her cross-complaint and awarded her alimony or support money. In the California action the husband maintained that the Nevada decree terminated the marriage and his obligations to support the wife and that the Illinois court was without jurisdiction to enter its judgment awarding the wife alimony. The Supreme Court of this state by its decision held that under the law of Illinois the right to support survives a foreign ex parte decree of divorce and that therefore the Illinois court had jurisdiction to enter its judgment awarding alimony and further held that "[t]he effect on a wife's right to support of a foreign, ex parte divorce secured by her husband *is determined by reference to the law of the state of the wife's domicile at the time of the divorce, in this case the law of Illinois.*" 49 Cal.2d at page 394, 317 P.2d at page 991. (Emphasis added.)

[1, 2] It is evident that under these decisions the wife's right to seek alimony after the termination of the marriage by an ex parte foreign decree of divorce rendered in an action in which the court did not have jurisdiction over her person, is dependent upon whether the law of the state of her domicile makes the right to support survive the termination of the marriage. Under the statute of this state the right of a party to the marriage to support from the other is limited to the period when the parties are husband and wife. Dimon v. Dimon, 40 Cal.2d 516, 254 P.2d 528, 529. The right of one party to the marriage to maintenance by the other is provided for by sections 136, 137, 137.2 and 139 of the Civil Code. In Dimon v. Dimon, supra, in commenting on these statutes the Supreme Court said in part:

"An examination of the law on the subject indicates merit in the defendant's contention that in this state a wife's right to recover alimony or support for herself is limited to the period when the parties are husband and wife." (The court here directs attention to §§ 136, 137 and 139 as they existed prior to their amendment in 1951.)

"The language of these sections shows a consistent legislative purpose to confine the powers of the court to decree support in any form to the period when actions for divorce, annulment and separate maintenance are pending, including time on appeal and such further time as may be within the scope of the decree in the particular action. The amendments to Sections 137, 138 and 139 since this action was commenced, Stats. 1951, vol. 2, p. 3910, do not change the provisions of these sections in matters here relevant. Primarily, the amendments broaden the provisions for separate maintenance *where the marriage still exists.* The language employed indicates a continued legislative purpose to limit the time during which application for alimony and support may be made. *Our courts have consistently recognized that the existence of the marital status is a prerequisite to the granting of alimony.* (Citations.)"[2] (Emphasis added.)

We think therefore that it must be held that if the Nevada decree was valid, the petitioner's right to support was terminated by that decree. We realize that this is an anomalous situation for while the Nevada court did not have the power to by its decree deny support, it did have the right to terminate the marriage relationship and this ipso facto terminated petitioner's right to support for her right to support was, under the law of this state, dependent upon the existence of the marital relationship. This anomaly is inherent in the theory of divisible divorce decrees adopted by the Supreme Court of the United States and that that court recognized the anomaly is made clear by the dissenting opinion of Mr. Justice Frankfurter in Vanderbilt v. Vanderbilt, supra. See 354 U.S. 416, 77 S.Ct. 1360, 1 L.Ed.2d at page 1463.

In arriving at our conclusion that a husband's or wife's right to support from the other is dependent upon the existence of the marital relationship, we have not overlooked the decision of the District Court of Appeal for the First District in Hudson v. Hudson, —— Cal.App.2d ——, 339 P.2d 618. That case involved an appeal from an order granting plaintiff alimony, attorney's fees and costs pendente lite, which order was made after the entry of a foreign decree of divorce terminating the marriage relationship. The foreign decree was entered in an action commenced after the California action was commenced and after the defendant husband had entered an appearance therein. The decision in the District Court of Appeal insofar as it upheld the order appealed from upon the ground that "a wife has a right to support, attorney's fees and costs to prosecute an attack upon a foreign divorce where she did not personally appear in the foreign action" is undoubtedly correct and fully supported by the decisions cited by the court upon that point. However, for the reasons heretofore stated in support of the conclusion heretofore stated, we cannot agree with the decision insofar as it holds that in California the right to support survives the termination of the marriage by a valid foreign decree.

[3-6] The fact that the dissolution of the marriage destroys the right to support does not destroy the power of the court to award alimony, costs and attorney's fees pendente lite in an action brought for divorce or separate maintenance in which the validity of a foreign ex parte decree of divorce is challenged. In such an action the court has jurisdiction to award alimony, attorney's fees and costs pendente lite provided that the marriage between the parties is proven. In the present case the validity of the marriage between Paul and Marie is not attacked. Marie had the right to bring an action for divorce or separate maintenance and to in that action challenge the bona fides of Paul's domicile in Nevada and thus the validity of the Nevada decree. The decision of the respondent court upon the order to show cause could not finally de-

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[2] It may be further noted that under the law of this state (see Civil Code, § 139) permanent alimony may only be granted to an innocent party (Brooks v. Brooks, 53 Cal.App.2d 93, 127 P.2d 298 and cases there cited) and that the Nevada decree, if valid, conclusively determined that petitioner was the wrongdoer. Baldwin v. Baldwin, 28 Cal.2d 406, at page 410, 170 P.2d 670.

termine the validity of the Nevada decree and as that decree if valid did in fact terminate the right to support, it is our opinion that the respondent court abused its discretion in refusing to hear evidence as to Marie's necessity for support, attorney's fees and costs in order that she might, in the courts of this state, protect her right to permanent support through an attack upon the validity of the Nevada decree. We think this is made clear by the Supreme Court in Baldwin v. Baldwin, supra, 28 Cal. 2d 406, at page 417, 170 P.2d at page 677, where the Supreme Court said: "It is our view that under such circumstances, and upon a proper showing otherwise, plaintiff *should not be denied the payment from defendant of funds to enable her* to properly prosecute an appeal from the judgment determining the fact and effect of the Nevada decree. [Citations.] It is now the law of this state that it is only after such an appeal has been finally determined (or the judgment of a California trial court adjudicating such issue has become final) that the validity or lack thereof of the Nevada decree and its effect—and consequently the marital status and reciprocal obligations of the parties in this state—can be conclusively settled." (Emphasis added.)

In the present case, the respondent court by denying jurisdiction to hear evidence as to and determine the issue of Marie's right to funds pendente lite, in effect made a final determination, not that the original marriage was void but that the Nevada decree was valid and in so doing it abused its discretion and thereby acted in excess of its jurisdiction.

Let a peremptory writ of mandate issue requiring the respondent court to vacate its order made and entered on the first day of April, 1959, and hereinabove quoted, and directing it to hear and determine upon its merits the order to show cause in re alimony, attorney's fees and costs pendente lite.

FOURT, Acting P. J., and LILLIE, J., concur.

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172 Cal.App.2d 285

John O. HALEY, Plaintiff and Appellant,

v.

LOS ANGELES COUNTY FLOOD CONTROL DISTRICT, a body corporate and politic, Defendant and Respondent.

Civ. 23716.

District Court of Appeal, Second District, Division 2, California.

July 23, 1959.

Rehearing Denied Aug. 18, 1959.

Action to quiet title to unused portion of land over which plaintiff's predecessors had granted an easement to county flood control district for flood control purposes. The Superior Court of Los Angeles County, John F. Aiso, J., entered judgment of dismissal and plaintiff appealed. The District Court of Appeal, Ashburn, J., held that where deed granted an approximately 800-foot-wide strip to flood control district for flood control purposes including right to construct, inspect, maintain and repair a channel and protection works for confining waters of river to single channel and right to enter upon land to deposit tools, implements and other materials and to take therefrom and use earth, rock, sand and gravel, easement was not lost as to portions thereof unoccupied by constructed channel 25 years after deed.

Judgment affirmed.

1. Easements ⚷30(2)

Easement created by grant is not lost by mere nonuser. West's Ann.Civ.Code, §§ 806, 811, subd. 4.

2. Easements ⚷30(2)

For an easement acquired by grant to be lost by disuse it must be accomplished with express or implied intention of abandonment. West's Ann.Civ.Code, §§ 806, 811, subd. 4.

3. Levees and Flood Control ⚷13½

Easement acquired by flood control district through 25-year-old grant giving district an easement in an 800-foot-wide strip of land for flood control purposes and authorizing district to construct, maintain and repair channel thereon to confine river waters and to enter and re-enter to repair the same and to take earth, rock, and sand therefrom, was not, with respect to the portions thereof not occupied by channel constructed by district, lost by nonuser.

4. Declaratory Judgment ⚿395

Where plaintiff sought a declaratory judgment and trial court entered judgment of dismissal after sustaining demurrer to petition and appellate court held that plaintiff had not stated a cause of action and could not do so, and if cause were reversed by appellate court plaintiff could not amend to eliminate present allegations which showed that he had no cause of action at law or in equity, reversal would be an idle and fruitless act and appellate court would affirm even though counsel argued that plaintiff was entitled to a declaratory judgment even if it was to the effect that plaintiff had no right to other relief. West's Ann.Const. art. 6, § 4½.

◆

James M. Gammon, Los Angeles, for appellant.

Harold W. Kennedy, County Counsel, Edwin P. Martin, Deputy County Counsel, Los Angeles, for respondent.

ASHBURN, Justice.

Plaintiff sues to quiet title to the unused portion of a strip of land over which his predecessors granted an easement to defendant for flood control purposes. A general demurrer to his second amended complaint was sustained without leave to amend and plaintiff appeals from the ensuing judgment of dismissal.

Plaintiff is the successor in interest to Lucius and Jeannette Vogel who, on August 10, 1932, conveyed to the Flood Control District a perpetual easement for flood control purposes across certain land owned by them. The deed recites that it is made "in the consideration of the benefits to be derived by the undersigned by the establishment and maintanance of the official channel hereafter referred to and for other valuable considerations"; grants "a perpetual Easement for flood control purposes in, over and across the following described real property situate in the County of Los Angeles." Here follows a metes and bounds description. The deed then specifies that: "The easement herein granted shall include the right to construct, reconstruct, inspect, maintain and repair a channel and protection works for the purpose of confining the waters of Los Angeles River in a single channel and the right to enter upon and to pass and repass over and along said land to deposit tools, implements and other materials thereon to take therefrom and use earth, rock, sand and gravel for the purpose of excavating, widening and deepening and otherwise recti*fi*ng the channel and for the construction, maintenance and repairs of embankments and other protection work by said District it's officers, agents and employ*es* and by persons under contract with it and their employ*es* whenever and wherever necessary for flood control purposes. * * * To have and to hold together with the right to do all things necessary to be done for the purpose of confining the water of said stream within said right way." Appellant alleges that the easement was granted in order "to procure the protection of the land herein referred to from said periodic floods," which averment refers back to the statement "that said property was intersected by the Los Angeles River, which was subject to annual overflow of said river and to shifting of the channel thereof." The parcel described appears to be 826.78 feet in width at the north end and 800.92 feet at the south boundary. It is not possible to determine from the complaint whether this strip of land is but a part of a larger parcel owned by the grantors or whether it covers their entire holding. Counsel took opposing positions on this question when propounded at oral argument.

The complaint alleges that the district built a permanent flood control channel through the property and "bisected" it;

that the channel has a width of 300 feet, the bottom and sides being lined with concrete and the banks protected by levees approximately 16 feet in width and 15 feet in height. It is also averred that immediately adjacent to the levees on the west side the state has constructed a permanent paved freeway, 175 feet wide, which occupies the major portion of the land west of the channel; that along the easterly side and immediately adjacent to the levee, a public sewer district of the county has constructed a sanitary sewer occupying 20 feet of the property on the east side of the channel. Also that "said improvement [flood control channel] is the only improvement planned or intended to be constructed by the Los Angeles County Flood Control District for the purposes as aforesaid and for the purposes mentioned in the said easement." And "[t]hat all of the rest, residue and remainder of said property has not been and is not now used by the defendant for the purpose specified in said easement; that more than twenty-five years have elapsed since the granting of said easement and said time is a reasonable time for the defendant to select a route for the said easement and the same has been selected as aforesaid." The presently unused parcels are two strips on the extreme east and west sides of the easement parcel. The District has refused to convey to plaintiff those portions of the property. Plaintiff prays for an adjudication of all adverse claims of defendant to said unused portions of the property; that defendant be declared to have no right, title or interest therein; that plaintiff's title thereto be quieted; and for other relief.

Appellant relies upon cases such as Youngstown Steel Products Co. v. City of Los Angeles, 38 Cal.2d 407, 240 P.2d 977, and Winslow v. City of Vallejo, 148 Cal. 723, 84 P. 191, 5 L.R.A.,N.S., 851. In the Youngstown Steel case the court says, 38 Cal.2d at page 410, 240 P.2d at page 979. "It is well settled that if the location of a right of way is not defined by the grant, a reasonably convenient and suitable way is presumed to be intended, and the right cannot be exercised over the whole of the land. [Citations.] Where the right of way has been used at a particular location with the acquiescence of the servient owner, the parties have, in effect, placed their own practical construction upon the grant, and the easement will be regarded as fixed at that place. [Citations.] Once the location of an easement has been finally established, whether by express terms of the grant or by use and acquiescence, it cannot be substantially changed without the consent of both parties. [Citations.]"

This deed defines the width of the parcel over which the easement was granted, and the following language of 3 Tiffany Real Property (3d Ed.) § 805, page 333, seems pertinent: "A grant or reservation of a right of passage over a space of a named width has been construed as giving a right of way, not of that width, but of merely a convenient width, to be located upon that space."[1] But the Winslow case, supra, 148 Cal. 723, at page 726, 84 P. at page 192 says: "[I]f the language of the grant in question, viewed in the light of all the conditions existing when it was executed, clearly gave to the defendant a right in excess of the one actually used, such right would still exist, notwithstanding the exercise for a time of a lesser privilege."

Plaintiff's allegations seem to establish, under the foregoing authorities, that the location of defendant's flood control channel is now fixed in the place heretofore chosen for it. But the grant does not stop with a right to an original construction.

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[1] Cf. cases where the width of the way is expressly fixed by deed, in which it is held that the grantee may make use of the land up to the limits of the physical limits described. Ballard v. Titus, 157 Cal. 673, 681, 110 P. 118; Greiner v. Kirkpatrick, 109 Cal.App.2d 798, 802, 241 P.2d 564; Hamaker v. Pacific Gas & Electric Co., 59 Cal.App. 642, 645, 646, 211 P. 265; City of Pasadena v. California-Michigan etc. Co., 17 Cal.2d 576, 589–590, 110 P.2d 983, 133 A.L.R. 1186; United States v. 5.61 Acres of Land, etc., D.C.Cal., 148 F.Supp. 467; 17 Cal.Jur. 2d § 23, pp. 127–128.

It also conveys incidental easements for reconstruction, maintenance and repair of the channel and the right to pass and repass for the deposit of tools and other materials and to take earth, rock, sand and gravel for the purpose of excavating, widening and deepening or otherwise rectifying the channel and the maintenance and repair of embankments and other protection work. Ward v. City of Monrovia, 16 Cal.2d 815, 821, 108 P.2d 425, 429 refers to "the well-recognized rule that an express or implied grant of an easement carries with it certain secondary easements essential to its enjoyment, such as the right to make repairs, renewals, and replacements," and further says: "Such incidental easements may be exercised so long as the owner thereof uses reasonable care and does not increase the burden on or go beyond the boundaries of the servient tenement, or make any material changes therein." See, also, Woods Irrigation Co. v. Klein, 105 Cal.App.2d 266, 270, 233 P.2d 48. While the complaint alleges that "said improvement," meaning the flood control channel, "is the only improvement planned or intended to be constructed by the [defendant] for the purposes * * * mentioned in the said easement" it does not aver that there can or will be no future need for widening or deepening or otherwise rectifying the channel (which would be within its present width due to the freeway on the west side and the public sewer on the east), or for the taking of earth, rock, sand and gravel for all or any of said purposes. It does not allege abandonment or intent to abandon.

[1, 2] It is well settled in this state that an easement created by grant is not lost by mere nonuser. City of Vallejo v. Scally, 192 Cal. 175, 177, 219 P. 63; Griffin v. Parker, 124 Cal.App. 701, 705, 13 P.2d 403; Glatts v. Henson, 31 Cal.2d 368, 371, 188 P.2d 745; Clark v. Redlich, 147 Cal.App.2d 500, 507, 305 P.2d 239. By statute the extent of the servitude is determined by the terms of the grant (Civ.Code, § 806), and only servitudes acquired by enjoyment shall be extinguished by disuse (Id., § 811, subd. 4). For an easement acquired by grant to be thus lost it must be accomplished with an express or implied intention of abandonment. Smith v. Worn, 93 Cal. 206, 212, 28 P. 944; Watson v. Heger, 48 Cal.App.2d 417, 420–421, 120 P.2d 153; Whelan v. Zahniser, 92 Cal.App.2d 770, 775, 207 P.2d 629; Flanagan v. San Marcos Silk Co., 106 Cal.App.2d 458, 462–463, 235 P.2d 107. As stated in Parker v. Swett, 40 Cal.App. 68, 74, 180 P. 351, 353: "It is true that the plaintiff and his predecessors have neglected for 25 years to exercise their right to lay a pipe line, but an easement founded upon a grant cannot be lost by mere nonuser, no matter how long that nonuser may continue. Currier v. Howes, 103 Cal. 431, 437, 37 P. 521; Walker v. Lillingston, 137 Cal. 401, 70 P. 282. And such an easement may only be lost by abandonment when the intention to abandon clearly appears." Such is the weight of authority. See, 17 Cal.Jur.2d, § 36, p. 144; 17A Am.Jur., § 172, p. 779; 28 C.J.S. Easements § 60(b), pp. 725–726; 98 A.L.R. 1292–1294; Simms v. William Simms Hardware, 216 Minn. 283, 12 N.W.2d 783, 787.

25 A.L.R.2d 1265, at page 1275: "The prevailing rule in the case of an easement created by deed or devise is that nonuser alone, however long it may be continued, will not constitute an abandonment of the easement or be deemed evidence thereof, or otherwise bar the grantee or his successors in title from either assuming or resuming, as the case may be, the exercise of the right."

Harvey v. Missouri Pacific R. Co., 111 Kan. 371, 207 P. 761, 762, 50 A.L.R. 300, involved a railroad right of way acquired by condemnation, wherein only a limited portion of the land condemned "has yet been used or needed for railway purposes—the usual hundred-foot strip for a right of way," and plaintiff claimed the right to the unused portion by adverse user. The court says: "It was not necessary for the railway company to make some pretended use of all the condemned property, to the exclusion of the successive fee title holders, in order to preserve its rights. The defendant was not required to clutter up the outlying portions of the tract with old ties, rails, or other junk merely to assert its dominant estate and discommode the owner of the fee. Such mere pretended use would have been an invasion of the rights of the fee title holder, who always had and still has such rights of enjoyment, use, and possession as do in no way impair or interfere with the proper, safe, convenient, and efficient discharge of the defendant's duties as a public carrier." The court held that the rights acquired by the railroad by condemnation are not lost through lapse of time and nonuse, so long as the railway has a potential need of them, and, where there has been in fact no adverse, hostile, inconsistent use, nor prejudicial exclusion of the holder of the dominant estate.

3 Tiffany (3d Ed.), § 802, pp. 321–322: "The mode in which the grantee of the easement, with the grantor's acquiescence, exercised the easement after its acquisition, that is, the practical construction of the grant by the parties, may be referred to in order to aid in ascertaining its meaning, but the fact that the grantee made for a considerable time a more limited use of the land than that justified by the grant cannot affect the construction of a grant which is in terms unambiguous."

[3] It follows that plaintiff has not stated a cause of action and cannot do so. But his counsel argues that he is entitled, in any event, to a declaratory judgment, even if it is to the effect that plaintiff has no right to other relief.

In this connection appellant could have relied upon Maguire v. Hibernia S. & L. Soc., 23 Cal.2d 719, 728, 146 P.2d 673, 151 A.L.R. 1062, and Columbia Pictures Corp. v. De Toth, 26 Cal.2d 753, 760, 161 P.2d 217, 162 A.L.R. 747. In those cases reversals were had because the court had denied declaratory relief through sustaining a demurrer. But those opinions do not command reversal in all instances regardless of the fact picture drawn by the complaint. An exception to the general rule appears in Davis v. City of Santa Ana, 108 Cal.App.2d 669, 239 P.2d 656. That was an action to prevent the performance of a contract for collection of city garbage and for declaratory relief. The attack upon the contract was that it was made without notice inviting bids and that it was not let to the lowest responsible bidder after notice, and hence it was illegal and void. Having determined that the court properly denied an injunction, the opinion in 108 Cal.App.2d at page 684, 239 P.2d at page 665 says: "It is true that a complaint for declaratory relief is legally sufficient if it sets forth facts showing the existence of an actual controversy relating to the legal rights and duties of the respective parties under a written instrument and requests that these rights and duties be adjudged by the court. Maguire v. Hibernia Sav. & Loan Society, supra. However, the pleadings must set forth facts which show an actual controversy. Under the statement of facts here presented the only controversy claimed is whether the contract for the handling of garbage was void because bids were not called for, and whether the conditional agreement to sell the equipment was void because such sale was not made at public auction. These questions were fully presented by the pleadings and plaintiff has suffered an adverse ruling on these subjects. He is not prejudiced by the ruling of the trial court which, in effect, denies declaratory relief. No abuse of discretion appears in the action of the court in refusing to entertain such complaint. [Citing cases.]"

In Essick v. City of Los Angeles, 34 Cal.2d 614, at page 624, 213 P.2d 492, the court held that the trial judge had erred in dismissing a declaratory relief complaint and, instead of reversing it, modified the judgment so as to declare that plaintiff was entitled to no relief.

Anderson v. Stansbury, 38 Cal.2d 707, 242 P.2d 305, was an action for accounting, declaration of trust and declaratory relief, in which the court had granted a nonsuit. At page 717 of 38 Cal.2d at page 310 of 242 P.2d it was held that this did not result in a miscarriage of justice within the constitutional provision. "From what has been said, it appears that the trial court properly granted the nonsuit as to plaintiffs' alleged causes of action for an accounting and for a declaration of trust. However, plaintiffs' complaint also included a count for declaratory relief, and the disposition of such count would ordinarily require an express declaration of the rights of the parties. Essick v. City of Los Angeles, 34 Cal.2d 614, 624, 213 P.2d 492; Kessloff v. Pearson, 37 Cal.2d 609, 613, 233 P.2d 899. While the trial court therefore erred in entering a nonsuit rather than a declaratory judgment in disposition of the count for declaratory relief, such error cannot be deemed prejudicial here. Any declaration of the rights of the parties would necessarily have been unfavorable to plaintiffs in conformity with the disposition of the other two counts, which latter disposition constituted the equivalent of an express declaration that plaintiffs had failed to establish any rights. Under such circumstances, the procedural error of the trial court does not constitute ground for reversal of the judgment. Const., art. VI, sec. 4½."

[4] 15 Cal.Jur.2d, § 25, p. 145, makes this observation: "It is of interest to note that, in affirming the denial of declaratory relief by the trial court, the opinion of the reviewing court sometimes discusses matters of substance with respect to which the declaration was sought, and in effect affords the plaintiff-appellant a declaration as to the law measuring his rights or duties." This must be true. Our holding that plaintiff cannot recover upon the cause of action which he attempts to state becomes the law of the case. If the cause were reversed, plaintiff could not amend to eliminate the present allegations which show he has no cause of action at law or in equity. Wennerholm v. Stanford Univ. School of Med., 20 Cal.2d 713, 128 P.2d 522, 141 A.L.R. 1358; Zakaessian v. Zakaessian, 70 Cal. App.2d 721, 161 P.2d 677. The superior court could do no more than enter judgment to that effect; in fact, this court, in the event of reversal, should so direct. It appears then that reversal would be an idle and fruitless act. The object of declaratory relief has been attained by the ruling herein. "The purpose of declaratory relief is to liquidate uncertainties and controversies which might result in future litigation." Hannula v. Hacienda Homes, 34 Cal.2d 442, 448, 211 P.2d 302, 306, 19 A.L.R.2d 1268. Under such circumstances, section 4½ of article VI, commands an affirmance. Anderson v. Stansbury, supra, 38 Cal.2d 707, 717, 242 P.2d 305; Bisinger v. Sacramento Lodge No. 6, 187 Cal. 578, 582–584, 203 P. 768. "Nor will a judgment be reversed where such reversal would be of no benefit to the appellant because the same judgment would have to be entered on retrial." 3 Am.Jur., § 1184, p. 691.

The judgment is affirmed.

FOX, P. J., and HERNDON, J., concur.

172 Cal.App.2d 498

Arthur VOGT and Grace Vogt, husband and wife, Plaintiffs and Appellants,

v.

Dan McLAUGHLIN and Gloria McLaughlin, Defendants and Respondents.

Civ. 18385.

District Court of Appeal, First District, Division 2, California.

July 30, 1959.

Action by overtaken truck passenger and her husband against overtaking motorist and another for injuries sustained by passenger and special damages incurred by husband when overtaking motorist's automobile struck rear of truck while passenger was standing in rear of truck. The Superior Court, Contra Costa County, Harold Jacoby, J., entered judgment for defendants on issue of damages after liability had been admitted, and plaintiff appealed. The District Court of Appeal, Draper, J., held that court's affirmative answer to request of plaintiffs' attorney for admonition for jury to disregard defense counsel's question, on cross-examination of husband who was operating truck, whether husband had a reputation for being a "road hog and holding people back", was sufficient to serve purpose of a full admonition, especially in view of fact that failure to admonish fully was due to interruption of court by plaintiffs' attorney.

Judgment affirmed.

1. Damages ⚷185(1)

Defense verdict may be returned even where liability is admitted, if evidence would sustain conclusion that plaintiff's injuries were not proximately caused by negligent event upon which action is brought.

2. Damages ⚷185(1)

In action by overtaken truck passenger and her husband against overtaking motorist and another for injuries sustained and special damages incurred when overtaking motorist's automobile struck rear of truck while wife was standing in rear of truck, passenger's testimony as to fact of her alleged fall could be disbelieved by jury in view of conflicting evidence as to whether passenger fell at all as result of collision and of conflict between passenger's testimony as to her symptoms and the medical evidence.

3. Trial ⚷133(6)

In action by overtaken truck passenger and her husband against overtaking motorist and another for injuries sustained and special damages incurred when overtaking motorist's automobile struck rear of truck while passenger was standing in rear of truck, court's affirmative answer to request of plaintiffs' attorney for admonition for jury to disregard defense counsel's question, on cross-examination of husband who was operating truck, whether husband had a reputation for being a "road hog and holding people back", was sufficient to serve purpose of a full admonition, especially in view of fact that failure to admonish fully was due to interruption of court by plaintiffs' attorney.

4. Appeal and Error ⚷1060(2)

In action by overtaken truck passenger and her husband against overtaking motorist and another for injuries sustained by passenger and special damages incurred by husband when overtaking motorist's automobile struck rear of truck while passenger was standing in rear of truck during deer hunt, defense counsel's asking on cross-examination of husband, why he had not brought action in his own county in which accident had happened and defense counsel's asking plaintiffs and their witnesses concerning deer hunting from a vehicle did not constitute prejudicial error.

5. Appeal and Error ⚷207

Where, in negligence action involving collision between deer hunters' overtaken truck and overtaking automobile, no objection or request for admonition was made at trial in regard to defense counsel's asking why action had not been brought in county in which accident had happened and defense counsel's questions concerning deer hunting from a vehicle, although the errors could have been corrected by admonition, issue could not be raised on appeal.

6. Appeal and Error ⚷1060(2)

Where, in negligence action arising from automobile accident, defense counsel, in cross-examination of plaintiffs' witness, referred to statements claimed to have been made and signed by one plaintiff but, on cross-examination of such plaintiff, such plaintiff denied making or signing such statement when defense counsel showed him the claimed statement, but defendant thereafter admitted liability, matter went clearly to issue of liability only and could not be prejudicial on remaining issue of injuries sustained.

7. Trial ⚷90

In automobile negligence action, plaintiffs' failure to avail themselves of court's reservation of ruling on question whether certain questions should be stricken by subsequently moving to strike constituted a waiver of the point.

8. Trial ⚷133(6)

Where, in personal injury action there was some suggestion that one plaintiff would have to undergo medical operation to enable such plaintiff to continue to assist in operation of plaintiffs' hotel and ranch, court's admonition to jury to disregard any statements by anyone about any money or funds or wealth or lack of wealth of any of the parties removed prejudicial effect of error in statements and questions pertaining to assertion that ranch was up for sale for $150,000.

9. Appeal and Error ⚷837(1)

Statements of counsel are not evidence and are not to be considered.

10. Appeal and Error ⚷1015(5)

The trial judge is in a better position than the district court of appeal for purpose of determining whether jury has been prejudicially influenced, and, therefore, district court of appeal must give weight to his conclusion that no prejudice has resulted.

◆

Dunne, Dunne & Phelps, R. Mitchell S. Boyd, Charles Lederer, San Francisco, for appellants.

Berry, Davis & Channell, Oakland, for respondents.

DRAPER, Justice.

This action seeks damages for personal injuries allegedly sustained by plaintiff wife in an automobile accident, and for items of special damages paid by plaintiff husband for her treatment. Near the close of the trial, defendant admitted liability. Accordingly, but one form of verdict was submitted to the jury, one in favor of plaintiffs, bearing a blank to be filled in for the amount of the award to each plaintiff. The jury returned this form bearing the word "none" in each blank. Plaintiffs appeal from judgment entered upon this verdict.

The accident occurred in Lassen County. Plaintiffs and another couple were deer hunting. Mr. Vogt was driving plaintiffs' pickup truck. Mrs. Vogt and one of their guests were riding in the rear of the truck, Mrs. Vogt standing and maintaining her balance by gripping a bar. Defendant, with his brother and the brother's wife as guests, also was hunting deer. His automobile turned into the dirt road along which plaintiffs were travelling, followed plaintiffs' truck for a short time, and then struck the rear of that truck. Mrs. Vogt and the guest riding in the rear of the truck with her testified that she was thrown to the metal seat placed on a board across the bed of the truck, striking it with such force that the back of the seat was bent. She testified that she felt immediate pain in her low back. Defendant's witnesses testified that Mrs. Vogt was not thrown to the seat, but remained standing after the collision. The evidence was in conflict as to the force of the impact of the two vehicles.

Mrs. Vogt received her first medical attention two or three days after the accident. Dr. McKenney, who then treated her, was not called as a witness. There is testimony that Dr. McKenney "treated her about once a week for about four months, feeling that she had suffered a soft tissue injury to her lower back and to her neck," but there is no testimony as to his specific findings of the date or cause of any such injury. The accident occurred September 27, 1955. Following her treatment by Dr. McKenney, Mrs. Vogt was examined at the Palo Alto Clinic January 19, 1956. Later, she was examined by Dr. Klabunde in San Francisco and was hospitalized from May 18 to June 25, 1956 for treatment of neck and back injuries. She was again hospitalized for like treatment from June 13 to July 3, 1957. Although her testimony dealt only with low back complaints, histories given by her to doctors show complaint of neck pain as well. There was evidence that she had sustained a neck injury in an automobile accident some 20 years earlier. She testified to acute swelling of hands, legs and feet following the accident here sued upon, but some medical testimony was that such results would not follow from the claimed injury. Moving pictures of plaintiff, taken some six months before trial, showed her engaged in physical activities in maintenance of the hotel operated by her husband and herself.

[1, 2] While appellants do not directly urge the point, an attack upon the sufficiency of the evidence to sustain the verdict is implicit in their argument. But the rule is clear that a defense verdict may be returned even where liability is admitted, if the evidence would sustain a conclusion that plaintiff's injuries were not proximately caused by the negligent event sued upon. Nelson v. Black, 43 Cal.2d 612, 275 P.2d 473. Here the jury was fully instructed that the only issue before it was what injury to plaintiff wife, if any had been proximately caused by the collision. In view of the conflicting testimony as to whether plaintiff fell at all as a result of the collision, and the contradictions which the jury could find between her testimony as to certain of her symptoms and the medical evidence, her testimony as to the fact of her fall could be disbelieved. The form of the verdict indicates that the jury recognized the responsibility of defendant, but concluded that his negligence had not proximately caused any injury to plaintiff.

[3] Appellants' principal argument is that defense counsel was guilty of misconduct, and that in view of the closeness of the case, this misconduct must be held prejudicial. In cross-examination of Mr. Vogt, defense counsel asked if he had "a reputation up in that area for being a road hog and holding people back." The court sustained the objection of appellants' attorney (not their counsel on this appeal). Plaintiffs' attorney then asked if he might "have an admonition to the jury to disregard" the question. The court answered "yes," but was interrupted by plaintiffs' counsel before a formal admonition was given. In view of the several admonitions to the jury in the course of this trial, it seems likely that the court's answer to counsel's request for an admonition may have served the purpose of a full admonition. If not, the failure to admonish fully was due to the interruption of the court by appellants' attorney.

[4, 5] Respondent's counsel, on cross-examination, asked Mr. Vogt why he had not brought the action "up in your own county where this accident happened." No objection was made and no admonition requested. Mr. Vogt answered with the reasonable explanation that the venue was chosen for convenience of medical witnesses. Defense counsel also questioned appellants and one of their witnesses concerning deer hunting from a vehicle. No objection was made and no admonition asked. The answers clearly showed that appellants were not planning to shoot from the truck, but to leave it to follow any deer they might see. It is significant that appellants' counsel also sought to show that defendant was hunting illegally. We see no prejudice in these questions now assigned as misconduct. In any event, the errors could have been corrected by admonition. Since no objection or request for admonition was made at trial, the issue cannot be raised on appeal. State Rubbish Collectors Ass'n v. Siliznoff, 38 Cal.2d 330, 340, 240 P.2d 282.

[6, 7] In cross-examining a witness for plaintiffs, defense counsel referred to a statement claimed to have been made and signed by Mr. Vogt, saying that he had "slowed down almost to a stop" immediately before the collision. On objection, respondent's attorney asserted that he had such a statement and would establish it. The court permitted the question, but only after stating that it would be stricken if the statement were not established. In cross-examination of Mr. Vogt, defense counsel showed him the claimed statement, but Vogt denied making or signing it. Thereafter defendant admitted liability. No further mention of the statement was made, and plaintiffs never moved to strike the references to it. The question clearly went to the issue of liability only, had no reference to injuries, and could not be prejudicial here. Further, appellants' failure to avail themselves of the court's reservation of this issue by moving to strike is a waiver of the point.

[8] Plaintiffs introduced evidence of possible necessity of an operation upon Mrs. Vogt's back in the future. There was some suggestion that the operation would be necessary to enable her to continue working in the operation of plaintiffs' hotel and ranch. In cross-examining Dr. Klabunde, defense counsel asked whether his view as to necessity of surgery would be altered if plaintiffs sold their ranch and hotel and retired. In arguing this objection, defense counsel said "We're going to develop that the ranch is up for sale for $150,000." Although not requested to do so, the court promptly instructed the jury to disregard the statement. Later, in cross-examination of Mrs. Vogt, defense counsel returned to the subject of sale, although mentioning no amount. Plaintiffs assigned the question as misconduct, and the court promptly and fully instructed the jury to disregard "any statements by anyone about any money or funds or the wealth or lack of wealth of any of the parties." The detailed admonition removed the prejudicial effect of the error. Downey v. Bay Cities Transit Co., 94 Cal.App.2d 373, 210 P.2d 713. The court also ruled that defendant could inquire about retirement only "as it has some connection with the necessity for an operation," but not otherwise. Later in the same cross-examination of Mrs. Vogt, defendant asked "What are you asking for" the property. Far from objecting, appellants' counsel said "I have no objection to that question if we can show ability to pay on the part of the defendant." The court stated that it would sustain an objection if one were made. None was, but when the court again explained its view as to the limits of such examination another question was asked and no answer was given to the question just quoted. Under these circumstances, it is difficult to see how this point can be raised on appeal. The remarks of defense counsel were improper. On the whole record, however, we cannot conclude that they prejudiced plaintiffs.

[9, 10] In its formal instructions, the court fully expounded the rule that statements of counsel are not evidence and are not to be considered. Further, motion for new trial specified misconduct of the adverse party as a ground. The motion was heard by the trial court and denied. The trial judge is in a better position than we to determine whether the jury was prejudicially influenced, and we must give weight to his conclusion that no such prejudice resulted. Tellefsen v. Key System Transit Lines, 158 Cal.App.2d 243, 322 P.2d 469; Aydlott v. Key System Transit Co., 104 Cal.App. 621, 629, 286 P. 456.

Judgment affirmed.

KAUFMAN, P. J., and DOOLING, J., concur.

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172 Cal.App.2d 219

PEOPLE of State of California, acting by and through DEPARTMENT OF PUBLIC WORKS, Plaintiff and Respondent,

v.

William P. MURRAY et al., Defendants.

H. Koch & Sons, Defendant and Appellant.

No. 18337.

District Court of Appeal, First District, Division 2, California.

July 22, 1959.

Rehearing Denied Aug. 21, 1959.
Hearing Denied Sept. 16, 1959.

Suit by department of public works for condemnation of portion of strip of land abutting highway. From a judgment of the Superior Court, County of Marin, Jordan L. Martinelli, J., the property owner appealed on question of severance damages. The District Court of Appeal, Kaufman, P. J., held that instructions on right of ingress and egress of property owner were a full and complete statement of the law.

Judgment affirmed.

1. Highways 🔑85

Generally, an abutting landowner on a public highway has a special right of easement and user in public road for access purposes, and it cannot be damaged or taken without due compensation, but an owner is not entitled, as against public, to access to his land at all points in the boundary between it and the highway, although entire access cannot be cut off, and if he has free and convenient access to his property, and his means of ingress and egress are not substantially interfered with by the public, he has no cause of complaint.

2. Highways 🔑85

Right of access is the right to reasonable and customary access.

3. Highways 🔑165

State may regulate or control entries upon highway if they should prove to be unsafe, and police power may even extend to limitation of a property right if interest of general public warrants such action.

4. Eminent Domain 🔑222(1)

In suit by Department of Public Works for condemnation of portion of strip of land abutting highway, instructions on right of ingress and egress of property owner were a full and complete statement of the law.

5. Eminent Domain 🔑221

In condemnation proceeding, extent of impairment of right of access is a question for the jury.

6. Evidence 🔑553(3)

In proceeding for condemnation of portion of tract of land which abutted on highway and which was hilly on south end and had access to highway at north end, it was not improper for expert witnesses for state to base their conclusions of value on assumption that there was a possibility of access being developed at southern boundary of property by connecting up to a road developed by adjacent landowner, and even if they proceeded on a theory of assemblage, it was within their proper function as expert witnesses and was not error.

7. Eminent Domain 🔑134

Where highest and best use of separate parcels will involve their integrated unitary use, such prospective use may be considered in fixing value of property taken if joinder of the parcels is reasonably practicable and the nature of case does not preclude possibility of a union without exercise of eminent domain.

8. Eminent Domain 🔑202(4)

In proceeding by state for condemnation of portion of land abutting highway, it was not improper to permit witnesses for state to testify that there was in existence an encroachment permit issued to property owner covering paved area from driveway into factory building and area within state's right-of-way.

9. Eminent Domain 🔑262(5)

In proceeding by state for condemnation of strip of land abutting highway, admission of testimony of expert witness by state as to listing of comparable property, for limited purpose of showing rate of absorption of properties in the area, did not constitute a ground for reversal.

10. Eminent Domain 🔑221

In proceeding for condemnation of strip of land abutting highway, credibility of survey representing number of transactions of industrial development in the county over a five-year period was a factual question for the jury.

11. Eminent Domain 🔑262(5)

In proceeding for condemnation of strip of land abutting highway, testimony of expert for state that access from highway to property was difficult and uneconomical and that therefore loss of that right resulted in no depreciation of value of remaining property, was not prejudicial when court instructed that a certain resolution did not give the highway the status of a freeway as far as property was concerned and that property owner's right of access along its frontage continued to exist until suit was filed.

12. Eminent Domain 🔑221

In proceeding for condemnation of strip of land abutting highway, opinion of witnesses as to uses to which the land was limited was a matter of credibility for the jury.

13. Evidence ⚷555

In proceeding for condemnation of strip of land abutting highway, opinion of witness based on zoning ordinances and minutes dealing with interpretations of zoning ordinances was not improper when ordinances were all admitted in evidence.

14. Evidence ⚷558(4)

In proceeding for condemnation of portion of land abutting highway, court did not abuse its discretion in sustaining objection to cross-examination of state expert witness as to an investigation by such witness of another piece of property in preparation for trial on ground that cross-examination was irrelevant and collateral.

15. Witnesses ⚷267

Extent of cross-examination is a matter over which trial court is given wide discretion, and only grounds for error are an abuse of that discretion.

16. Witnesses ⚷270(2)

In proceeding for condemnation of portion of land abutting highway, testimony as to total cost of constructing a roadway along length of property parallel to the highway, stricken as improper on direct examination, concerned a collateral fact and was not admissible on cross-examination.

17. Eminent Domain ⚷219

In proceeding for condemnation of land abutting highway, court did not err in hearing foundation testimony about comparable sales in chambers.

18. Eminent Domain ⚷219

In proceeding for condemnation of portion of land abutting highway, court, in ruling on admissibility of testimony relating to comparable sales, did not necessarily find that such sales were indeed comparable.

19. Eminent Domain ⚷262(5)

In proceeding for condemnation of portion of land abutting highway, instruction by court to reporter to prepare a transcript of testimony of rebuttal witness for property owner and to supply two photostats of written statements to be forwarded to district attorney and grand jury followed by admonition to jury not to indulge in any inferences from what the court had done about certain testimony in the case, was not prejudicial. West's Ann.Const. art. 6, §§ 4½, 19.

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Morris M. Grupp, San Francisco, for appellant.

Robert E. Reed, Holloway Jones, Jack M. Howard, Norris J. Burke, Roger Anderson, Robert S. Webber, San Francisco, for respondent.

KAUFMAN, Presiding Justice.

This action was brought by the state, through its Department of Public Works, to condemn 12.826 acres of land, owned by the appellant, H. Koch & Sons. The land abuts Highway 101 in Marin County. The jury fixed the value of the condemned parcel at $69,000 and found severance damages in the amount of $5,000. This appeal is concerned only with the severance damages. According to the appellant-property owner, the severance damages are grossly inadequate because of errors in evidentiary rulings and instructions. The respondent maintains that the rulings and instructions were correct, and in any event not prejudicial.

The facts are as follows: The appellant owned approximately 62 acres of land located in the City of Corte Madera. A portion of the property abuts the east side of Highway 101 between the Corte Madera Wye and the Alto Wye for a distance of 4,300 feet. Appellant acquired the entire property in 1953 for $67,000. The northern section (approximately 24 acres) of the property consisted of marsh land and the southern section (approximately 38 acres) of hill land. Between 1953–1955, appellant had taken some fill from the hill area and placed it on the marsh land area. In the northwest corner of the property, fronting along Highway 101, appellant had developed a factory building, which with its parking area and roadway occupied about four acres of the total property. The remaining 58 acres were unimproved, vacant land.

The property acquired in this action was a 40 foot wide, 4,300 foot long, strip abutting Highway 101 consisting entirely of slope area off the highway. The northern portion of the strip (about 2700 feet) was downslope ranging from 3 feet to 56.5 feet below the grade of the existing highway down to the level marsh land area; the southern portion was upslope, rising sharply above the highway. Of the 12.826 acres acquired by the state, 4.489 was a slope easement already owned by the state. The state also acquired all direct highway access of the appellant's property to Highway 101.

In the before-situation, the only developed access from the appellant's property to the highway was an entrance way in front of the factory. In the before-situation, the property had direct legal access to Highway 101, only for northbound traffic which entered directly from Highway 101 at the above mentioned entrance way. The southbound traffic, however, was prevented from direct access to the property by the dividing barrier down the middle of Highway 101 and had to undertake a circuitous route (for about 2½ miles past the entrance way south, then a U-turn at Alto Wye) in order to enter the northbound lanes of the highway. In leaving the property southbound traffic had to drive north to the Corte Madera Wye and then make a U-turn into the southbound lanes of the highway.

In the after-situation, a paved road was provided as part of the improvement to the northern boundary of the property from a freeway overpass located approximately one-half mile north of the property at the Corte Madera Wye. In the after-situation, the northbound traffic travels an additional one-half mile north to the overpass at the Corte Madera Wye, and returns to the property by the frontage road. The overpass eliminated the necessity of a U-turn for the southbound traffic. The driveway into the factory building was paved out to the existing pavement of Highway 101 under an encroachment permit for the paved area over the shoulder of Highway 101, within the state's existing right of way. The state's expert witnesses testified that because of traffic patterns the access was considerably improved in the after-situation, even though no other means of access existed in the after-situation.[1] Appellant's witnesses testified that the area acquired by the state was developed for the purpose of providing access roads from Highway 101 to the main body of the property. One of appellant's witnesses testified that the slopes could be developed for a service station site if the land were filled in to make it level with the highway.

[1] One of the major issues is whether the trial court erroneously instructed the jury as to the extent of appellant's right of access. The general rule, as stated in Genazzi v. County of Marin, 88 Cal.App. 545, at page 547, 263 P. 825, at page 826 is as follows:

> "Generally speaking, an abutting land owner on a public highway has a special right of easement and user in the public road for access purposes, and this is a property right of easement which cannot be damaged or taken from him without due compensation. But an owner is not entitled, as against the public, to access to his land at all points in the boundary between it and the highway, although entire access cannot be cut off. If he has free and convenient access to his property, and his means of ingress and egress are not substantially interfered with by the public, he has no cause of complaint. 29 Cor.Jur., p. 547."

[2, 3] Rose v. State of California, 19 Cal.2d 713, at page 728, 123 P.2d 505, at page 514, states that the right of access is

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[1] The court instructed the jury that the subject property was not benefited by the improvement.

the right to "customary or reasonable" access. In Bacich v. Board of Control, 23 Cal.2d 343, at page 352, 144 P.2d 818, at page 824, the court pointed out that the "easement of access may be said to be that which is reasonably required giving consideration to all the purposes to which the property is adapted." Certain witnesses testified that at certain points along the highway access from the appellant's property would constitute a hazardous entry to the heavy traffic. It is well established that the state may regulate or control such entries if they should prove to be unsafe, and that the police power may even extend to the limitation of a property right if the interest of the general public warrants such action. Holman v. State of California, 97 Cal.App.2d 237, 217 P.2d 448; People v. Sayig, 101 Cal.App.2d 890, 226 P.2d 702; Holloway v. Purcell, 35 Cal.2d 220, 217 P.2d 665.

[4] The jury was instructed on this matter as follows:

> "Before these proceedings were commenced, defendant H. Koch & Sons owned the property herein involved facing and adjacent to the easterly side of Highway 101, which ran along said Highway 101 for approximately 4,000 feet. The owners of property facing on property such as Highway 101 have the right of access to and from that highway and have the right to receive light and air from that highway. This right of access is a right to come onto and to leave that property via the highway, and is often referred to as a right of ingress and egress. Ingress means coming into or entering a piece of property. Egress means leaving or departing from a piece of property. This right of ingress and egress includes the right to have vehicles come from the highway into the property and from the property to the highway, and the right to have pedestrians who are passing the property on foot, or alighting from public or private means of conveyance, using the highway, enter and leave the same. These rights are property rights and belong to the property owners, and if these rights are destroyed or impaired for the benefit of the public, that is a damage for which the property owner is entitled to be reimbursed. It is one element of what is legally called severance damages.
>
> "An abutting owner has the right to a free and convenient use of and access to the highway on which his property abuts. This right of ingress and egress attaches to the land and is a right of property as fully as is the land itself, and any act by which that easement is destroyed or substantially impaired, for the benefit of the public, is a damage to the land itself within the meaning of the Constitutional provision under which the owner is entitled to compensation.
>
> "Although owners of real property abutting upon an existing highway have as an easement or appurtenance to such property the right of access to and from the highway, this does not mean that an owner of abutting property is entitled, as against the public, to access at all points in the boundary between the land and the highway.
>
> "Such owner is entitled only to reasonable and convenient access to his property, considering all the uses to which the property is adapted and available.
>
> "This right of ingress and egress that I have described extends to a use of the street or highway by such means of conveyance and travel as are appropriate to that particular highway and in such a manner as is reasonable and customary.
>
> * * * * * *
>
> "When the right of ingress and egress is taken, or is destroyed or impaired, the damage resulting is called 'severance damage.' It is not the only element that is called severance damage, but is included under the hearing of severance damage.

"You are instructed that under the facts presented the right of defendant H. Koch and Sons to access to and from Highway 101 along the entire approximately 4000 feet of highway frontage has been destroyed. It is for you, however, to determine the extent of that impairment in money.

* * * * * *

"In determining the amount of severance damage, if any, you may take into account such factors, if you find from the evidence such factors exist, as alteration or reduction in size of the remaining land, of severance of remaining land into an irregularly shaped piece or parcel, or reduction of particularly zoned portion of the property which abuts on the highway, of loss of access from the highway to remaining land not taken, of the change in grade of highway and improvements in relation to land not taken, of the taking or impairment, if any, of the right of visibility from the highway in relation to remaining property; of any re-routing of highway in relation to defendants' undertaken property, as distinguished from re-routing of traffic in relation to highway, the latter of which you may not take into account in determining the amount of severance damage; and you may also take into account in determining the amount of such severance damage the damage resulting to land not taken from the diversion of the highway from direct access to defendants' remaining property.

* * * * * *

"Any of the following elements which you may find from the evidence exists in this case, you may consider in determining the severance damage suffered by defendants to the extent that you find such elements, or any of them, reduces the market value of the remaining land by reason of the take of the state and this condemnation of access rights:

"(1) The loss of access rights along that portion of the defendants' property which formerly fronted on Highway 101."

These instructions were a full and correct statement of the law. See People v. Ricciardi, 23 Cal.2d 390, 144 P.2d 799; People v. Sayig, 101 Cal.App.2d 890, 226 P.2d 702; People ex rel. Department of Public Works v. Schultz Co., 123 Cal.App.2d 925, 268 P.2d 117.

[5] Appellant further argues that the extent of damages for loss of access is a question of law for the court, rather than a question of fact for the jury, and cites People v. Sayig, 101 Cal.App.2d 890, 226 P.2d 702 and People v. Ricciardi, 23 Cal. 2d 390, 144 P.2d 799 for the proposition that the trial court must determine whether the right of access has been substantially impaired. In this case, the above quoted instructions show that the jury was properly instructed that the extent of the impairment is a jury question. People v. Sayig, 101 Cal.App.2d 890, at page 902, 226 P.2d 702.

[6] We turn now to appellant's arguments relating to the court's rulings on the testimony of the respondent's expert witnesses. Appellant's witnesses premised their appraisals on the theory that since other access could be developed by means of roads down to the slope sides to the level land, the state should pay for a "substitute road" running along the entire length of the property, at a distance of 3,700 feet from the frontage road connecting the northern boundary of the property. The respondent's witnesses testified that the precipitous hills and downslopes off Highway 101 would make the construction of any such new roads economically unfeasible for developing access other than the most northerly 200 feet of the property, which already had access to the factory building; and that the physical limitations and costs of developing the other roads off Highway 101 precluded direct access from the highway; and that the southerly hill section of appellant's property would have

to remain undeveloped for a long time because of its inaccessibility. The witnesses considered however the possibility of the property adjoining appellant's to the south being developed as a residential subdivision and the possibility of new connecting roads at that location.

Appellant argues that it was improper for respondent's expert witnesses, David Cohn and David Simmons, to base their conclusions of value on the assumption that there was a possibility of access being developed at the southern boundary of the property by connecting up to a road developed by the adjacent landowner. There is no merit to this contention. The witness Simmons testified that the southern hilly section of the property was inaccessible for any immediate development and would have to remain undeveloped until the surrounding area of more suitable lands was developed. The witness did, however, consider the reasonable probable development in the future and attached an appropriate value thereto. The witness Cohn testified that the southern section had no economically feasible access except at the northern boundary of the property, and that the southern portion would remain undevelopable until such time as a connection could be made with the adjoining landowner.

[7] The record does not indicate that these witnesses valued the property in conjunction with the adjoining property to the south. Rather, they considered the property separately and added an increment of value by considering the future possible development. "[W]here the highest and best use of separate parcels will involve their integrated unitary use, such prospective use may be considered in fixing the value of the property taken if a joinder of the parcels is reasonably practicable, and the nature of the case does not preclude the possibility of a union without the exercise of eminent domain." People v. Ocean Shore Railroad, 32 Cal.2d 406, 424, 196 P.2d 570, 581, 6 A.L.R.2d 1179; see also City of Pasadena v. Union Trust Co., 138 Cal.App. 21, 31 P.2d 463; City of Stockton v. Ellingwood, 96 Cal.App. 708, 275 P. 228; City of Stockton v. Vote, 76 Cal.App. 369, 244 P. 609. Even had they proceeded on a theory of "assemblage," it would not be error as it was within their proper function as expert witnesses. People ex rel. Department of Public Works v. Dunn, 46 Cal.2d 639, 642, 297 P.2d 964.

[8] Appellant next argues that the respondent's witnesses should not have been permitted to testify to the fact that there was in existence an encroachment permit issued to the appellant and covering the paved area from the driveway into the factory building, and the area over the shoulder of Highway 101, within the state's right-of-way. The witnesses also testified that an encroachment permit can be required of any abutting property owner who wishes to develop a similar improvement within the state's right-of-way. As was correctly pointed out by the trial court, the fact that there was an existing permit could not be denied. The record also indicates that when appellant vigorously argued this point the trial court invited appropriate instructions on numerous occasions and that appellant submitted these instructions which were then given to the jury.

[9] Appellant's next contention of error is that respondent's expert witness, Howell, a real estate appraiser, testified to the listing of comparable property, as under Central Pacific Ry. Co. of California v. Pearson, 35 Cal. 247, an offer to sell is not admissible for the purpose of showing value. However, the record indicates that here the testimony was admitted for the very limited purpose of showing the rate of absorption of properties in the area. Furthermore, the issue was a collateral one and could not here constitute ground for reversal. Atchison, T. & S. F. Railway Co. v. Southern Pac. Co., 13 Cal.App.2d 505, 57 P.2d 575.

[10] The next argument is that the court erroneously admitted a survey prepared by the witness Simmons as a product of his investigation and analysis. The survey represented the number of transactions of industrial development in Marin

County for 1952–1957, as well as the amount of acreage so utilized in that five-year period. Appellant objected to the exhibit and the latter portion was removed so that the exhibit showed only the rate of absorption of industrial properties. Appellant now argues that this was error because the survey purported to represent all of the industrial transactions in the county whereas it was brought out on trial that there were properties developed industrially during the period of time in question, which were not included in the particular survey. All of the authorities cited by the appellant are not relevant here as they deal with hearsay problems or unfounded documentary evidence. The credibility of the survey was a factual question which was properly left to the jury. As pointed out in People v. Nahabedian, 171 Cal.App.2d 302, 340 P.2d 1053, at page 1058: "It must be remembered that the facts stated as reasons for the opinion of the witness do not become evidence in the sense that they have independent probative value upon the issue as to market value. On the contrary, they serve only to reinforce the judgment of the witness, that is, they go to the weight to be accorded his opinion [citation]."

[11] Appellant also argues that the trial court improperly denied its motion to strike portions of the testimony of respondent's three expert witnesses, Simmons, Cohn, and Howell. The first ground for the motion that the witnesses testified that Koch had no right of access in the before-condition [because the new improvement had been a freeway since 1941] is not supported by the record. The witnesses testified again and again that the access from the highway to the Koch property was difficult and uneconomical and that therefore the loss of that right resulted in no depreciation of the value of the remaining property. We cannot see how this testimony could possibly have been prejudicial since the court also gave explicit instructions which clearly stated that the 1946 resolution did not give Highway 101 the status of a freeway as far as the appellant was concerned, and that appellant's right of access along its frontage on Highway 101 continued to exist until this suit was filed on November 8, 1955.

[12] The second ground for appellant's motion is that the witnesses considered "[t]hat the uses were limited to the one and only use and no higher." This again was a matter of the opinion of the witnesses and a question of weight and credibility properly left to the jury.

[13] The third ground for appellant's motion to strike was that the witness Howell based his opinion on both zoning ordinances and the minutes dealing with interpretations of zoning ordinances. The ordinances in question were all admitted into evidence. The final ground urged for the motion again related to access rights discussed above.

[14] Appellant next argues that the court improperly restricted its cross-examination of the state's witness Cohn, and thus prevented it from impeaching the witness. During the trial, appellant had in its possession Cohn's appraisal report of another and completely separate piece of property prepared for another trial and made before the appraisal of the property in the instant case. The cross-examination was based on the witness' report in preparation for that trial. The witness testified, in part as follows:

> "Q. And was that investigation any different from the investigation you made in the Koch property? A. It followed somewhat the same line. We had a different condition on the Andler property than on the Koch property.
>
> "Q. The condition was what? A. The Andler property was entirely at highway grade.
>
> "Q. The Andler property was entirely at highway grade? A. Yes, for the full length of it."

The trial court sustained respondent's objection that the matter was irrelevant and collateral. Appellant, relying on Bingaman v. City of Seattle, 139 Wash. 68, 245 P. 411; People v. Murata, 161 Cal.App.2d

369, 326 P.2d 947, and San Diego Land & Town Co. v. Neale, 88 Cal. 50, 25 P. 977, 11 L.R.A. 604, argues that a witness can be required to answer on cross-examination questions which might be improper on direct examination. However, in the Bingaman case, the similarity between the properties provided the basis for the cross-examination, while the Murata and Neale cases involved former appraisals of the same property. As recently stated in Sacramento, etc., Drainage Dist. v. Jarvis, 51 Cal.2d 799, 336 P.2d 530, at page 533:

> "The rule is settled that in a condemnation proceeding a witness cannot state his *opinion* of the value of neighboring land.[3] [Citations.] [3. However, he may give evidence of the prices paid for similar property in the vicinity of the land condemned.]
>
> "In Old Colony R. Co. v. F. P. Robinson Co., 176 Mass. 387, 57 N.E. 670, the rule is stated thus: 'The rule has been held very strictly that the opinion of experts as to the value of other lands is not to be received. In Wyman v. Lexington & W. C. Railroad Co., 13 Metc. (Mass.) [316] 327, Mr. Justice Dewey uses language as follows: "Evidence of mere opinion as to the value of property is to be confined exclusively to the subject in reference to which damages are claimed. If you aid the jury by reference to other articles or other property similarly situated, the evidence in reference to such other articles or other property must be that of facts, and not opinions." ' "

[15] Nor, under the circumstances here presented can there be an impeachment of the witness. The extent of cross-examination is a matter over which the trial court is given wide discretion, and the only grounds for error are an abuse of that discretion. People v. La Macchia, 41 Cal.2d 738, 264 P.2d 15; People v. McReynolds, 31 Cal.App.2d 219, 87 P.2d 734. We can see no abuse of discretion here.

[16] The next contention is that the trial court did not permit the examination of the cost of constructing a roadway along the length of the property, parallel to the highway, so that the jury was prevented from considering this as an element of severance damages. The record, however, indicates that the expert witness Cohn testified that such a road could be placed at the cost of $.30 per square foot and that the witness Koch testified that the total cost of such a road would be about $160,000. The latter figure, however, was stricken as improper direct examination. Appellant now argues that even though not admissible on direct such testimony should be admissible on cross-examination. However, the reason for the rule, as explained in People v. Al. G. Smith Co., 86 Cal.App.2d 308, at pages 312 and 313, 194 P.2d 750, is that such a collateral fact would add an additional element of damage to the market value prescribed by sections 1248–1249 of the Code of Civil Procedure and the California authorities for arriving at such value. This reasoning is equally persuasive for excluding a collateral fact on cross-examination.

[17] The next major contention on appeal is that the trial court erred in hearing foundation testimony about comparable sales in chambers. In the leading case of County of Los Angeles v. Faus, 48 Cal.2d 672, at page 678, 312 P.2d 680, at page 684, our Supreme Court quoted the following from McCormick on Evidence:

> " '* * * These safeguards are the following: The sales of the other tracts must have been sufficiently near in time, and the other land must be located sufficiently near the land to be valued, and must be sufficiently alike in respect to character, situation, usability, and improvements, to make it clear that the two tracts are comparable in value and that the price realized for the other land may fairly be considered as shedding light on the value of the

> land in question. Manifestly, the trial judge in applying so vague a standard must be granted a wide discretion.' "

Appellant cannot now complain of the trial court's careful and conscientious exercise of its broad discretion by first ruling on the matter in chambers.

[18] Appellant's next argument is equally without merit. It argues that the trial court, having ruled on the admissibility of the testimony relating to comparable sales, necessarily found that such sales were indeed comparable. The record shows that the trial court in ruling on the foundation testimony reiterated the fact that the question of weight to be given by the jury to any particular sale was for the jury to determine.

[19] The final contention on appeal is that the court's comment on the testimony of appellant's rebuttal witness, Mr. Adam, was prejudicial error. This rebuttal witness testified that contrary to the earlier testimony by Mr. Simmons he (Adam) had not advised Simmons (as Simmons had testified) as to any estimate of costs of installing utilities on the subject property, the construction of the building on pilings, that Corte Madera was "one of the last outposts of civilization," and various other matters collateral to the main issues at the trial. In surrebuttal, the respondent called Mrs. Mary Simmons who often acted as her husband's secretary and had taken notes of the alleged conversation between her husband and Mr. Adam. Mrs. Simmons, referring to her notes taken at the meeting between Simmons and Adam, established that certain figures and costs had been supplied to Simmons by Adam. The court then recalled Mr. Simmons who corroborated the testimony of his wife. The court then instructed the reporter to prepare a transcript of the testimony of the witness Adam and to supply two photostats of the written statements to be forwarded to the District Attorney and the Grand Jury. Immediately following the trial court admonished the jury as follows:

> "The Court: I will admonish the jury not to indulge in any inferences from what the Court has done about certain testimony in this case."

We do not think the statement went beyond the court's privilege to comment on the credibility of witnesses, under section 19 of Article VI of the State Constitution. Appellant cites People v. Johnson, 11 Cal. App.2d 22, 52 P.2d 964, which presented a more aggravated fact situation. In that case, however, the court held that no reversible error had been committed and cited the applicable rule: " 'But flagrant as misconduct of the trial court in a given case may be, unless it clearly appear that its probable effect was prejudicial to the substantial rights of the party affected by the litigation, and that probably it resulted in a miscarriage of justice because thereof, an appellate tribunal is forbidden to set aside the judgment or to grant a new trial.' " (11 Cal.App.2d at page 24, 52 P. 2d at page 965.) Nor has the appellant made the requisite showing of miscarriage of justice due to this incident which was far removed from the central issue of valuation. (Calif.Const., art. VI, § 4½; Pizer v. Brown, 133 Cal.App.2d 367, 283 P.2d 1055.) Nor, apparently, did appellant so consider it as it did not ask for citation of misconduct or request an admonition to the jury.

We conclude that the judgment is amply supported by the record before us.

Judgment affirmed.

DOOLING and DRAPER, JJ., concur.

172 Cal.App.2d 401

Karol Lyn BEDFORD, Plaintiff and Appellant,

v.

BECHTEL CORPORATION, a corporation, Pacific Gas & Electric Company, a corporation, Defendants and Respondents.

Oliver JACOBS, Plaintiff and Appellant,

v.

BECHTEL CORPORATION, a corporation, Pacific Gas & Electric Company, a corporation, Defendants and Respondents.

Leslie E. HOGAN, Plaintiff and Appellant,

v.

BECHTEL CORPORATION, a corporation, Pacific Gas & Electric Company, a corporation, Defendants and Respondents.

Patrick BENNINGER, Plaintiff and Appellant,

v.

BECHTEL CORPORATION, a corporation, Pacific Gas & Electric Company, a corporation, Defendants and Respondents.

Cyril LEFEE, Plaintiff and Appellant,

v.

BECHTEL CORPORATION, a corporation, Pacific Gas & Electric Company, a corporation, Defendants and Respondents.

Richard S. MORGAN, Plaintiff and Appellant,

v.

BECHTEL CORPORATION, a corporation, Pacific Gas & Electric Company, a corporation, Defendants and Respondents.

Richard E. SCHADROW, Plaintiff and Appellant,

v.

BECHTEL CORPORATION, a corporation, Pacific Gas & Electric Company, a corporation, Defendants and Respondents.

No. 17900.

District Court of Appeal, First District, Division 1, California.

July 29, 1959.

Rehearing Denied Aug. 25, 1959.

Hearing Denied Sept. 22, 1959.

Action by employees and a widow and child of a deceased employee of a subcontractor for injuries sustained during construction of a tank for defendant owner which engaged codefendant as general contractor. The Superior Court, City and County of San Francisco, Edward Molkenbuhr, J., granted defendants' motions for nonsuit, and plaintiffs appealed. The District Court of Appeal, Bray, P. J., held that even though general contractor's contract with a subcontractor gave general contractor authority to require subcontractor to install additional safeguards and observe such special safety precautions as appeared to be necessary, such contract provision did not impose a duty upon general contractor or owner to exercise that authority, and neither general contractor nor owner could be held liable to subcontractor's employees for general contractor's failure to exercise such duty, especially in view of fact the contract provided that subcontractor was an independent contractor and that all persons employed by it were its employees and not employees of owner or general contractor.

Judgments affirmed.

1. Contracts ⚿189

Master and Servant ⚿322

Even though a general contractor's contract with a subcontractor gave general contractor authority to require subcontractor to install additional safeguards and observe such special safety precautions as appeared to be necessary, such contract provision did not impose a duty upon general contractor to exercise that authority, and neither general contractor nor owner could be held liable to subcontractor's employees for general contractor's failure to exercise such duty, especially in view of fact the contract provided that subcontractor was an independent contractor and that all persons employed by it were its employees and not employees of owner or general contractor.

2. Master and Servant ⚿315

Generally, an owner or a general contractor is not answerable for the negligence of an independent contractor, although they may be held liable where the employee of the independent contractor was injured by some condition of the owner's premises over which the owner remained in control, and where the owner's duties to the employee were those owing to a business invitee, or where the owner furnished equipment or was obligated by contract to do so, and the equipment proved defective, or where the owner or general contractor actively interfered with or arbitrarily assumed to direct the employees of the independent contractor as to the manner and method of performing the work.

2. Master and Servant ⚷317

A public utility is, as primary obligor, under a nondelegable duty imposed by or pursuant to law, and hence is liable for injuries due to the negligence of an independent contractor.

4. Contracts ⚷186(4)

Provision in a construction contract to the effect that the general contractor might require the subcontractor to install additional safeguards and observe such special safety precautions as appeared to be necessary did not confer any obligation upon the general contractor to exercise such right in favor of employees of the subcontractor, and general contractor therefore could not be held liable for injuries sustained by subcontractor's employees based on general contractor's alleged breach of duty in failing to direct observation of special precautions.

5. Master and Servant ⚷320

Fact that representatives of a general contractor and an owner knew or should have known that the manner of erection of certain tanks by a subcontractor was not safe, did not make owner or general contractor liable for injuries sustained by employees of subcontractor when a portion of a tank fell, since no duty toward the subcontractor's employees arose because of such knowledge of the danger.

◆

Bruce Walkup, Dan L. Garrett, Jr., San Francisco (Cyril Viadro, San Francisco, of counsel), for appellants.

Bledsoe, Smith, Cathcart, Johnson & Phelps, San Francisco (Wilbur J. Russ, San Francisco, of counsel), for respondents.

BRAY, Presiding Justice.

Plaintiffs are six employees and the widow and a child of a deceased employee of Consolidated Western Steel which was hired as an independent contractor to erect certain oil storage tanks for Pacific Gas and Electric Company. The injuries occurred as a result of the manner in which Consolidated Western Steel used its equipment during the course of construction. Plaintiffs contend that the defendants Pacific Gas and Electric Company and Bechtel Corporation are liable to them for this claimed negligence on the part of Consolidated Western Steel. The case was tried before a court and jury. At the end of the plaintiffs' case the court granted motions for nonsuit upon the ground that plaintiffs had failed to prove the violation of any duty owed by the defendants.

The sole question upon this appeal is whether or not either of the defendants owed a duty to any of these employees of Consolidated.

The Contracts and the Accident.

The P. G. & E. Co. entered into a contract with Bechtel Corporation to design and construct a steam electric power plant near Morro Bay. It was contemplated by the parties that Bechtel might have some of the work done by subcontractors and that the P. G. & E. Co. might let out some of the work directly to contractors.

The P. G. & E. Co. entered into a contract with Consolidated Western Steel Division wherein it was agreed that

> "Contractor will at its own risk and expense perform the work hereinafter described and, except as herein otherwise provided, will furnish all labor, equipment and materials required therefor: To furnish, fabricate and erect two (2) fuel oil storage tanks for the Company's Morro Bay steam plant * * * All work shall be per-

formed in accordance with Specification 4360A, Drawing 410511–7, and Contractor's proposal of December 18, 1953."

It was further agreed in part as follows:

"Contractor [Consolidated Western Steel Division] is an independent contractor, and all persons employed by Contractor in connection herewith will be employees of Contractor, and not employees of Company [P. G. & E.] or Constructor [Bechtel Corp.] in any respect.

"Bechtel Corporation as Engineer and Constructor for Company will act in behalf of Company and all questions or claims by Contractor shall be handled through the Constructor.

"All work shall be subject to general supervision and inspection by Constructor, which may exercise such control of the work as is required to safeguard the interests of the Company. All inspections as to quality of materials furnished and work performed, will be made by the Constructor's representative, who shall have authority to reject unsatisfactory work or materials. Any subcontractor or any person employed by the Contractor who is deemed by the Constructor to be incompetent shall be removed from the job, at the request of the Constructor."

"11. Safety Precautions:

"(a) The Contractor shall plan and conduct his work so as to safeguard adequately all persons from injury, and all property from damage.

"(b) In planning and maintaining safe working conditions and safety facilities, the Contractor shall give due consideration to the following:

"(1) The Constructor will be required to maintain in efficient order and operate without interruption such portions of the plant and equipment as must be placed in operation prior to completion of the entire station.

"(2) Construction work by others may be carried on in conjunction with the work of this Contractor and frequently may occupy the same working area.

"(c) To enforce the intent of these specifications, the Constructor may require the Contractor to install additional safeguards and observe such special safety precautions as appear to be necessary. Special instructions given by the Constructor shall not relieve Contractor of its responsibility to maintain safe and efficient working conditions.

"12. Scaffolding:

"The contractor shall not use any scaffolding or other temporary elevated structures for the support of workmen or materials that have been furnished or erected by the Constructor or by the other Contractors unless authorized by the Constructor so to do. The Contractor shall pass upon the safety of all such structures before using and shall assume all risk and responsibility in using same whether the structures are provided by the Constructor or others.

"14. Insurance and Indemnity:

"(a) Contractor shall indemnify Company and Constructor against any and all loss, damage and liability for injury or harm to person or property resulting from, arising out of or in any way connected with the performance hereof, excepting only such injury or harm as may be caused solely by the fault or negligence of either Company or Constructor, or both."

Plaintiffs, employees of Consolidated, were engaged in the construction of a fuel oil storage tank at Morro Bay, when they were injured. The tank was one of two being built by Consolidated for P. G. & E. under the above mentioned contracts. The finished tanks were to be 195 feet in diameter and 32 feet high. The accident occurred on August 25, 1954, at approximately 11 a. m. There was little or no wind and the weather was good. (The details relating to the construction are technical and difficult to describe. The following is generally what occurred.) Work on the tanks had begun in June of 1954. By August 25th, one tank had been completed, except for the roof, and Consolidated was working on the top ring of the second tank.

The top ring consisted of 18 plates, each weighing in excess of one ton and approximately 32 feet long and 8 feet high. These plates were in place and had been welded along the vertical seams (with the exception of one joint). In preparation for the welding of the horizontal seam, the ring had to be aligned. The fitting and alignment was to be accomplished with a "bull" (a U-shaped pneumatic device weighing approximately one ton) which was guided around the top of the ring and hammered the ring into place. In connection with this operation a workman would precede the "bull" by 10 or 15 feet and knock out the wedges and spacers which held the plate in position. Working immediately behind the "bull," a welder would tack or spot weld the horizontal seams together until such time as they could be welded by the automatic welder.

All the plaintiffs were then at work on the ring though none had anything to do with the operation of the "bull." At the time of the accident, six of the plaintiffs were working on the outside surface of the tank and plaintiff Benninger was on a catwalk inside of the tank. The operation of the "bull" was sufficient to shake the ring and cause it to vibrate. The "bull" had been in operation about three hours and had covered approximately one-third of the inside circumference when just ahead of the "bull," several plates tipped inward and began to peel off. The falling plates hit the staging on the inside of the tank and caused most of the ring to collapse and fall into the bottom of the tank. This accident occasioned the injuries upon which these actions were brought.

There is evidence tending to indicate that the accident could have been averted with the use of proper precautions. Expert testimony was introduced to show that in the construction of tanks of unusual size, problems of instability are acute and that necessary stabilization can be achieved through the use of additional support (guy wires).

Defendants Violated No Duty Owed Plaintiffs.

1. *The contracts created no duty.*

[1] Plaintiffs' first theory is that the authority which Consolidated gave to Bechtel to "require" Consolidated "to install additional safeguards and observe such special safety precautions as appear to be necessary" (§ 11(c) of the contract) imposed a duty upon Bechtel to exercise that authority by so instructing Consolidated whenever safeguards and safety precautions additional to those being observed by Consolidated seemed necessary,—a duty to be exercised by Bechtel for the benefit of all persons who might come near the site of Consolidated's operations, including Consolidated's own employees.

Additionally to that theory, plaintiffs contend that defendants knew or should have known that the method Consolidated was using to erect the tanks was unsafe, and therefore defendants had a duty to require Consolidated to take the necessary precautions.

Plaintiffs' first theory would require a strained construction of the authority thus granted. It ignores the fact that by the same contract Consolidated was the primary obligor (§ 11(a)). Bechtel was to exercise *general* supervision and inspection to "safeguard the interests of the Company." The very authority under discussion was given "to enforce the intent of these specifications," and special instructions given by Bechtel were not to relieve Consolidated of its "responsibility to maintain safe and efficient working conditions" (§ 11(c)).

These factors plus the express declaration that Consolidated is an "independent contractor" and that all persons employed by it are its employees and not employees of P. G. & E. or of Bechtel and the promise of Consolidated to indemnify P. G. & E. and Bechtel from liability for injury except such injury as may be caused *solely* by the fault or negligence of P. G. & E. or Bechtel, negative any such strained construction as plaintiffs would have us put upon this contract.

The P. G. & E. did not reserve unto itself or Bechtel the right of control as to the manner or details as to how the component parts of either of these two tanks were to be put together, nor did either of them direct or interfere in any manner with the actual physical construction of the tanks. Consolidated, its officers and employees were given complete control over the site where the tanks were to be erected. They by the work procedures which they adopted and used created the only hazards which the plaintiffs encountered.

[2] Generally the rule is that an owner or a general contractor is not answerable for the negligence of an independent contractor. That rule is succinctly expressed in Gardner v. Stonestown Corp., 145 Cal. App.2d 405, at page 408, 302 P.2d 674, 677: "The mere relationship of owner and independent contractor does not make the owner liable for the independent contractor's negligent acts in performing the details of the work contracted for. McDonald v. Shell Oil Co., 44 Cal.2d 785, 788, 285 P.2d 902; Barrabee v. Crescenta Mutual Water Co., 88 Cal.App.2d 192, 196, 198 P.2d 558."

"An independent contractor is one who renders service in the course of an independent employment or occupation, following his employer's desires only as to the results of the work, and not as to the means whereby it is to be accomplished * * * The general supervisory right to control the work so as to insure its satisfactory completion in accordance with the terms of the contract does not make the hirer of the independent contractor liable for the latter's negligent acts in performing the details of the work. Green v. Soule, 145 Cal. 96, 99–100, 78 P. 337. An owner is not liable for injuries resulting from defective appliances unless he has supplied them or has the privilege of selecting them or the materials out of which they are made * * * or unless he exercises active control over the man employed or the operations of the equipment used by the independent contractor * * *" McDonald v. Shell Oil Co., 44 Cal.2d 785, 788–789, 285 P.2d 902, 903.

There are exceptions to the general rule. These are set forth in the McDonald case:

"Various factual situations in which an owner may be liable for injuries to the employee of the independent contractor should be distinguished: (1) This is not a case where the employee of the independent contractor was injured by some condition of the owner's premises over which the owner remained in control, and where the owner's duties to the employee were those owing to a business invitee * * * (2) Nor is this a case where the owner furnished the equipment or was obligated by contract to do so, and the equipment proved to be defective, causing injury to the employee of the independent contractor * * * (3) Finally, this is not a case where the owner actively interfered with or arbitrarily assumed to direct the employees of the independent contractor as to the manner and method of performing the work * * * Likewise distinguishable is Snow v. Marian Realty Co., 212 Cal. 622, 299 P. 720, where the owner's liability for damages stemmed not from responsibility for the negligent acts of the independent contractors but from the allowance of work on its property constituting a nuisance." At pages 790 and 791 of 44 Cal.2d, at pages 905 of 285 P.2d.

[3] Obviously the facts in our case do not bring it within any of the above exceptions to the general rule. Additionally to the exceptions stated in the McDonald case, there is one more exception, which also is not applicable to our case. That is that a public utility is, as primary obligor, under a nondelegable duty imposed by or pursuant to law and hence is liable for injuries due to negligence of an independent contractor. See Snyder v. South-

ern Cal. Edison Co., 44 Cal.2d 793, 285 P.2d 912.

The decision of the McDonald case, supra, is determinative of this case. There the contract between the Shell Oil Company and an independent contractor to recover certain casing from, and to abandon, an oil well on Shell property, is surprisingly like the contracts in our case as to the provisions which plaintiffs contend cast a duty on P. G. & E. and Bechtel to protect Consolidated's employees, and the arguments made by the plaintiff in that case are significantly like those here. There the control of the work of the contractor was in fact greater than was that of defendants in our case. "Plaintiff argues that Shell retained control over the methods and manner of performance of the work by Owens' crew because defendant Neuhaus, its general production foreman. testified that he was in charge of the abandonment of the oil well in question and had the equipment under his observation; that Shell always had a working production foreman on the job, though he never gave any 'orders or directions to any man on the job' but dealt directly with Owens' foreman; that the Shell foreman and Owens received the same work sheets; that Shell had authority under its contract to stop Owens if it considered the work unsatisfactory in any respect; that after the accident Shell conducted an investigation and its committee recommended the use of a catline clamp to replace riding the rope on the cathead, which safety device was thereafter installed by Owens' employees. * * * Finally, plaintiff cites his own testimony as to his personal observation of a visit made to Owens' well-pulling rig by a Shell foreman; that the latter criticized the way in which the casing had been piled, stating to Owens' driller, 'You know better than that, how to stack that casing'; that the Shell foreman then procured a truck and moved the casing." (44 Cal.2d at pages 789–790, 285 P.2d at page 904.)

In discussing those contentions the court said (44 Cal.2d at page 790, 285 P.2d at page 904): "However, the owner may retain a broad general power of supervision and control as to the results of the work so as to insure satisfactory performance of the independent contract—including the right to inspect, Callan v. Bull, 113 Cal. 593, 598–599, 45 P. 1017, the right to stop the work, Fay v. German General Ben. Soc., 163 Cal. 118, 122, 124 P. 844, the right to make suggestions or recommendations as to details of the work, S. A. Gerrard Co. v. Industrial Acc. Com., supra, 17 Cal.2d 411, 414, 110 P.2d 377, the right to prescribe alterations or deviations in the work, Green v. Soule, supra, 145 Cal. 96, 99–100, 78 P. 337—without changing the relationship from that of owner and independent contractor or the duties arising from that relationship."

Applicable to the rights retained by defendants is the following language from that case (44 Cal.2d at page 790, 285 P.2d at page 905): "All of these rights retained by Shell in the exercise of its general supervisory control accord with its interest in the ultimate result of the work without undertaking to direct the '"means whereby it is to be accomplished."' S. A. Gerrard Co. v. Industrial Acc. Com., supra, 17 Cal.2d 411, 413, 110 P.2d 377, 378." The court held that no duty towards the employees of the independent contractor was disclosed.

[4] Plaintiffs contend that the facts of the McDonald case are distinguishable from those in our case because the contracts here contain a clause not in the one in that case, namely, the provision of section 11(c), above quoted, to the effect that the constructor might require the contractor to "install additional safeguards and observe such special safety precautions as appear to be necessary." This is a difference without a distinction. This right of the constructor in nowise conferred any obligation upon the constructor to exercise such right in favor of employees of the contractor. Moreover, in the McDonald case there was a specific instance where the Shell actually exercised authority over an employee of the contractor in the manner in which the

casings were piled, and yet the court held that such fact did not make the Shell liable for injuries to the independent contractor's employee not caused by the action of the Shell.

The rule of the McDonald case was followed in the recent case of Williams v. Fairhaven Cemetery Assn., 52 Cal.2d 135, 338 P.2d 392. There the defendant owned the Santa Ana Hotel. It entered into a written agreement with Santora Company wherein it was agreed that Santora would operate the hotel and would keep and maintain the hotel building in good condition and repair. Santora operated the hotel with full control and management thereof. The plaintiff, a porter and bellhop employed by Santora, was injured by an explosion of a gas water heater. The court held that Santora was an independent contractor. In holding the defendant not liable to the plaintiff for the injuries, the court quoted from the McDonald case to the effect that the general supervisory right to control the work does not make the hirer of the independent contractor liable to the latter's employee for the contractor's negligent acts in performing the details of the work. The court further said (52 Cal.2d at page 139, 338 P.2d at page 395): "'* * * An owner is not liable for injuries resulting from defective appliances unless he has supplied them or has the privilege of selecting them or the materials out of which they are made, Hard v. Hollywood Turf Club, 112 Cal.App.2d 263, 274–275, 246 P.2d 716, or unless he exercises active control over the men employed or the operations of the equipment used by the independent contractor. Willis v. San Bernardino Lumber & Box Co., 82 Cal.App. 751, 756, 256 P. 224.' (See also Sabin v. Union Oil Co., 150 Cal.App.2d 606, 608 [1], 310 P.2d 685.)"

In Hard v. Hollywood Turf Club, 1952, 112 Cal.App.2d 263, 246 P.2d 716, the employees of a painting subcontractor sued the owner and general contractor for injuries received from a defective scaffold supplied by their employer. The court held that although the general contractor had general supervision of the work and knew of the high painting being done on the scaffolding, such contractor owed no duty to the employees of the subcontractor.

The reasoning behind the rule that the general contractor (and the same reasoning applies to the owner) is not liable to the employees of an independent contractor for the latter's negligence, is the same as that set forth in the Hard case, supra, 112 Cal. App.2d 263, 246 P.2d 716, where the court in discussing the persons included in the word "employer" in the "Act to regulate certain scaffolding" (Stats.1913, ch. 48, §§ 1 and 2, pp. 49–50) said (112 Cal.App.2d at page 271, 246 P.2d at page 722): "* * * to impose the duty upon the general contractor directly to oversee all labor being performed and to inspect every device imported for use by the workmen on a particular construction and to impose nondelegable duties upon him to enforce all statutory safety provisions would be to place an extremely onerous burden upon him who has the general control over the ultimate result of the labor done yet without control or management of the means utilized to achieve the purpose planned."

Raich v. Aldon Const. Co., 129 Cal.App. 2d 278, 276 P.2d 822, is not opposed to the rule here stated. That case dealt with the first exception stated in the McDonald case to the general rule, namely, where a duty exists on behalf of the one in control of a dangerous condition of premises to the employees of an independent contractor to provide such employees a safe place in which to work.

Sullivan v. Shell Oil Co., 9 Cir., 1956, 234 F.2d 733, likewise comes within the second exception stated in the McDonald case. There the court stated the rule as to the exception to be: "Employees of an independent contractor injured in the performance of a contract between their employer and the owner, are on the premises by the owner's invitation express or implied, and the owner owes a duty to warn against hidden dangers of which he knows or reasonably ought to know and of which they are unaware [citations]; and the owner-occupier owes to them the duty to furnish them a safe place in which to work." At page 738. The court then went on to say (at page 738): "* * * the owner-occupier is not liable when the injuries result from a danger obvious to the injured party." It distinguished the case from the McDonald case by saying that in the latter case "the injury to the employee resulted from defective equipment, supplied and operated by the contractor-employer." (At page 738, footnote.) Under the facts of our case the question of either Bechtel or P. G. & E. providing an unsafe place for Consolidated's employees to work is not involved, nor is there any question of there being a hidden danger.

Dow v. Holly Manufacturing Co., 49 Cal. 2d 720, 321 P.2d 736 (contractor built a home with a defective heater and the owner resold it; the contractor was held liable to subsequent purchaser of the house) is not in point. It stands solely for the rule that a contractor who delivers or supplies a defective product is liable to third persons for negligence. Such rule is not applicable to the facts of this case.

2. *Knowledge of danger created no duty.*

[5] The evidence shows that representatives and inspectors of both P. G. & E. and Bechtel observed the work practically daily. There was testimony that the necessary stability of the tank during erection could have been achieved easily by supporting each plate ahead of the bull with a guy wire and using strong-backs on the horizontal seam as well as on the vertical seam. From the experience of some, at least, of the Bechtel and P. G. & E. representatives, it could be inferred that both companies should have known that the manner of erection of the tanks was not safe. However, that fact does not make the defendants liable. No duty towards the independent contractor's employees arises thereby.

In Richards v. Stanley, 1954, 43 Cal.2d 60, 271 P.2d 23, the court quoted from Routh v. Quinn, 20 Cal.2d 488, 491, 127 P.2d 1, 149 A.L.R. 215: "'It is an elementary principle that an indispensable factor to liability founded upon negligence is the existence of a duty of care owed by the alleged wrongdoer to the person injured, or to a class of which he is a member.'" (43 Cal. 2d at page 63, 271 P.2d at page 25.)

Plaintiffs contend that the fact that a jury could have found that defendants should have known of the negligent method of construction distinguishes this case from the McDonald case, Hard v. Hollywood Turf Club, supra, 112 Cal.App.2d 263, 246 P.2d 716, and the other cases holding that neither the owner nor general contractor is liable for injuries to the employees of an independent contractor for injuries due to the negligence of the latter. Plaintiffs admit that there is no case in which it is held that mere knowledge of the negligence of the independent contractor creates any duty on the part of the owner or general contractor towards said employees. A somewhat similar contention was made in Schwerdtfeger v. State of Cal., 148 Cal. App.2d 335, 306 P.2d 960, where it was claimed that the State's right to inspect conferred a duty to inspect in favor of invitees of the tenant. In denying any such duty we said (148 Cal.App.2d at page 350, 306 P.2d at page 970): "Undoubtedly if the wharfinger believed or knew the cable was dangerous, he could have ordered it removed. But this power did not create a duty to inspect and maintain." See Goodman v. Harris, 40 Cal.2d 254, 253 P.2d 447, where the evidence shows that the P. G. & E., the lessor of the premises upon which a defective gas heater belonging to the lessee, was located, inspected the premises on several occasions and presumably must have seen the heater. There, the court held that the lessor was not liable for a death caused by the defective heater.

Although the question of the owner's knowledge or imputed knowledge is not directly discussed in McDonald v. Shell Oil Co., supra, 44 Cal.2d 785, 285 P.2d 902, implicit in the facts and the decision of the court is the fact that the owner should have known of the negligent manner in which the injured man's employer was performing the work.

Plaintiffs suggest that Restatement of Torts, sections 414 and 416, are applicable to the case here on appeal. In Hard v. Hollywood Turf Club, supra, 112 Cal.App. 2d 263, 273, 246 P.2d 716, the court in holding that the owner of the land was not liable to employees of the independent contractor, held that section 414 of the Restatement of Torts was not applicable. The court emphasized that section 414 can only apply when the owner remains in control of the activity or work. Section 416 provides that the employer of an independent contractor will be liable for injuries to "others" where the work is of a type involving a "peculiar risk." This section is not applicable since the construction of the tanks would not appear to be work involving a "peculiar risk" or inherently dangerous. Moreover, section 414 and section 416, which provide that the employer shall be liable to "others," do not include employees of the independent contractor. An employee is not a third person within the meaning of the rule. See Salmon v. Kansas City, 1912, 241 Mo. 14, 145 S.W. 16, 39 L.R.A.,N.S., 328; Wellman v. East Ohio Gas Co., 160 Ohio St. 103, 113 N.E. 2d 629; also Humble Oil & Refining Co. v. Bell, Tex.Civ.App., 1943, 180 S.W.2d 970, 975, where it was stated: "Let it be assumed also that the work of blasting was inherently dangerous. With these assumptions let us determine the measure of duty owed by defendant, at all times bearing in mind its relationship to plaintiff. In regard to the liability to the employer of an independent contractor where the work contracted for is inherently dangerous, the rule is that the employer may be held liable to a third person for the negligence of the independent contractor * * *. Is an employee of an independent contractor a third person within the meaning of the rule? It is our opinion that such employee is not."

The judgments are affirmed.

TOBRINER, J., and DOOLING, Justice assigned, concur.

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172 Cal.App.2d 580

James MITCHELL and Marie Mitchell, Plaintiffs and Appellants,

v.

Anna M. JONES, Defendant and Respondent.

Civ. 23630.

District Court of Appeal, Second District, Division 2, California.

Aug. 4, 1959.

Action by landowners for damages allegedly caused by acts of adjoining owner depriving landowners property of its lateral support. The Superior Court of Los Angeles County, A. A. Scott, J., entered judgment for defendant adjoining owner and landowners appealed. The District Court of Appeal, Fox, P. J., held that where defendant had obtained a default judgment against plaintiff landowners establishing that plaintiffs had excavated high portion of their property and filled in lower portion thereof causing a soil embankment to be raised adjacent to and partially upon defendant's property which caused mud and debris to flow from plaintiffs' property onto adjoining owner's property to damage of adjoining owner, such default judgment was not a bar to subsequent suit by plaintiffs alleging that defendant adjoining owner had negligently excavated portion of her property thereby lowering the same below the natural contour of plaintiffs' property which was left without lateral support.

Reversed.

1. Judgment ⚷584

Primarily doctrine of res judicata operates as a bar to maintenance of a second suit between the same parties on the same cause of action, but in its secondary aspect doctrine has limited application to a subsequent suit between the same parties based on a different cause of action so that prior judgment, while not a complete bar, operates as an estoppel or conclusive adjudication as to such issues in the second action as were actually litigated and determined in the first action.

2. Judgment ⟹585(1)

Where instant cause of action is not the same as one previously litigated, judgment in prior action is not a complete bar to the instant proceedings but only a conclusive adjudication as to issues litigated and determined in the prior action.

3. Judgment ⟹715(1)

When applying collateral estoppel doctrine, each case must be carefully scrutinized to determine whether a particular issue was raised even though some legal theory, argument or matter relating to issue was not expressly mentioned or asserted. West's Ann.Code Civ.Proc. § 1911.

4. Judgment ⟹652

Default judgment conclusively establishes between the parties, so far as subsequent proceedings on a different cause of action are concerned, truth of all material allegations contained in complaint in first action and every fact necessary to uphold default judgment, but such default judgment is not conclusive as to any defense or issue which was not raised and is not necessary to uphold judgment.

5. Judgment ⟹652

Where defendant landowner had obtained a default judgment against adjoining plaintiff landowners which conclusively established that plaintiffs had during the specified year excavated high portion of their property and filled in the lower portion thereof causing a soil embankment to be raised adjacent to and partially on defendant's property and subsequently resulting in mud and debris flowing from plaintiffs' property onto defendant's adjacent property to defendant's damage, such judgment was not conclusive bar to subsequent action by plaintiffs in which they alleged that defendant negligently excavated portion of her property thereby lowering the same below the natural contour of plaintiff's property which was then deprived of its lateral support to plaintiff's damage.

Barker & Miller, Montebello, for appellants.

Wade & Wade, Los Angeles, for respondent.

FOX, Presiding Justice.

This is an appeal by plaintiffs from a judgment for defendant in an action for damages allegedly caused by acts of the defendant depriving plaintiffs' property of its lateral support. By her First Affirmative Defense, defendant alleged that in 1954 she commenced an action against the plaintiffs; that in her complaint she alleged that "since 1953 the real property of plaintiffs [defendants therein] * * * was adjacent to the real property of defendant [plaintiff therein] * * *; that during the years 1953 and 1954 plaintiffs herein excavated * * * the high portion of their said real property and filled in the lower portions thereof; that in so excavating and filling, plaintiffs herein caused a dirt embankment to be erected and maintained adjacent to and partially upon the said real property of defendant herein; that the erection and maintenance of said dirt embankment changed the direction, volume and rate of the natural flow of surface waters causing said surface waters to flow at an increased and at a rapid rate upon and over the said property of defendant herein; that said surface waters carried with them great amounts of mud and debris, which mud and debris accumulated on said property of defendant herein; that said dirt embankment constituted a nuisance and caused defendant herein great annoyance, discomfort, expense and actual damage to her house, yard and furnishings." Defendant then alleged that plaintiffs were served with process and that "on the 3d day of November, 1954, judgment and decree were duly given and made * * * in said prior proceeding in favor of defendant herein and against plaintiffs herein, ordering, adjudging and decreeing that defendant herein recover from plaintiffs herein judgment for the sum of $1455.22 * * * and that plaintiffs herein be permanently enjoined and restrained from depositing loose dirt or debris upon their property in any manner which may cause the same to fall or flow or slide upon the adjacent property of defendant herein and from placing soil and debris upon said real property of defendant herein. That said judgment and decree * * * has not been set aside, modified or reversed, but * * * remains in full force and has become a final and binding judgment and decree." Finally, with respect to this defense, defendant alleged that the allegations contained in paragraph V of the plaintiffs' complaint herein to the effect that defendant negligently excavated the westerly portion of her property, lowering it between 4 to 15 feet below the natural contour of plaintiffs' property, without leaving proper and sufficient support for the soil on plaintiffs' property, and the allegation "as a result of being deprived of its support as aforesaid" (para. VI), "would have constituted a partial or total defense to the cause of action in said prior proceeding had they been asserted and proved * * *; that by reason thereof the plaintiffs herein are estopped and barred from alleging or proving any of the allegations contained in paragraph V of their complaint herein and the allegation 'as a result of being deprived of its support as aforesaid' * * *." The complaint and judgment in the prior proceeding were incorporated in the defendant's answer. The plaintiffs herein did not appear in the prior action and judgment was entered against them by default.

At the outset of the trial of the instant action, the trial judge personally viewed the premises involved. Thereafter, plaintiffs' first witness was sworn and gave brief testimony, whereupon defendant objected to the introduction of any further evidence upon the ground that the matter was *res judicata* and that plaintiffs were estopped and barred from introducing any further evidence by reason of the prior suit and judgment rendered therein. The court sustained the objection and entered judgment for defendant. The trial judge found as a fact that all of the allegations of defendant's First Affirmative Defense were true. The plaintiffs have appealed from the judgment.

Basically, this appeal presents a single question for determination, viz., what effect does a default judgment have on a subsequent proceeding between the same parties based on a different cause of action where the defendants in the prior action are the plaintiffs in the latter?

[1] The doctrine of *res judicata* has two distinct aspects. Sutphin v. Speik, 15 Cal.2d 195, 201–202, 99 P.2d 652, 101 P.2d 497; 2 Freeman on Judgments, p. 1425, § 676 (5th ed.). Primarily, it operates as a bar to the maintenance of a second suit between the same parties on the same cause of action. Taylor v. Hawkinson, 47 Cal. 2d 893, 895, 306 P.2d 797; Clark v. Lesher, 46 Cal.2d 874, 880, 299 P.2d 865; Panos v. Great Western Packing Co., 21 Cal.2d 636, 638, 134 P.2d 242. In its secondary aspect, the doctrine has a limited application to a subsequent suit between the same parties based on a different cause of action. "The prior judgment is not a complete bar, but it 'operates as an estoppel or conclusive adjudication as to such issues in the second action as were actually litigated and determined in the first action.' (Citation.) This aspect of the doctrine of res judicata, now commonly referred to as the doctrine of collateral estoppel, is confined to issues actually litigated." Clark v. Lesher, supra [46 Cal.2d 880, 299 P.2d 868]; Taylor v. Hawkinson, supra; Todhunter v. Smith, 219 Cal. 690, 695, 28 P.2d 916.

[2] It is clear that the instant cause of action is not the same as the one previously litigated and, therefore, we are here concerned with the doctrine of collateral estoppel and not with res judicata in its primary sense. This being the case, the judgment obtained in the prior action is not a complete bar to the instant proceeding, but only a conclusive adjudication as to issues litigated and determined in the first action. Taylor v. Hawkinson, supra, 47 Cal.2d at page 896, 306 P.2d 797.

[3] When applying the collateral estoppel doctrine, it is not always an easy matter to determine what issues were litigated, "for the term 'issue' as used in this connection is difficult to define, and the pleadings and proof in each case must be carefully scrutinized to determine whether a particular issue was raised even though some legal theory, argument or 'matter' relating to the issue was not expressly mentioned or asserted." Clark v. Lesher, supra, 46 Cal.2d at pages 880–881, 299 P.2d 865, 868.

Section 1911, Code of Civil Procedure, states: "That only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto."

In Sutphin v. Speik, supra, a collateral estoppel case, the court discusses this question as follows (15 Cal.2d at page 202, 99 P.2d at page 655): "Next is the question, under what circumstances is a matter to be deemed decided by the prior judgment. Obviously, if it is actually raised by proper pleadings and treated as an issue in the cause, it is conclusively determined by the first judgment. But the rule goes further. If the matter was within the scope of the action, related to the subject-matter and relevant to the issues, so that it could have been raised, the judgment is conclusive on it despite the fact that it was not in fact expressly pleaded or otherwise urged. The reason for this is manifest. A party cannot by negligence or design withhold issues and litigate them in consecutive actions. Hence the rule is that the prior judgment is *res judicata* on matters which were raised or could have been raised, on matters litigated or litigable. In Price v. Sixth District Agricultural Ass'n, 201 Cal. 502, 511, 258 P. 387, 390 this court said: 'But an issue may not be thus split into pieces. If it [a particular issue] has been determined in a former action, it is binding notwithstanding the parties litigant may have omitted to urge for or against it matters which, if urged, would have produced an opposite result * * * This principle also operates to demand of a defendant that all his defenses to the cause of action urged by the plaintiff be asserted under the penalty of forever losing the right to thereafter so urge them.'"

The scope of the estoppel is discussed in 2 Freeman on Judgments (§ 677, 5th ed.), pages 1429–1432, as follows: "* * * where the causes of action involved in the two actions are different * * * the estoppel does not extend to matters which might have been litigated in the first action but is limited to those matters or issues common to both actions which were either expressly or by necessary implication adjudged in the first * * *. But as to all matters expressly or necessarily adjudicated, a judgment is, of course, conclusive, regardless of the difference in the causes of action. It is important to note in this connection, however, that even though the causes of action be different, if the second action involves a right, title or issue as to which the judgment in the first action is a conclusive adjudication, the estoppel so far as that right, title or issue is concerned must likewise extend to every matter which was or might have been urged to sustain or defeat the determination actually made."

To what extent are the above principles applicable to a default judgment?

In O'Brien v. Appling, 133 Cal.App.2d 40, 42, 283 P.2d 289, 290, the court stated that a "judgment by default is just as conclusive upon the issues tendered by the complaint as if rendered after answer filed and trial on allegations denied by the answer." In Freeze v. Salot, 122 Cal.App.2d 561, 566, 266 P.2d 140, 143 it was held that "[a] judgment by default is a complete adjudication of all the rights of the parties embraced in the prayer of the complaint. * * *" To the same effect, see Brown v. Brown, 170 Cal. 1, 5, 147 P. 1168; Spurr v. Daniels, 152 Cal.App.2d 867, 870, 313 P.2d 621; Fitzgerald v. Herzer, 78 Cal.App.2d 127, 131–132, 177 P.2d 364. In the last cited case, the court stated 78 Cal.App.2d at page 132, 177 P.2d at page 366 that a default judgment is *res judicata* "as to all issues aptly pleaded in the complaint and defendant is estopped from denying in a subsequent action any allegations contained in the former complaint."

In English v. English, 9 Cal.2d 358, 363–364, 70 P.2d 625, 628, 128 A.L.R. 467, the court, quoting from 34 Corpus Juris, page 891 section 1299 (50 C.J.S. Judgments § 706, p. 162), stated: "'The doctrine of conclusiveness of judgments applies to a judgment by default with the same validity and force as to a judgment rendered upon a trial of issues, provided such judgment is regular and valid, and shows distinctly on what count or cause of action it was rested. *But the confession implied from the default is limited to the material issuable facts which are well pleaded in the declaration or complaint, and does not apply to issues which were not raised in the pleadings.* Nor subject to the rule that the judgment is conclusive as to every fact necessary to uphold it, is a default judgment conclusive, in a subsequent suit on a different cause of action, against any defenses defendant may have, although the same defense, if pleaded and proved in the former action, would have defeated plaintiff's recovery, because in the absence of a trial and hearing in the first suit, it cannot be said that such matters were adjudicated therein.'" (Accord, 29 Cal.Jur. 2d, p. 195, § 235; see Sutphin v. Speik, supra, 15 Cal.2d at pages 202–203, 99 P.2d at pages 655, 656.)

[4] It is our understanding, based upon the foregoing authorities, that a default judgment conclusively establishes, between the parties so far as subsequent proceedings on a different cause of action are concerned, the truth of all material allegations contained in the complaint in the first action, and every fact necessary to uphold the default judgment; but such judgment is not conclusive as to any defense or issue which was not raised and is not necessary to uphold the judgment.

[5] The default judgment which defendant herein obtained in 1954 against the plaintiffs herein conclusively established the following: (1) during the years 1953 to 1954, the plaintiffs excavated the high portion of their property and filled in the lower portion thereof causing a soil embankment to be raised adjacent to and partially upon defendant's property, and (2) the erection of the soil embankment subsequently caused mud and debris to flow from plaintiffs' property onto defendant's property to the damage of defendant in the amount of $1455.22 (including a retaining wall).

In the instant case, plaintiffs allege that in 1953, prior to July 23, defendant negligently excavated on the western portion of her property, thereby lowering the same 4 to 15 feet below the natural contour of plaintiffs' property leaving the property of the latter without support, and that in 1956, as a result of this deprivation of support, the easterly portion of plaintiffs' property "sank and gave way to plaintiffs' damage."

The default judgment obtained by defendant in 1954 against the present plaintiffs did not determine that she was not guilty of negligently excavating her property. This was not raised by her pleadings and a determination of this question clearly was not required to uphold the default judgment. Assuming, arguendo, that the question of defendant's excavation would have constituted a defense to her action, the default judgment does not preclude subsequent litigation on this issue in California for this question was not raised by the pleadings, nor was its resolution necessary to uphold the judgment. English v. English, supra.

It appears, therefore, that the trial court erred in holding that the former judgment worked an estoppel on the issue of defendant's negligence in the instant action.

The judgment is reversed.

ASHBURN and HERNDON, JJ., concur.

172 Cal.App.2d 450

Thomas S. BUNN and Thomas A. Wood, Plaintiffs and Appellants,

v.

LUCAS, PINO AND LUCAS, a partnership consisting of Malcolm M. Lucas, James R. Pino and Campbell M. Lucas, associated together under the firm name and style of Lucas, Pino and Lucas, Malcolm M. Lucas, James R. Pino and Campbell M. Lucas, individually, and Richard Wicks, Defendants and Respondents.

Civ. 23642.

District Court of Appeal, Second District, Division 2, California.

July 29, 1959.

Rehearing Denied Aug. 26, 1959.

Hearing Denied Sept. 22, 1959.

Action, by two attorneys, against firm of attorneys which had originally engaged plaintiffs on employer-employee basis, to aid them in protecting their client's interest in estate, brought to recover greater compensation than that originally provided in their agreement, on ground that unexpected turn in litigation had required plaintiffs to render greater services than originally contemplated. The Superior Court of Los Angeles County, William J. Palmer, J., rendered judgment awarding plaintiffs a smaller recovery than they sought and they appealed. The District Court of Appeal, Herndon, J., held that evidence sustained trial court's findings that plaintiffs had not become defendants' joint venturers but remained their employees, but that plaintiffs had rendered services not within the contemplation of the original agreement, and that award to them for their services of $40,000 was not an abuse of discretion.

Affirmed.

1. Joint Adventures 🔑1.1

A joint venture is an undertaking by two or more persons jointly to carry out single business enterprise for profit; it is consensual relationship originating in voluntary agreement of parties.

2. Joint Adventures 🔑1.5

Existence of joint venture depends on intentions of parties.

3. Appeal and Error 🔑991

In action wherein plaintiffs sought recovery on ground that they were joint venturers with defendants, question of relationship of joint venturers was primarily for trial court to determine from facts and inferences to be drawn therefrom.

4. Contracts 🔑28(2)

Words and conduct of parties prior to, contemporaneous with, and subsequent to point at which an agreement allegedly has been made may be examined in determining whether, in fact, contractual relationship has been created.

5. Contracts 🔑170(1)

Practical construction placed upon agreement by parties is substantial evidence of their intent.

6. Joint Adventures 🔑1.15

In action wherein plaintiffs sought recovery from defendants on ground that parties had been joint venturers, plaintiffs had burden of proving existence of joint venture relationship.

7. Joint Adventures 🔑1.15

In action by attorneys who were not attorneys of record in probate proceeding, against the attorneys of record who had engaged services of plaintiffs originally under employment agreement providing for stated compensation, contingent upon success, evidence sustained trial court's findings that plaintiffs and defendants did not subsequently enter into a joint venture agreement, after unexpected development occurred which required more work by plaintiffs than was originally contemplated.

8. Attorney and Client 🔑151

Where lawyers jointly undertake to represent client without agreement as to division of fees, they will be regarded as joint venturers, entitled to share equally in fees earned by their joint efforts.

9. Attorney and Client 🔑151

Rule that where attorneys undertake jointly to represent client without agreement as to division of fees they are to be regarded as joint venturers could have no application where attorneys had entered into agreement under which two attorneys were employees of firm of attorneys and it was mutual intent of parties that such relationship should continue unchanged throughout period of their association.

10. Attorney and Client ⚿29

In action by two attorneys, against firm of attorneys which had originally retained plaintiffs under employer-employee relationship to aid them in establishing their client's interest in estate of testator who had named a charity as principal beneficiary in last will, brought to recover compensation beyond that provided in original agreement for services required when proceedings became unexpectedly more complicated as charity attempted to probate prior will, evidence sustained trial court's findings that plaintiffs were at all times defendants' employees, not joint venturers, and that plaintiffs performed services not contemplated under agreement and evidence warranted implication of agreement that plaintiffs would be paid for reasonable value of their additional services required. West's Ann. Prob.Code, §§ 40–43, 41, 1080.

11. Attorney and Client ⚿29

Reasonableness of attorneys' fee contract with their client had no bearing whatsoever upon reasonable value of services rendered such attorneys by other attorneys, as their employees, in connection with client's business.

12. Appeal and Error ⚿991, 1013

What constitutes reasonable attorney's fee is primarily question of fact for trial court and amount awarded will not be disturbed on appeal unless abuse of discretion is clearly shown.

13. Attorney and Client ⚿166(3)

Expert testimony as to reasonable value of an attorney's legal services is not necessary.

14. Attorney and Client ⚿29

In action wherein two attorneys sought to recover from firm of attorneys which had originally retained plaintiffs in employer-employee relationship to aid them in establishing their client's interest in estate of testator who had made a charity the principal beneficiary, to recover more than the $15,000 contingent fee to which parties had agreed originally, on theory that much more extensive services were required than contemplated because charity sought probate of prior will, wherein trial court properly found that defendants had obligated themselves to pay reasonable value of the additionally required services, trial court's award to plaintiffs of $40,000 was not an abuse of discretion.

◆

Larwill & Wolfe and Thomas S. Bunn, Jr., Los Angeles, for appellants.

Ball, Hunt & Hart, Joseph A. Ball, Long Beach, for respondents.

HERNDON, Justice.

The two appellants and the four respondents in this case are lawyers. Their unfortunate controversy involves disputed rights with respect to the substantial attorneys' fees which were earned by the rendition of professional services in certain contested probate proceedings. These six lawyers collaborated successfully in representing the interests of a client who claimed a major share of a very large estate. At the outset the client had retained respondents Lucas, Pino, Lucas and Wicks to act as her attorneys pursuant to a contingent fee agreement. Thereafter, respondents, deeming it prudent to have the assistance of more experienced lawyers in a matter of such importance, sought the aid and counsel of appellants Bunn and Wood. The client, incidentally, is not a party to this litigation.

The significance of the facts shortly to be detailed will be made more readily apparent, we trust, by first presenting a very brief and general description of the nature of the controversy.

The basic issue of fact in this case is whether appellants Bunn and Wood became *joint venturers* with respondents in the performance of the professional services which were rendered in the representation of the client or whether the relationship between respondents and appellants was that of *employers and employees.* It is undisputed that under the agreement made at the time appellants were first brought into the case, respondents were employers and appellants were employees, and that the agreed amount of appellants' compensation was the sum of $15,000, payment of which, however, was to be contingent upon success in the litigation.

Appellants here contend: (1) that subsequent to their original employment, the probate litigation took an unexpected turn and that as a result of unforeseen developments they were requested to assume greater responsibilities and to render additional services neither contemplated at the time they were hired nor covered by the original agreement; (2) that these unexpected developments gave rise to a "new matter"; (3) that respondents' request for appellants' services in connection with this "new matter" and appellants' performance thereof without any new agreement upon the amount of appellants' compensation necessarily gave rise to an implied agreement creating a joint venture; and (4) that appellants, as joint venturers, are entitled to share equally in whatever fee respondents receive under their agreement with the client.

Respondents took the position that all of appellants' services were within the contemplation of the original agreement, so that appellants were entitled to no more than the amount therein specified, to wit, the sum of $15,000. In respondents' view the unexpected developments in the probate litigation did not give rise to any "new matter". The essence of their response to this contention was that in the course of lawsuits new and unforeseen developments are so common that experienced lawyers always expect the unexpected. As a secondary proposition, respondents have contended that if any services were rendered by appellants which were not contemplated at the time of the original hiring and not covered by the original agreement, such services should be compensated on the basis of their reasonable value. They argue that appellants at all times regarded themselves, and were regarded, as respondents' employees—a relationship utterly inconsistent with the relationship of joint venturers.

The trial court found in substance: (1) that appellants were employed by respondents to perform certain services by way of assisting respondents in connection with a pending proceeding to determine heirship; (2) that appellants were not employed by the client, either directly or indirectly, and that no contractual relationship existed between appellants and the client; (3) that appellants were not at any time partners of or joint venturers with the respondents; (4) that as a result of unexpected developments in the litigation "the problems of the case became much more extensive and complex than those contemplated by the parties" when they entered into their original agreement; (5) that appellants rendered services in connection with certain new proceedings initiated in the probate matter by an adverse party, which services were not within the contemplation of the original agreement; and (6) that the reasonable value of all the professional services rendered by appellants to respondents is the sum of $40,000. The judgment of which appellants complain awards them the said sum of $40,000.

After a review of the record, we have concluded that the determinative findings of the trial court are unassailable. Indeed, the basic finding to the effect that no joint venture was created is supported by the overwhelming weight of the evidence. Hence, in this case, it is unnecessary to invoke the familiar rule that the facts should be viewed in the light most favorable to respondents. We shall now proceed to state the salient facts in more detail.

Malcolm M. Lucas, his brother, Campbell M. Lucas, and James R. Pino practiced law in Long Beach, California, as partners under the name of Lucas, Pino and Lucas. Richard Wicks is a professor of law at the University of Southern California Law School. He also engages in the practice of law, specializing in probate matters. All four respondent lawyers are young men admitted to the bar within the last ten years.

In April, 1956, Mrs. Shirley Young, who previously had been a client of Malcolm Lucas, went to the office of Lucas, Pino and Lucas, seeking legal assistance in connection with the estate of her deceased grandmother, Leona M. Crawford. Mrs. Crawford had died earlier that year in Long Beach, leaving a will dated November 15, 1953, which named Columbia University of New York City as the principal beneficiary. When Mr. Lucas examined Mrs. Crawford's will he noticed that it contained no provision which would be effective to avoid the restrictions on charitable gifts found in Probate Code, §§ 40–43. His immediate impression was that if Mrs. Young could establish the fact that she was the relative to whom the property would have gone but for the charitable dispositions, then under Probate Code, § 41 she would be entitled to distribution of two-thirds of the property which Mrs. Crawford had bequeathed to the University.

Lucas thereupon consulted Richard Wicks and the latter was associated with the firm under an agreement providing that he was to receive one-fourth of any fee which the partnership might receive in connection with this matter. Thereafter, a written contract was executed between attorneys Lucas, Pino and Lucas and Richard Wicks (hereinafter sometimes referred to as Lucas and Wicks) and Shirley Young, as client, whereby said attorneys were retained in consideration of a contingent fee to be computed upon percentages of any distributions to Mrs. Young from the estate of Crawford.

During the summer of 1956 Lucas and Wicks worked on the problems posed by the Crawford will and in September, 1956, they filed a petition under section 1080 of the Probate Code to determine heirship and to establish the rights of Mrs. Young in the estate. The hearing on this petition was set for November 5, 1956. Since none of the four respondents considered themselves "courtroom lawyers" they decided to engage an older attorney for advice in the preparation and presentation of their case.

Accordingly, in the early part of October, 1956, Lucas and Wicks approached appellant Thomas S. Bunn, the father of a law school classmate of Malcolm Lucas. At a luncheon meeting, Malcolm explained to Mr. Bunn the general nature of the problems involved, stating that the estate was valued at "between two and three million dollars" and referring to the pendency of the heirship proceedings which respondents had initiated on behalf of Mrs. Young. Lucas told Bunn that he and his associates desired the assistance of an experienced attorney at the time of the hearing on the pending petition to determine heirship. When Bunn asked what amount they were prepared to pay for such assistance, Lucas replied that they had a "top figure in mind which was $5000 contingent upon our successful completion of the case." According to Mr. Bunn's testimony, he offered to give Malcolm free advice, but Malcolm "insisted that they were not willing to take the assistance gratuitously from me and that they insisted on paying for it." Bunn then suggested a meeting with his associate, Thomas A. Wood. This meeting was accordingly scheduled for October 10, 1956, at the office of Bunn and Wood. On that date Lucas and Wicks first conferred with Bunn alone. Bunn told them that Wood was the man that they should hire, but he apprehended that Wood would not accept a limited employment but would insist on playing a dominant role which Bunn characterized as "sitting at the head of the table".

Wood thereafter joined the conference, and was informed generally concerning the earlier discussions and the nature of the employment contemplated. There was a discussion of the petition to determine heirship, the legal points involved, including the tax problems. Wood was informed that respondents simply desired aid and counsel with respect to procedural matters at the hearing. Wood responded that he did not like to handle matters in that way; that if he went into a case he would expect to do his own research and would assume considerable responsibility, and that in view of the responsibilities that he would expect to undertake if he accepted such employment a contingent fee of $5,000 would not be satisfactory. By way of counter proposal, Wood stated that he and Bunn would accept employment for the sum of $15,000, contingent on success.

According to Bunn's testimony, the response of Lucas and Wicks to Wood's counter-proposal was as follows: "After Mr. Wood had made the statement that we would do it for $15,000 on a contingent basis, one of them, I think, said, 'We are not used to that kind of money. * * * We consider it high * * *' That is more money than we contemplated paying." However, Lucas and Wicks indicated that they would discuss the matter with their associates and inform appellants promptly as to their decision. At the conclusion of the conference, and as Lucas and Wicks were leaving, Wood stated to them that he hoped they had the case on a good fee arrangement and Bunn said: "I hope so, too, but don't tell us anything about it."

The following day Lucas advised Bunn by telephone that his partners had agreed to pay the fee of $15,000 contingent on success. Wood and Bunn immediately commenced work on the case. It is apparent from the record that for a period of some six weeks, from October 11th to November 20th, Wood and Bunn entered actively into every phase of the case. Mr. Wood took a prominent part in various settlement negotiations and in discussions of the legal issues and tax problems involved in the case.

On October 11, 1956, Wood, Bunn and Malcolm Lucas drove to Beverly Hills and there questioned attorney Kenneth D. Holland, a nephew of Mrs. Crawford, concerning matters of family history. From him they learned that another attorney, Paul D. Holland, had drawn an earlier will for Mrs. Crawford which also had named Columbia University as the principal beneficiary. This prior will evidently contained a clause which would have been effective to avoid section 41 of the Probate Code limiting the amount of the charitable bequests. However, as we have noted, Mrs. Crawford's later will contained no such saving clause.

Thereafter, Wood, Bunn, Lucas and Wicks had numerous conferences in which they discussed the facts and the applicable law. They met with attorneys Tackabury and Ingram, who represented the trustees of Columbia University, and discussed various possible bases of settlement and the allocation of taxes as between the University and Mrs. Young in the event of settlement. As above indicated, it is apparent that Wood played a very active part in all the conferences and discussions. As he, himself, phrased it: "I acted as spokesman from the time we came into it until I got fired."

The so-called "unexpected turn" in the course of the litigation developed on November 20, 1956. On that date, Columbia University, through its local attorneys, filed a petition to probate the former will of Mrs. Crawford containing the clause which would render effective in its entirety the charitable bequest in favor of Columbia University, avoiding the restrictive effect of Probate Code, sections 41–43. It was obvious that counsel for the University, in filing this petition, were seeking to invoke the doctrine of "dependent relative revocation", that is to say, that the revocation of the former will by the later was dependent upon, and relative to, the validity of the later will in all respects so far as necessary to carry out the intentions of the testatrix.

Appellants Bunn and Wood base their claim to additional fees upon the additional services which they rendered after November 20, 1956, contending that the filing of the petition to probate the former will upon the theory of "dependent relative revocation" gave rise to a new matter not contemplated by the employment contract under which they had been performing up to that time.

There is a substantial conflict in the evidence as to whether there was any discussion between appellants and respondents after November 20th of such a nature as to indicate an understanding that the new petition filed by the University would be regarded as a new matter which would entitle appellants to additional compensation. Both Malcolm Lucas and Wicks testified that after November 20th Bunn and Wood continued to participate in the case in essentially the same way that they had done during the preceding six-week period. They testified to their understanding and belief that appellants' services were still being performed under the express contract of October 11, 1956. In his testimony appellant Bunn admitted that he personally had no conversation with any of respondents which would have changed the existing fee arrangement in any way. Appellant Wood testified that at a meeting in his office on November 21st he had said: "Now, you fellows understand that this is a different piece of business than you originally brought into the office?" and that "They replied, 'Yes,' and I asked them if they wanted Mr. Bunn and I to handle it and they said, 'Yes.'" Lucas and Wicks denied that any such conversation took place. Wood further testified as follows concerning a conversation with Lucas which he said took place on December 5, 1956: "* * * I suggested to Mr. Lucas that he, Mr. Wicks, Mr. Bunn and myself should get together and adjust our position on fees in this matter, that we were now handling an entirely different matter and he turned around to me and he says, 'You go right ahead, there will be no question about fees being adjusted.' And that was all that was said as far as fees were concerned." Lucas denied that there was any such conversation. Wood further testified that at a later time in March, 1957, after the settlement of the case, he suggested that Malcolm Lucas and Wicks come to his office and talk about fees; "that we ought to sit down and settle the fee matter," and that Lucas said "he and Mr. Wicks would be up to do it." Lucas testified that no such discussion occurred.

After further conferences with counsel representing Columbia University, the case was settled on January 7, 1957, and a decree determining heirship was accordingly entered in February, 1957. Under the terms of the settlement, Mrs. Young became entitled to distribution of amounts aggregating approximately $1,000,000.

Malcolm Lucas testified that Bunn or Wood first mentioned the matter of additional fees in April, 1957. Bunn called Lucas and said that he and Wood wanted to see Lucas and Wicks in regard to the estate. He said nothing about fees. A few days later Lucas went to the offices of Bunn and Wood. He met with Bunn and Wood in the latter's office at which time Wood said "[w]e have called this meeting to discuss fees," and Lucas asked "[w]hat about fees?" Wood replied "[w]e have done more work than we thought we were going to have to in this matter. We feel that we are entitled to more fees." Lucas inquired "[w]hy didn't you tell me earlier that you were going to ask for more fees? * * * You say that you had to do more work because of what happened in November. * * Now, it is April here and you never told me about a thing about this until this very day, sitting in your office." Wood replied "[w]ell, it was an emergency. When you are fighting a fire you don't stop to talk about how much you are going to get paid for fighting this fire." Lucas said that he finally asked Bunn and Wood "[w]hat do you fellows want in the way of a fee?" and Wood replied "[w]ell, Malcolm, I can't tell you. I don't know what you are getting * * * If you tell us what you are getting, we will be able to tell you what we are entitled to, but we have got to know what your fee is to be fair to you and be fair to ourselves."

In response to Wood's inquiry about the fee contract with Shirley Young, Lucas refused to disclose the contract and said to Wood: "Don't you recall that you said, 'We don't want to know what the fee is,' * * * It has never been material before * * * you never based your fee on that and now you say you can't set a fee until you know what it is * * * it is a confidential matter and I am just not going to tell you."

Sometime later, on April 30, 1957, Wicks and Malcolm Lucas went to the offices of Bunn and Wood. Lucas made a memorandum of that conversation, which he produced at the time of the trial and which he used to refresh his memory. Wicks told Bunn and Wood that he thought the relationship between the lawyers was governed by the express contract of October 10th under which Lucas and Wicks agreed to pay Bunn and Wood the sum of $15,000 contingent upon success. Bunn and Wood countered that they were hired for a limited purpose and that when the petition to probate the former will was filed they undertook a new matter for which they felt they should have a larger fee. Harsh words were exchanged and there was argument about the determination of the "reasonable value" of the services which Bunn and Wood had rendered. Wicks finally made an offer to pay $20,000 in full settlement, but said he wanted it in writing. Wood appeared to be angered by this suggestion, stated that he was not interested and declared that the matter would have to be litigated. After expressing amazement at appellant's demands for a larger fee, Lucas declared: "So that there will be no further claim to a quantum meruit recovery * * I want to notify you gentlemen right now that we terminate your services as of this minute."

Promptly after the foregoing conference, Malcolm Lucas forwarded a letter to Mr. Tackabury advising him that Bunn and Wood were no longer associated. A copy of this letter was sent to Bunn and Wood.

On May 21, 1957, Lucas and Wicks made a tender to Bunn and Wood of $15,000 in the form of a certified check on the First Western Bank of Long Beach. Bunn and Wood rejected the tender with a letter which contained the following language: "We have your letter of May 31, 1957, in which you enclose your check payable to us for $15,000. In view of the fact that you have attempted to make remittance serve as payment in full for our services to you and Mrs. Shirley Sandusky Young, and that it does not represent the *reasonable value* of our services, we return the check herewith." (Emphasis added.)

Bunn and Wood thereafter filed suit against respondent seeking declaratory relief. Their complaint alleges the existence of an actual controversy between the parties and states appellants' contentions in the following terms: "1—That the contract made and entered into on or about October 10, 1956, obligated plaintiffs only to advise defendants in connection with the matter then pending in the Matter of the Estate of Leona M. Crawford, deceased, to-wit, the then pending Petition for Construction of Will and for Decree Determining Heirship and Interest in the Estate under Probate Code 1080; and that said agreement did not contemplate that plaintiffs would handle any other, new, or then unknown matters. 2—That for new matters arising subsequent to said original employment and involving new and different questions of fact and new and different questions of law, which plaintiffs were requested to manage, *there was an agreement to pay plaintiffs the reasonable value of their services.*" (Emphasis added.)

In the prayer of their complaint, after requesting a declaration in conformity with their contentions as above stated, appellants prayed "that the court determine *the reasonable value* of plaintiffs' said services." (Emphasis added.)

It should be noted at this point that appellants were never attorneys of record for the client. It seems to have been clearly understood from the outset that appellants would not become attorneys of record. It is also clear and undisputed that appellants made no effort to ascertain the terms of respondents' fee contract with the client until after the dispute between appellants and respondents had arisen. Appellants first learned the terms of the said contract when a copy of it was produced on the occasion of the taking of the deposition of Mr. Wicks.

As we have heretofore indicated, the basic issue in this case is essentially a factual one: whether appellants became *joint* *venturers* with respondents, or whether their status continued to be (as admittedly it was at the beginning of the undertaking) that of respondents' *employees*. After restating certain well settled principles of law, we shall indicate the reasons for our conclusion that the trial court correctly decided this basic issue.

[1–6] A joint venture is an undertaking by two or more persons jointly to carry out a single business enterprise for profit. Nelson v. Abraham, 29 Cal.2d 745, 749, 177 P.2d 931; Hansen v. Burford, 212 Cal. 100, 108–109, 297 P. 908. It is a consensual relationship originating in the voluntary agreement of the parties. See Campagna v. Market Street Railway Co., 24 Cal.2d 304, 308, 149 P.2d 281; Universal Sales Corp. v. California Press Mfg. Co., 20 Cal. 2d 751, 764–765, 128 P.2d 665. As in the case of other consensual relationships, the existence of a joint venture depends upon the intention of the parties. Lasry v. Lederman, 147 Cal.App.2d 480, 486, 305 P. 2d 663; Universal Sales Corp. v. California Press Mfg. Co., supra, 20 Cal.2d 751, 764–765, 128 P.2d 665. The question whether the relationship of joint venture was created was primarily a question for the trial court to determine from the facts and inferences to be drawn therefrom. Cutter Laboratories, Inc. v. R. W. Ogle & Co., 151 Cal.App.2d 410, 417, 311 P.2d 627; California Home Extension Ass'n v. Hilborn, 115 Cal.App.2d 634, 638, 252 P.2d 368. Words and conduct of the parties prior to, contemporaneous with, and subsequent to the point at which an agreement allegedly has been made may be examined in determining whether in fact the alleged contractual relationship was created. The practical construction placed upon the agreement by the parties is, of course, substantial evidence of their intent. See Universal Sales Corp. v. California Press Mfg. Co., 20 Cal.2d 751, 761, 128 P.2d 665; Restatement of Contract, section 235(e). The burden of proving the existence of a joint venture rested upon appellants. The party who seeks to recover pursuant to such an agreement must accept the burden of proof. Sully v. Kern Drilling Corp., 126 Cal.App.2d 651, 654, 272 P.2d 549. A finding that a joint venture did not exist, supported by substantial evidence, will not be disturbed on appeal. Cutter Laboratories, Inc. v. R. W. Ogle & Co., supra, 151 Cal.App.2d 410, 417–418, 311 P.2d 627.

[7] In the case at bar, the words and conduct of the parties speak eloquently in support of the trial court's factual determination that no joint venture was ever contemplated by them. Appellant Wood testified that on December 5, 1956,—prior to the time when the parties found themselves in dispute—Malcolm Lucas stated that they would have no trouble "*adjusting* the fees". Accepting Wood's testimony, the quoted statement would strongly support the inference that the "adjustment" contemplated was an adjustment of the $15,000 fee. Manifestly, such expression would not suggest any intention to change the existing relationship between the parties.

Appellant Wood also testified that he had said to Malcolm Lucas: "We ought to sit down and *readjust* our fees in this matter, in view of the subsequent happenings." When asked, on cross-examination, what he meant by the words " 'readjust' our fees," he answered, "I can't tell you at the moment, Mr. Ball, exactly what I had in mind when I used that word." It seems reasonable to infer that the words used indicated no belief in the existence of a joint venture agreement. The word "readjust" naturally suggested a change in the amount of the agreed fee rather than a claim of right to *share* or *divide* the fee which respondents were to receive from the client.

Both appellants testified that prior to the taking of depositions in the action they had no knowledge as to what fee arrangement respondents had with the client. At no time prior to the emergence of a disagreement over appellants' demand for an adjustment of the $15,000 fee did appellants either by word or action indicate that they entertained the slightest notion that they had any vested interest in the fee contract between respondents and the client. It must have appeared to the trial court quite improbable that attorneys as experienced as appellants would enter into a joint venture entitling them to share in an existing fee arrangement without making any inquiry concerning the terms of that arrangement.

Appellants testified that in April, 1957, they asked for an adjustment of their fee —they sought a *higher* fee but they asserted no right to *share* respondents' fee. Appellant Wood testified that after the dispute concerning fees had arisen, he stated that he could not "fix a fee in fairness to you or in fairness to ourselves unless we know what your fee is." The use of the words "fix a fee" was not without significance. The court could infer that if Wood at that time thought he had any rights as a joint venturer, he would have spoken in terms of *sharing* or *dividing* the fee which respondents were to receive from the client, rather than in terms of *adjusting, fixing* or *setting* a fee. The expressions used seem quite inconsistent with a belief in the existence of a joint venture relationship—a relationship which would call for an equal division of the profits of the venture (in the absence of agreement to the contrary) regardless of the extent of participation by the respective parties.

Appellant Wood testified "I acted as spokesman from the time we came into it until I got fired." From the use of the word "fired" the trial court could infer that Wood at all times viewed his relationship with respondents as one of employment. On April 3, 1957, Malcolm Lucas said to Bunn and Wood "I want to notify you gentlemen right now that we terminate your services as of this minute." Appellants made no protest, but evidently accepted the statement of Lucas as being effective to terminate the relationship. In announcing his decision, the trial judge commented that this acquiescence in respondents' power to terminate the relationship seemed inconsistent with a belief in the existence of a joint venture.

Finally, when respondent sent appellants a check for $15,000, Bunn returned it and stated in the transmittal letter that the check did not represent the "reasonable value" of their services. From this it was reasonable for the trial court to infer that as late as a month before the complaint was filed in this action, and two months after a dispute had arisen, appellants were speaking in terms of the *reasonable value* of their services and not in terms of a right to share the emoluments of a joint venture.

Furthermore, with respect to the relationship existing between the parties, the language of appellants' amended complaint is entirely consistent with the finding of the trial court. In stating their contention in the controversy presented, appellants alleged "that for new matters arising subsequent to said original employment and involving new and different questions of fact and new and different questions of law, which plaintiffs were requested to manage, there was an agreement to pay plaintiffs *the reasonable value of their services.*" The prayer of the complaint was couched in similar language and requested that the "court determine *the reasonable value* of plaintiffs' said services." (Emphasis added.) Manifestly, this quoted language from appellants' pleading is inconsistent with their present joint venture theory.

[8] The essence of appellants' position is that since they performed services additional to those contemplated by the original agreement without any new *express* agreement relative to additional compensation, it necessarily follows that there was an *implied in law* agreement creating a joint venture. In support of this position, appellants rely upon a general proposition of law that where lawyers jointly undertake to represent a client without any agreement as to the division of fees, they will be regarded as joint venturers, entitled to share equally in the fees earned by their joint efforts. Ford v. Freeman, 40 Cal. App. 221, 227, 180 P. 545; Bailey v. Griggs, 174 Okl. 90, 49 P.2d 695, 697; Gill v. Mayne, Iowa, 162 N.W. 24, 26; Langdon

v. Kennedy, Holland, De Lacy & McLaughlin, 118 Neb. 290, 224 N.W. 292, 293, 63 A.L.R. 896.

[9] The proposition of law advanced is unquestionably sound and valid, but it has no application in the case at bar. Here we have undisputed evidence that the relationship between the parties was that of employers and employees—a relationship established by *express* agreement. And we have most persuasive evidence that it was the mutual intent of the parties that the same relationship should continue unchanged throughout the period of their association. As stated in Wiltsee v. California Employment Comm., 69 Cal.App.2d 120, 127, 158 P.2d 612, 616: "There is * * * substantial authority to the effect that the relationship of employer-employee and joint adventurers are incompatible and cannot exist together between the same parties in relation to the same transaction. Larson v. Lewis-Simas-Jones Co., 29 Cal.App.2d 83, 84 P.2d 296; see, note, 138 A.L.R. 968, at page 992 et seq."

[10] Thus appellants' reliance upon Ford v. Freeman, supra, 40 Cal.App. 221, 227, 180 P. 545, 548 is entirely misplaced. As there stated: "Attorneys who jointly undertake to prosecute or defend a lawsuit are entitled, *in the absence of an agreement to the contrary,* to share equally in the compensation." (Emphasis added.) It is clear from all the authorities cited by appellants that the rule of equal division applies only where it is shown that the collaborating lawyers have not expressly or impliedly agreed otherwise. In the case at bar, as we have shown, there is ample evidence to support the trial court's finding to the effect that appellants at all times regarded themselves, and were regarded, as respondents' employees. Thus, the agreement most reasonably to be implied from the words and conduct of the parties was that appellants would be paid the reasonable value of their services.

Deutsch v. Haas, 55 Ga.App. 463, 190 S.E. 637, 639, is a decision which deals with a factual situation very closely analogous to that of the instant case. The plaintiff in that case was a resident attorney employed by two nonresident attorneys to assist them in a bankruptcy proceeding on behalf of certain bondholders against a Georgia company which had defaulted on its obligations. Plaintiff was to do most of the preliminary work, but under the express contract between the three attorneys, he was to receive 40% of the fee which might be awarded the associates for successful representation of the clients. While the matter was pending the federal bankruptcy laws were amended so as to establish procedures completely different from those in effect when the parties contracted. At plaintiff's suggestion, the defendant attorneys agreed to bring the action under this new legislation, and plaintiff continued with his preparation of the case. He "* * * spent months in preparing the case for trial, in the investigation of the facts and legal research far beyond the necessities of the original plan; * * * [and] when the case came on for trial, the local attorneys spent seventeen days in conducting the same * * *." The case was eventually settled, and the settlement agreement provided for an award of $19,000 attorney fees. This sum was paid to defendants, who refused to pay plaintiff more than $7,600, which was 40% of the $19,000 fee paid the attorneys. Upon defendants' refusal to pay more than the originally agreed sum, plaintiff filed suit for the reasonable value of his services.

The trial court found that the original contract, under which plaintiff was entitled to 40% of the fee ultimately recovered, was abandoned by the parties in light of the new federal legislation which created new problems entirely different from those originally anticipated. The trial court thereupon awarded plaintiff $9,000 as the reasonable value of the services which he had rendered.

On appeal, the defendants argued that if the original contract was abandoned, then the three attorneys must have proceeded with the case as joint venturers entitled to share equally in the fee to be recovered.

It was further argued that since the parties had failed to set plaintiff's compensation, he was a joint venturer with them and as such he was entitled to receive only one-third of the fee, or $6,333.33. In rejecting defendants' contention, the appellate court said, at page 640 of 190 S.E.: "* * * under the evidence it was shown that the original contract between the parties negatived the idea of any joint adventure, and that such contract * * * was abandoned by all parties, * * * without any agreement as to how the fees should in that case be divided between them, and that the services performed by the local attorney were different and more onerous in volume and responsibility than the work to be done under the original agreement, and under the evidence the court was authorized to find that for the services actually performed by the local attorney he was reasonably entitled to receive $9,000 out of the total amount of fees awarded jointly by the District Court of the United States. 'Ordinarily, when one renders services or transfers property valuable to another, which the latter accepts, a promise is implied to pay the reasonable value thereof.'"

We must also reject appellants' argument that statements in respondents' answer that Bunn and Wood were "associated" with them and that they worked in "cooperation" and in "conjunction" with them in "counselling" and in "representing" with them the interests of the client amounted to admissions that there was a joint venture. These forms of expression are equally consistent with the relationship which the court found to exist. Indeed, appellant Wood, in his own testimony, used the word "associated" in reference to the original relationship which admittedly was purely one of employment. Concerning respondents' acceptance of his $15,000 counter proposal, Wood testified: "The following morning Mr. Bunn advised me that Mr. Lucas had telephoned him, saying that they would like to have us *associated.*"

Appellants' final contention is that the trial court's award of $40,000 must be held inadequate as a matter of law, assuming that the reasonable value of their services is the proper measure of their recovery. This argument is based very largely upon the following unwarranted assumptions of fact: (1) that appellants performed the major share of the services which accomplished the favorable result for the client; (2) that respondents ultimately will receive fees approximating $400,000; and (3) that the reasonable value of the services rendered jointly by appellants and respondents on behalf of the client was $400,000. These assumptions are not justified by the record, and, certainly, the evidence does not compel their acceptance. The client retained respondents to represent her throughout the probate proceedings. Their services began long before appellants were employed, and presumably continued long after appellants were discharged. The trial court could well have believed from the evidence, not only that respondents carried the full responsibility to the client, but also that they performed the greater part of the work in connection with the heirship proceedings and related matters. The record does not disclose the amount of the fees which respondents had received up to the time of the trial of this action. The trial court properly sustained an objection to a question designed to elicit this fact on the ground that it was immaterial.

[11] A short but complete answer to appellants' argument, insofar as it is based on their assumption relative to the amount which respondents ultimately will receive under their contract with the client, is simply this: The reasonableness of respondents' fee contract has never been an issue in this case, and has no bearing whatsoever upon the reasonable value of appellants' services. Whether respondents ultimately would receive from the client the full amount of the fees called for by their contingent fee contract was a matter of pure speculation with which the trial court in this case was in no way concerned.

There was ample evidence before the court to indicate the nature and extent of appellants' legal services and to afford a basis for determining their reasonable value. Practically all of appellants' services were rendered between October 11, 1956, and January 7, 1957, when the case was settled—a period of less than three months. Appellants gave considerable testimony concerning the nature and extent of their services. They admitted that during this period their services in connection with the estate of Crawford occupied only a portion of their professional time. Moreover, it is to be emphasized that, insofar as the client was concerned, the responsibility for the conduct of the litigation rested entirely upon respondents.

[12] What constitutes a reasonable attorney's fee is primarily a question of fact for the trial court, and the amount awarded will not be disturbed on appeal unless an abuse of discretion is clearly shown. As stated in State ex rel. State Public Works Board v. Westover Co., 140 Cal.App.2d 447, 450, 295 P.2d 96, 97: "We are not given authority to fix a reasonable fee on appeal * * * the appeal is not a trial de novo of the basic issue of reasonableness of the fee allowed. What constitutes a reasonable fee is and ought to be confided in the first instance to the trier of fact, the court called upon to make the allowance, and it matters not whether an appellate court sitting in review of the trial court's order finds itself in agreement with or differing from the amount so fixed. We can inquire only whether or not the sum allowed is so exorbitant that its allowance constitutes a palpable and plain abuse of discretion."

[13] Expert testimony as to the reasonable value of attorney's legal services is unnecessary. Barlin v. Barlin, 156 Cal. App.2d 143, 149, 319 P.2d 87; Mitchell v. Towne, 31 Cal.App.2d 259, 266, 87 P.2d 908. "The value of attorney's services is a matter with which a judge must necessarily be familiar. When the court is informed of the extent and nature of such services, its own experience furnishes it with every element necessary to fix their value." Spencer v. Collins, 156 Cal. 298, 307, 104 P. 320, 324.

[14] It is to be remembered that appellant Wood, in making his $15,000 counter proposal, justified his proposal by emphasing the fact that he would expect to do his own research, to play a dominant role in settlement negotiations and to assume a considerable amount of responsibility. Hence, the original contract of employment constituted some evidence of the value which appellants, themselves, had placed upon their services. Mitchell v. Towne, supra, 31 Cal.App.2d 259, 266, 87 P.2d 908; cf. Oliver v. Campbell, 43 Cal.2d 298, 305, 273 P.2d 15. From the evidence in this case the trial court could very well have found that a very substantial proportion of all services which appellants rendered were rendered prior to November 20, 1956, and, hence, were within the contemplation of the original agreement. As a matter of fact, the settlement of the case relieved appellants of substantial work which would have been incident to a contested trial, work which clearly would have been within the contemplation of the $15,000 fee agreement. And a substantial part of the work actually done after November 21, 1956, could properly be regarded as having been contemplated by that agreement. The court could reasonably have found that the services which appellants performed after November 21, 1956, were of no greater value than those which they had rendered prior to that date.

The able and experienced trial judge awarded appellants two and two-thirds times the $15,000 fee which they had agreed to accept at the outset. We conclude from our review of the record that the award of $40,000 for appellants' services cannot fairly be regarded as niggardly or unreasonable. Certainly this award constituted no abuse of discretion.

The judgment is affirmed.

FOX, P. J., and ASHBURN, J., concur.

172 Cal.App.2d 104

Edward M. MALONEY, Individually and doing business as Red Maloney's, Petitioner and Appellant,

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL and the Department of Alcoholic Beverage Control Appeals Board, Respondents.

Civ. 18558.

District Court of Appeal, First District, Division 2, California.

July 17, 1959.

Mandamus proceeding by licensee to set aside decision of Department of Alcoholic Beverage Control revoking his license. The Superior Court, City and County of San Francisco, Milton D. Sapiro, J., entered judgment denying petition and licensee appealed. The District Court of Appeal, Kaufman, P. J., held that there was substantial evidence to support finding that licensee had permitted gambling on premises in violation of statute and that he and his employees had pleaded guilty to public offense involving moral turpitude, namely a conspiracy to evade federal gambling tax, and there was no abuse of discretion by Department in ordering revocation of license.

Affirmed.

1. Mandamus ⚷168(4)

In licensee's mandamus proceeding to set aside decision of Department of Alcoholic Beverage Control revoking license, there was substantial evidence to support findings of Department that licensee and his employees had permitted gambling on licensed premises and that licensee and employees had pleaded guilty to felony of conspiracy to evade payment of federal gambling taxes. West's Ann.Bus. & Prof.Code, §§ 24200(a, b, d), 25601; West's Ann.Pen. Code, § 337a; 18 U.S.C.A. § 371; 26 U.S.C.A. (I.R.C.1954) §§ 4401, 4411, 7201.

2. Mandamus ⚷172

Where it was apparent that Department of Alcoholic Beverage Control's decision revoking license would be valid if any single count could be sustained, it was not necessary to deal with all of the licensee's contentions on the various counts.

3. Intoxicating Liquors ⚷106(4)

There was no abuse of discretion by Department of Alcoholic Beverage Control in revoking license upon finding that licensee and his employees had permitted gambling on licensed premises and that licensee and his employees had conspired to evade payment of federal gambling taxes. West's Ann.Bus. & Prof.Code, §§ 24200(a, d), 25601; 18 U.S.C.A. § 371; 26 U.S.C.A. (I.R.C.1954) §§ 4401, 4411, 7201; West's Ann.Pen.Code, § 337a.

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Emmet F. Hagerty, San Francisco, for appellant.

Stanley Mosk, Atty. Gen., Albert W. Harris, Jr., Deputy Atty. Gen., for respondents.

KAUFMAN, Presiding Justice.

This is an appeal by Edward M. Maloney, the licensee, from a judgment of the trial court denying his petition for a writ of mandate to set aside a decision of the Department of Alcoholic Beverage Control revoking his license.

In April 1953, appellant applied for and received a general on-sale liquor license for premises known as "Red Maloney's" in San Francisco. In April 1956, the Department filed an accusation against the appellant charging him with violations of Sections 25601 and 24200, subdivision (a), (b) and (d) of the Alcoholic Beverage Control Act, Business and Professions Code. The hearing officer found that the accusation was true, as the appellant had permitted gambling on the premises in violation of Section 25601 and Section 337a of the Penal Code, and the appellant and his employees had pleaded guilty to a public offense involving moral turpitude, namely a violation of Title 18 U.S.C. Section 371 [conspiracy to commit offense or to defraud United States], and Title 26, Sections

4401, 4411, and 7201 [attempt to evade or defeat any tax imposed by Title 26]. The hearing officer found that grounds for suspension or revocation of the license under Section 24200, subdivisions (a) and (d) had been established and recommended revocation of the license on each of the four counts contained in the accusation. The Department adopted his recommendation and revoked appellant's license in December 1956.

The appellant then appealed to the Alcoholic Beverage Control Appeals Board, which affirmed the Department on all grounds. Appellant commenced this action in the Superior Court to obtain a writ of mandate to set aside the decision of the Department. The Superior Court received the entire record and denied the appellant's petition. On appeal, it is argued that: (1) the findings of fact made by the Department are not supported by substantial evidence; and (2) the penalty imposed is unduly harsh and disproportionate to the offense.

[1] The Department found that the appellant and his employees engaged in bookmaking and permitted bookmaking to take place on the licensed premises (Counts I, II, and IV), and that the appellant licensee and his employees pleaded guilty to the felony of conspiracy to evade payment of federal taxes (Count III). The evidence is uncontroverted. The appellant himself admitted that he had accepted horse race bets at his premises; that he had instructed his employees to accept such wagers, and that his income from these operations had been between $100–$200 a day. Several witnesses testified that they had placed bets on the premises during the time in question. Two of appellant's employees testified that they had accepted bets and had also pleaded guilty to a federal charge of wilfully failing to pay the federal tax levied on every person in the business of accepting wagers. Certified copies of the federal court indictments against the appellant and his employees were received into evidence, as well as a certified copy of the judgment and commitment of appellant. In the light of the above record, there can be no question that the findings are amply supported by the evidence.

[2] The appellant next argues that the Department acted arbitrarily in determining that continuance of the license would be contrary to public welfare and morals, that neither bookmaking nor evidence of an attempt to evade the federal gambling tax involves moral turpitude and that bookmaking on the premises is not a violation of Section 25601. It is not necessary to deal with all of these contentions, as it is apparent that the Department's decision would still be a valid revocation if any single count can be sustained. Mast v. State Board of Optometry, 139 Cal.App.2d 78, 293 P.2d 148. Therefore, appellant's lengthy contentions that avoidance of the federal tax does not involve moral turpitude need not detain us further here.

[3] In Macfarlane v. Department of Alcoholic Bev. Control, 51 Cal.2d 84, 330 P.2d 769, a license was revoked because the licensee had taken a two-dollar bet on the premises and had subsequently been convicted of a violation of Section 337a, subdivision 3, of the Penal Code. In affirming the judgment the court said at pages 89, 90 and 91 of 51 Cal.2d, at page 772 of 330 P.2d:

> "The record clearly indicates that the department's decision was based upon the acts committed by petitioner which constituted a violation of section 337a, (3), and upon the fact that he had been convicted of the violation, rather than upon any view or determination that the crime was a felony on the one hand, or a misdemeanor on the other. Thus, as already quoted hereinabove, the department 'found' that 'the taking of unlawful bets on horse races in (licensed) premises * * * and * * * by (licensed) persons * * * are both contrary to public welfare and morals. * * *' And the 'determination of issues' was that petitioner violated section 377a (3), on the licensed premises, that under the constitutional provisions

> such *violation* constitutes ground for suspension or revocation of license, and that by reason of the *conviction* of petitioner for such violation 'continuance of the license would be contrary to public welfare and morals within the meaning of Article XX Section 22 of the Constitution.' "

Appellant's final contention is that the penalty is unduly harsh and disproporionate to the crime. We cannot agree. In upholding the revocation of a license in a case where one partner had failed to obtain a renewal license in the name of the partnership, instead of in his own name alone (Martin v. Alcoholic Beverage Control Appeals Bd., 52 Cal.2d 287, 341 P.2d 296, our Supreme Court, relying on the Macfarlane case, supra, where a similar contention was raised, said at page 300 of 341 P.2d:

> "* * * In our recent decision in Macfarlane v. Department of Alcoholic Beverage Control, 51 Cal.2d 84, 330 P.2d 769, 773, where a liquor license was revoked upon evidence that the licensee had violated section 337a of the Penal Code (the taking of unlawful bets on horse races at the licensed premises), we said: 'Petitioner also urges that revocation, rather than mere suspension, of license is too harsh. On the record this might appear to some of us to be a just criticism. But no such determination is within our proper function. The conduct for which the license was revoked constituted a crime under the laws of this State, and was thus at least technically contrary to public welfare or morals. The Constitution (art. XX, § 22) expressly authorizes license revocation in the discretion of the department under such circumstances, and this court is not free to substitute its own discretion as to the matter, even if it were inclined so to do.' [51 Cal.2d at page 91, 330 P.2d at page 773.]
>
> "* * * The most that can be said is that reasonable minds might differ as to the propriety of the penalty imposed, but this fact serves only to fortify the conclusion that the Department acted within the broad area of discretion conferred upon it. Const. art. XX, § 22; Martin v. Alcoholic Beverage Control Appeals Board, supra. We are therefore of the opinion that the trial court correctly determined that the Appeals Board had exceeded its powers in reversing the decision of the Department."

We can see no abuse of discretion here. In view of the foregoing, the judgment denying the petition for a writ of mandate is affirmed.

DOOLING and DRAPER, JJ., concur.

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172 Cal.App.2d 532

Leonard GREENBERG, Plaintiff and Respondent,

v.

Ernest ROSE, Nick Cominos and Joseph Young, Defendants and Appellants.

Civ. 23306.

District Court of Appeal, Second District, Division 3, California.

July 31, 1959.

As Modified Aug. 17, 1959.

Action for recovery of one-fourth of the net profits of a joint venture for production of a motion picture. The Superior Court, Los Angeles County, John P. McMurray, J., entered judgment in favor of plaintiff and defendants appealed. The District Court of Appeal, Shinn, P. J., held that where defendants did not furnish in their brief or supplement thereto a statement of the evidence with respect to alleged failure of plaintiff to perform the agreement on his part, District Court of Appeal would not search the record for evidence bearing upon such issue, but findings that plaintiff rendered performance which was due until defendants wrongfully prevented him from further performance were conclusive, and therefore, plaintiff was entitled to his agreed share of profits notwithstanding refusal of defendants to accept his further service, and their attempted ouster of him from further participation.

Judgment affirmed.

1. Appeal and Error ⚿757(3)

Where defendants, in action for share of joint venture profits allegedly due plaintiff, did not furnish in their brief or supplement thereto a statement of the evidence with respect to alleged failure of plaintiff to perform the agreement on his part, District Court of Appeal would not search the record for evidence bearing upon such issue, but findings that plaintiff rendered performance which was due until defendants wrongfully prevented him from further performance were conclusive.

2. Joint Adventures ⚿4(1)

Where a joint adventurer performed the agreement on his part he was entitled to his agreed share of profits notwithstanding refusal on the part of other adventurers to accept his further service, and their attempted ouster of him from further participation.

3. Joint Adventures ⚿4(3)

Where a joint venture agreement made no provision for compensation for personal services, an ousted joint adventurer was entitled to an agreed one fourth of the profits, rather than an award of profits commensurate with the extent and value of his services.

4. Appeal and Error ⚿1050(1)

In action for recovery of one fourth of the net profits of a joint venture, error, if any, in receipt in evidence of a letter written by defendant's attorney in which it was stated that defendant had agreed with plaintiff that he would share equally with them in the net profits of the venture, was not prejudicial on theory trial court improperly considered the letter to be an admission of plaintiff's right to one fourth of the net profits of the venture, since District Court of Appeal, on review, looked to the trial court's findings for the facts that were established, and not to the reasons stated for its factual conclusions.

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Theodore H. Cominos, Lawrence Shostak, Salinas, for appellants.

Pregerson & Costley, Harry Pregerson, William M. Costley, Van Nuys, for respondent.

SHINN, Presiding Justice.

This is an appeal by defendants Rose, Cominos and Young from a judgment declaring plaintiff Greenberg to be entitled to one-fourth of the net profits of a joint venture for the production of a motion picture, the subject of which was mosaics.

Young was a mosaics craftsman; Rose was a film specialist; Cominos and Greenberg came into the venture through the submission of scripts, the one prepared by Cominos having been selected. It was orally agreed that Rose would provide the equipment and film, for which he would be reimbursed; all the participants were to give their services and endeavor to obtain outside financing, but there was no agreement for the contribution of any specific funds by the parties. Shooting of film commenced in October 1954 and continued on week-ends to completion in July 1956. The picture has now been sold and the proceeds are subject to distribution. Rose contributed his services, camera, film and $91.57 in cash, all four contributed services, and Cominos contributed $50 in cash. There was no outside financing.

Greenberg testified that he devoted 100 hours of work on the project; Cominos estimated that he had put in 500–600 hours.

Appellants admit that the joint venture agreement called for a four-way division of profits after Rose was reimbursed and the others had received a return of their cash contributions, but they contend the joint venture was terminated by their expulsion of Greenberg for cause. Therefore, they contend, he should receive compensation for his services but no part of the profits. The ouster of Greenberg is asserted to have taken place in May 1955 when some 80% of the picture had been made. After that time Greenberg rendered no services but neither did he refuse to contribute his work.

[1, 2] The contentions of appellants rest upon the alleged dissolution of the joint venture. They say that Greenberg did not perform his part of the agreement; he failed to contribute money or to seek other financing and they became dissatisfied with his services and discharged him. This contention does not deserve consideration on the appeal. Appellants have not furnished in their brief or a supplement thereto a statement of the evidence with respect to the alleged failure of Greenberg to perform the agreement on his part. (Rule 13, Rules on Appeal.)

The parties assume that the findings establish that Greenberg did render performance for as long as he was permitted to participate and that his attempted ouster was wrongful and the briefs are written upon that supposition. We shall not search the record for the evidence bearing upon this issue. Goldring v. Goldring, 94 Cal.App.2d 643, 211 P.2d 342; Hickson v. Thielman, 147 Cal.App.2d 11, 15, 304 P.2d 122, and cases cited.

The "findings" (to which we shall later refer) that Greenberg rendered performance which was due from him until appellants wrongfully prevented further performance on his part are conclusive on the appeal. When the attack upon those findings failed, for the reasons we have stated, the contention that the joint venture was legally terminated also fails, and the principles of law which govern where there has been a dissolution of the venture are without application. There is, of course, no contention that a member of a joint venture who has performed services as agreed can be deprived of his agreed share of the profits of the venture by a refusal on the part of his associates to accept his further services and an attempt to oust him from further participation.

In taking an accounting the court found that receipts to the date of trial amounted to $11,708.05, the allowable expenses to $9,070.59, the net proceeds to $2,637.46 and that plaintiff's share amounted to $659.37. It was decreed that plaintiff should have one-fourth of the "net proceeds" to be realized in the future. In the computation of the net proceeds the respective parties were held to be entitled to reimbursement for their contributions of cash, but that there should be no allowance made for salaries, drawing accounts, litigation expenses or attorney's fees in connection with the case.

[3] Appellants contend that there should be paid to each party an amount commensurate with the extent and value of his services as a part of the deductible expense. The contention is untenable. The agreement as pleaded and as found by the court made no provision for compensation for personal services. Our attention has not been called to any evidence of an agreement that anyone was to have a salary or drawing account or was to be compensated for his personal services as a part of the general expense. Appellants argue that Greenberg rendered less service than the others and thus did not earn a full one-fourth of the profits. But this is merely an assertion, unsupported by a statement of the evidence on the subject and can carry little weight in view of the fact that appellants wrongfully prevented full performance by Greenberg.

[4] Error is assigned in the receipt in evidence over objections of appellants of a letter written by their attorney to the attorneys for plaintiff in which it was stated that the appellants had agreed with plaintiff that he would share equally with them in the net profits of the venture. Rose testified that the attorney was unauthorized to make any admissions. We find no error in the ruling and no tenable ground for complaint. Appellants say that the letter meant only that the agreement was for an equal division of profits and was not an

admission that plaintiff had performed the agreement upon his part. We so understand the letter. Appellants concede that it correctly stated the agreement. But appellants assert that the trial court considered the letter to be an admission of plaintiff's right to one-fourth of the net profits of the venture as of the time of trial. That fact, however, does not appear in the record. But even if the court misunderstood the meaning of the letter it is of no consequence. We look to the court's findings for the facts that were established and not to the remarks of the court or the reasons stated for its definite factual conclusions.

A few simple findings would have sufficed, namely, the terms of the agreement, its performance by plaintiff, appellants' prevention of full performance, and a finding as to the accounting. We are furnished a set of 34 findings and 11 conclusions of law. The findings made 54 references to the various paragraphs of six causes of action of the complaint and to each paragraph of each answer to each cause of action. To closely analyze these findings by reading and rereading each paragraph of each finding, each allegation and each denial, would consume hours of painstaking study and comparison. This manner of drafting findings should be discouraged. It disregards the rule that has been stated a thousand times or more that findings should cover only the ultimate facts in issue. We have not attempted the arduous task of complete analysis. We have, however, gone far enough to discover that the court inadvertently found to be untrue the allegation of the complaint that "plaintiff has carried out his part of the said agreement in every particular, and done and performed everything by him to be performed." As far as we have gone we have discovered no finding that plaintiff did perform his part of the agreement. However, it is obvious that the court believed it was making such a finding, and that the parties understand that it was made. The complexities of the form of findings here employed invite just such mistakes. No point is made in appellants' brief of the omission. We ignore it, except to express the hope that our comments will come to the attention of practitioners who will profit by them and prepare their findings in simple form.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

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173 Cal.App.2d 94

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Donald LILYROTH, Defendant and Appellant.

Cr. 1503.

District Court of Appeal, Fourth District, California.

Aug. 13, 1959.

Prosecution for escape. The Superior Court, Riverside County, John G. Gabbert, J., entered judgment of conviction and defendant appealed. The District Court of Appeal, Griffin, P. J., held that where defendant was convicted of a misdemeanor violation and was confined in an industrial road camp, and thereafter escaped from custody of the person in charge of him while returning from certain county work, defendant was guilty of a felony under section of the Penal Code providing that every prisoner making such an escape is guilty of a felony, notwithstanding the fact that at the time of defendant's escape he was under the control of an employee of the county road department who was not a special deputy sheriff.

Judgment affirmed.

1. Escape 🔑1

Where defendant was convicted of a misdemeanor violation and was confined in an industrial road camp, and thereafter escaped from custody of the person in charge of him while returning from certain county work, defendant was guilty of a felony under section of the Penal Code providing that every prisoner making such an escape is guilty of a felony, notwithstanding the fact that at the time of defendant's escape he was under the control of an employee of the county road department who was not a special deputy sheriff. West's Ann. Pen.Code, §§ 4532, 12025.

2. Convicts ⚿12

Statutes providing for establishment of industrial road camps are constitutional and not discriminatory. West's Ann.Pen.Code, §§ 4100 et seq., 4200 et seq.

3. Constitutional Law ⚿83(2)
Convicts ⚿12

Statute making it a felony for a person confined in an industrial road camp to escape could not be deemed unconstitutional on theory that it authorized granting of custody of a prisoner to one other than a sheriff for purpose of having prisoner engage in public works, and thereby created a system of peonage, in view of fact that the county board of supervisors does not have unrestrained power to dispose of prisoners in such a camp, but has only the authority which is vested in the supervisors by law. West's Ann.Pen.Code, § 4532.

4. Escape ⚿10

Evidence of legality of defendant's sentencing on a prior charge and confinement at time of his escape from a truck while being returned to an industrial road camp was sufficient to sustain his conviction for escape. West's Ann.Pen.Code, § 4532.

5. Prisons ⚿13

The regularity of actions of prisoner administrators in transferring a prisoner from one prison to another does not affect the legality of the original commitment.

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John B. Morgan, Riverside, for appellant; and Donald Lilyroth, in pro. per.

Edmund G. Brown, Atty. Gen., William E. James, Asst. Atty. Gen., for respondent.

GRIFFIN, Presiding Justice.

Defendant appeals from a judgment upon a jury verdict of guilty of the crime of escape, a violation of section 4532 of the Penal Code. Defendant had pleaded not guilty and "Not guilty by reason of insanity" and at a jury trial was found guilty of the offense charged and was found to be sane at the time of its commission. The evidence indicates that defendant was convicted of a misdemeanor violation of section 12025 of the Penal Code, carrying a concealed weapon, and was committed to the custody of the sheriff of Riverside County for a term of six months. It was determined that he would be confined at the Industrial Road Camp at Banning, California, where he was assigned to work under the supervision of Mr. Rose, an employee of the Riverside County Road Department and not a deputy sheriff. On November 25, 1957, twelve days after defendant's conviction and sentencing, Mr. Rose took his group of prisoners out to work on the road in a truck which had been converted for use in transporting prisoners. It appears that other crews in custody of deputy sheriffs also were sent to the same project. After completing their day's work the prisoners, defendant among them, were reloaded on the truck and Mr. Rose drove the truck back to the industrial road camp. While the truck was proceeding along the highway, Mr. Rose heard a noise from the rear and some shouting. He stopped the truck and as he did so he saw the back of a man running through the brush. A roll call was taken and defendant was discovered to be absent although he had not been given permission to leave by anyone in a position to authorize his departure. Mr. Rose was responsible for the custody of prisoners while transporting them.

Defendant seeks a reversal on three grounds: (1) That he was not in lawful custody at the time of the alleged escape because he was under the control of an employee of the county road department who was not a special deputy sheriff; (2) If section 4532 of the Penal Code is construed as prohibiting escape from the control of a county employee who is not a special deputy sheriff, the statute is unconstitutional because it would permit the sheriff to establish a system of "peonage"; and (3) That the evidence of defendant's being lawfully confined at the time of his alleged escape was insufficient.

[1] In the early case of Hicks v. Folks, 1893, 97 Cal. 241, 32 P. 8, the Supreme Court resolved the conflict between then section 4176, subsection 6 of the Political Code (now section 26605 of the Government Code) and then sections 1613 and 1614 of the Penal Code (now sections 4017 and 4018 of the Penal Code). The former section generally provides that the sheriff shall take charge of the county jail and custody of the prisoners in it and the latter sections provide that the county board of supervisors may require certain prisoners to work on the public roads or ways in the county. The court said "These statutes do not impose any additional duties upon the sheriff. If it were intended that prisoners, while at labor, should be in immediate custody of the sheriff, it is reasonable to suppose the statute would have said so. The authority given the board of supervisors is broad enough to include the custody of the prisoners while absent from the jail * * *." In People v. Vanderburg, 67 Cal. App. 217, 227 P. 621, it was held that although a person having custody of prisoners was paid by the highway commission he was a prison guard where he was under the control of prison authorities and responsible for the custody of the prisoners who worked under his direction. See also People v. Johnson, 67 Cal.App. 680, 228 P. 357, and People v. Smith, 103 Cal.App. 747, 284 P. 1066. Section 4532 of the Penal Code provides: "Every prisoner * * * convicted of a misdemeanor who is confined in any * * * industrial road camp * * * and who thereafter escapes or attempts to escape from such * * * industrial road camp or from the custody of the officer or *person* in charge of him while engaged on or going to or returning from such county work or from the custody of any officer or *person* in whose lawful custody he is, is guilty of a felony * * *." Defendant's contention that to be unlawful an escape must consist of an unauthorized departure from the immediate presence and custody of the sheriff or his deputy must be rejected as being contrary to the plain meaning of the statute.

[2, 3] Defendant's second contention that if Section 4532 of the Penal Code is interpreted to authorize the granting of custody of a prisoner to one other than a sheriff for purposes of having a prisoner engage in public works the statute in question is unconstitutional in that it creates a system of peonage is similarly without merit. In People v. Doetschman, 1945, 69 Cal.App.2d 486, 159 P.2d 418, this court held that the statutes providing for establishment of industrial road camps were constitutional and not discriminatory. The reasons for county industrial road camps are aptly described in Penal Code, section 4100: "It is the purpose of this article to make possible the substitution of constructive labor for profitless prison confinement in order that those who are charged with or convicted of public offenses and deprived of their liberty may become better citizens because of their disciplinary experience."

The County Board of Supervisors does not have unrestrained power to dispose of prisoners but has only the authority which is vested in them by law. Statutory provision is made for compensation of each prisoner in custody on any industrial farm or industrial road camp for each day's work done by him and it is provided that so far as practical those in custody on an industrial farm shall be employed in productive labor. The products of the labor so employed are to be used on the industrial farm or to supply other county institutions or persons with whose relief and support the county is charged. Penal Code, sec. 4100 et seq.; sec. 4200 et seq.

[4, 5] Defendant's remaining contention is similarly without merit. The evidence of the legality of defendant's sentencing on the prior charge and confinement at the

time of his escape is ample and unchallenged in the record. The regularity of the actions of prison administrators in transferring a prisoner from one prison to another does not affect the legality of the original commitment. People v. French, 61 Cal.App. 275, 214 P. 1003; People v. Hadley, 88 Cal.App.2d 734, 199 P.2d 382. It is presumed that an official duty has been regularly performed. Code Civ.Proc., § 1963. Here there is no evidence indicating that defendant's confinement was other than lawful.

The cases of Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461, and Smith v. O'Grady, 312 U.S. 329, 61 S.Ct. 572, 85 L.Ed. 859, cited in defendant's brief, involve the defendant's right to counsel under the Sixth and Fourteenth amendments to the Federal Constitution, and are not in point in this case.

The judgment is affirmed.

MUSSELL and SHEPARD, JJ., concur.

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172 Cal.App.2d 714

R. J. DARTER, Executor of the Last Will and Testament of Anna Magnussen, Deceased, substituted for Anna Magnussen, Plaintiff and Respondent,

v.

Carsten MAGNUSSEN, Defendant and Appellant (two cases).

Nos. 18153, 18195.

District Court of Appeal, First District, Division 1, California.

Aug. 10, 1959.

Divorce suit by wife, wherein executor of her estate was substituted for plaintiff upon her death after entry of interlocutory decree of divorce. The Superior Court, Alameda County, Thomas J. Ledwich and Donald K. Quayle, JJ., respectively, entered an order denying defendant's motion for modification of interlocutory decree and order appointing a receiver to sell realty as provided in decree, and defendant appealed and the appeals were consolidated. The District Court of Appeal, Bray, P. J., held, inter alia, that death of wife approximately one and one-half months after entry of interlocutory decree terminated interlocutory period and that court had no power to modify or strike from interlocutory decree provision for sale of community property realty and payment of $20,000 from proceeds of such sale to wife, though court expressly reserved jurisdiction to make any further orders respecting such sale, and that death of wife did not divest court of jurisdiction to enforce terms of decree.

Orders affirmed.

1. Divorce ⚷254

Though provision is made by statute for modification or termination of alimony award, trial court is without jurisdiction to modify unqualified disposition of property rights made in interlocutory decree of divorce except in accordance with methods applicable to judgments generally. West's Ann.Code Civ.Proc. § 473; West's Ann. Civ.Code, § 139.

2. Divorce ⚷254

Provision in interlocutory divorce decree for sale of community property realty and payment of $20,000 from proceeds of such sale to wife to enable her to reduce or discharge existing encumbrances on other realty awarded to her was an award of community property and not an alimony award subject to modification by trial court, though decree stated that such award was in lieu of alimony, and reservation by court of jurisdiction to make any further order respecting sale of such property did not affect the finality of such property award. West's Ann.Civ.Code, § 139.

3. Divorce ⚷249(3), 255

Court has jurisdiction to make immediate disposal of community property by interlocutory decree of divorce and when such decree becomes final, it is a conclusive adjudication and is res judicata with respect to award of community property.

4. Divorce ⚷156, 254

Death of wife approximately one and one-half months after entry of interlocutory decree of divorce terminated interlocutory period, and upon failure of husband to appeal from interlocutory decree, it became final and trial court had no power to modify or strike portion of interlocutory decree ordering sale of community property realty and payment of $20,000 from proceeds of such sale to wife as and for her share of community property. West's Ann.Civ.Code, § 132.

5. Divorce ⚷83

Death of one of the parties to suit for divorce abates the action and terminates the jurisdiction of court to proceed with action or make any further determination of property rights, alimony, costs or attorney's fees. West's Ann.Civ.Code, § 132.

6. Divorce ⚷83

Death of a party to suit for divorce after entry of interlocutory decree does not affect court's power to take such action as may still be necessary to enforce property rights adjudicated by interlocutory decree. West's Ann.Civ.Code, § 132.

7. Abatement and Revival ⚷67

Even in actions which do not survive death, death of plaintiff after judgment in his favor and while such judgment stands does not abate action or affect validity of judgment, which becomes part of estate of deceased judgment creditor and may be enforced by his representative. West's Ann.Code Civ.Proc. § 686, subd. 1.

8. Divorce ⚷83

Death of wife after entry of interlocutory decree of divorce did not divest court of jurisdiction to enforce provisions of decree making final disposition of community property rights of the parties. West's Ann.Code Civ.Proc. § 686, subd. 1; West's Ann.Civ.Code, § 132.

9. Divorce ⚷83

Where wife died approximately one and one-half months after entry of interlocutory decree of divorce awarding specified community property realty to wife and ordering sale of other such realty and payment of specified amount from proceeds of sale to wife, and no attack was made on decree either by appeal or under statute, property rights of the parties were determined by decree and it was the duty of court to enforce terms of decree, and court had no power to determine that such realty should not be sold as directed, notwithstanding reservation of jurisdiction to make any further orders respecting sale of such property. West's Ann.Code Civ. Proc. §§ 473, 564, subd. 3, 686, subd. 1; West's Ann.Civ.Code, § 132.

10. Divorce ⚷267

After interlocutory decree of divorce, ordering sale of community property realty and payment of $20,000 from proceeds of such sale to wife, became final, court had authority under statute to appoint receiver to sell such realty in order to enforce and carry decree into effect. West's Ann.Code Civ.Proc. § 564, subd. 3.

11. Divorce ⚷255

Provision in interlocutory decree of divorce that $4,000 from proceeds of sale of community property realty should be paid to wife's attorneys for services rendered by them in divorce suit and in an action brought by husband and wife against others was not subject to collateral attack by motion to strike such award from decree, in view of statute authorizing award of attorney's fees as may be reasonably necessary for prosecution or defense of divorce suit or any proceeding relating thereto. West's Ann.Civ.Code, § 137.3.

12. Divorce ⚷83

Court had jurisdiction to enforce terms of interlocutory decree of divorce, including provision that community property realty be sold and that from proceeds of sale $4,000 be paid to wife's attorneys for services rendered by them in divorce suit and in another action, though wife died after entry of interlocutory decree and before sale of such realty. West's Ann. Code Civ.Proc. § 686, subd. 1; West's Ann. Civ.Code, § 137.3.

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Robert H. Kroninger, Oakland, for appellant.

Harris, Darter & Older, Oakland, Cyril Viadro, San Francisco, of counsel, for respondent.

BRAY, Presiding Justice.

Two consolidated appeals by defendant in a divorce action. One (No. 18153) is from an order denying defendant's motion for modification of the interlocutory decree. The other (No. 18195) is from an order appointing a receiver to sell real property as provided in that decree.

Questions Presented.

1. Did the court have power by reason of Anna's death to modify the community property award to her in the interlocutory decree?

2. Did the court abuse its discretion in appointing a receiver?

3. Did the court err in refusing to strike from the interlocutory decree the award to plaintiff of attorney's fees?

Record.

On March 11, 1957, plaintiff Anna Magnussen was granted an interlocutory decree of divorce on grounds of defendant's extreme cruelty. Finding that the property was community property, the court awarded Anna three duplexes, a triplex and certain personal property. Defendant was awarded certain personal property and was ordered to pay $75 per month for support of the minor child.

The parties owned a community property ranch of some five acres. The disposition of this ranch was set forth in paragraph X of the decree, and will be discussed later.

No appeal was taken from that decree by either party.

Anna died April 28, (approximately 1½ months after the entry of the interlocutory decree). May 10, defendant moved to modify the interlocutory decree, principally by striking paragraph X and redistributing the ranch property on the ground of a material change in circumstances in that plaintiff had died. The court denied the motion. Defendant appealed. December 18, Darter as executor of Anna's estate, who had been substituted for Anna in the action, moved for an order appointing a receiver to sell the ranch "in satisfaction of the interlocutory judgment" and for an order directing payment of attorney's fees in connection with said motion. An order appointing receiver was made and denying Darter's request for attorney's fees. Defendant appealed. The denial of attorney's fees was not appealed.

1. Court had no Power to Change Paragraph X of the Interlocutory Decree.

That paragraph provided that the ranch be sold within 90 days; "that the Court hereby reserves jurisdiction to make any further order respecting the sale of said property, including the appointment of a commissioner, that the court may deem necessary or advisable." The proceeds, after payment of expenses of sale, "are hereby allocated as follows: 1. That the sum of $20,000 be paid to plaintiff herein as and for her share of community property and in lieu of alimony, to enable said plaintiff to reduce or discharge existing encumbrances on the real estate hereinabove awarded to her" (the duplexes and triplex hereinbefore mentioned). The balance of the proceeds after the payment of $4,000 attorney's fees to Anna and $4,000 attorney's fees to defendant, was to be paid defendant.

[1] The trial court is without jurisdiction to modify an unqualified disposition of property rights made in an interlocutory decree of divorce except in accordance with the methods applicable to judgments generally (e. g. modification on appeal or under section 473, Code of Civil Procedure).

Leupe v. Leupe, 1942, 21 Cal.2d 145, 148, 130 P.2d 697. An entirely different situation exists with respect to alimony. Section 139, Civil Code, provides for subsequent modification and termination. (Id., 21 Cal.2d at page 150, 130 P.2d at page 700; Dupont v. Dupont, 1935, 4 Cal.2d 227, 228, 48 P.2d 677; McClure v. McClure, 1935, 4 Cal.2d 356, 360, 49 P.2d 584, 100 A.L.R. 1257.

[2] The award of $20,000 was not alimony but an award of community property. The court said so in the decree. Even though it added "and in lieu of alimony" it said that the money was to enable plaintiff "to reduce or discharge existing encumbrances on the real estate hereinabove awarded to her." Defendant had remarried after obtaining a Nevada divorce. The court at the hearing stated its desire to avoid alimony because of the second wife. The provision in the decree reserving jurisdiction "to make any further order respecting *the sale* of said property" (emphasis added) did not purport to modify the property disposition. The court stated at the hearing: "* * * if not so sold, the Court reserves jurisdiction to make any appropriate order in the premises to *accomplish the sale thereof*, including the appointment of a commissioner if that becomes necessary or advisable." (Emphasis added.) It is obvious from the decree itself as well as from the statement of the court that the court's retaining of jurisdiction concerning the *sale* was without in any way affecting the finality of the property award.

[3, 4] Defendant contends that the court had no power to make a *present* disposition of the community property in the interlocutory decree, that the decree should have provided that the disposition would be effective only upon entry of the final decree, citing Dowd v. Dowd, 1952, 111 Cal.App.2d 760, 765, 245 P.2d 339; Slavich v. Slavich, 1951, 108 Cal.App.2d 451, 457, 239 P.2d 100; Dallman v. Dallman, 1958, 164 Cal.App.2d 815, 819, 331 P.2d 245. Those cases, however, were appeals from the interlocutory decree. In Leupe v. Leupe, supra, 21 Cal.2d 145, 130 P.2d 697, the court pointed out that it is fully established by the cases in this state that an immediate disposal of the property upon an interlocutory decree of divorce is within the jurisdiction of the trial court, although in cases dealing with direct appeals from interlocutory decrees it has been held that the trial court should not dispose of the community property immediately by such decree but should wait until such time as the marriage is absolutely dissolved. As there pointed out, when the interlocutory decree becomes final it is a conclusive adjudication and is res judicata with respect to awards of community property. Here the interlocutory decree had become final and the court had no power to strike the portion of the decree dealing with community property or to make any other disposition of it. As said in Leupe v. Leupe, supra, 21 Cal.2d at page 149, 130 P.2d at page 700, "The time for appeal having elapsed, the determination of property issues in the interlocutory decree became final and was no longer subject to modification * * *." If the disposition was erroneous, defendant's remedy would have been by appeal from the decree and not by this motion. Moreover, the death of Anna ended the interlocutory period. See Wilson v. Wilson, 1946, 76 Cal.App.2d 119, 172 P.2d 568, where we said: "There can be no doubt at all that the trial court has jurisdiction to make a present disposition of the community property in the interlocutory decree, and that upon that decree becoming final, it measures finally the property rights of the parties." 26 Cal.App.2d at page 130, 172 P.2d at page 574.

[5, 6] The death of one of the parties to a suit for divorce abates the action and terminates the jurisdiction of the court to proceed with the action or to make any *further* determination of property rights, alimony, costs or attorney's fees. Bevelle v. Bank of America Nat. Trust & Savings Ass'n, 1947, 80 Cal.App.2d 333, 334, 181 P.2d 730. However, the death of a party does not affect the court's power to take such action as may still have to be taken to

enforce the property rights adjudicated by the interlocutory decree.

Section 132, Civil Code, provides in part that "The death of either party after the entry of the interlocutory judgment does not impair the power of the court to enter final judgment * * *." In Gould v. Superior Court, 1920, 47 Cal.App. 197, 191 P. 56, the court in denying a petition for rehearing, in referring to its decision stated: "It was held that, although the court may have lost jurisdiction to make a final decree, after the death of the husband, dissolving the marriage status, the property rights fixed by the agreement and confirmed by the interlocutory decree still remained in existence, and that as to them the court retained jurisdiction to enter the final decree in the manner specified in the interlocutory decree." 47 Cal.App. at page 204, 191 P. at page 59. The rationale of the decision was the contract basis of the interlocutory decree in respect to the division of the property. And contract rights may endure beyond death. This view was later adopted in Klebora v. Klebora, 1931, 118 Cal.App. 613, 618–619, 5 P.2d 965.

In Leupe v. Leupe, supra, 21 Cal.2d at page 150, 130 P.2d at page 700, the court stated it reserved judgment upon the question "of the effect of an immediate disposition of property in an interlocutory decree of divorce where there is a reconciliation before the final decree" until the issue was presented directly, and it was not in that case. Based upon that reservation defendant contends that the court intimated that it would not consider in the event of a reconciliation the disposition of community property in an interlocutory decree to be final. We find no such intimation in the opinion. Moreover, it should be pointed out that section 132, Civil Code, supra, expressly provides that the death of a party after the interlocutory decree does not prevent the entry of a final decree.

[7] In general, "'Even in the case of actions which do not survive death, it is well settled that death of the plaintiff after judgment in his favor and while the judgment stands does not abate the action or affect the validity of the judgment. [Citations.] Such a judgment becomes part of his estate and may be enforced by his representatives. [Citation.] This rule rests upon the theory that the original wrong or claim is merged in the judgment and that thereafter the controversy is over the judgment and not over the original wrong.'" Widener v. Hartnett, 1938, 30 Cal.App.2d 165, 167–168, 85 P.2d 925, 926.

And section 686, Code of Civil Procedure, provides: "Notwithstanding the death of a party after the judgment, execution thereon may be issued, or it may be enforced, as follows:

"1. In case of the death of the judgment creditor, upon the application of his executor or administrator, or successor in interest; * * *."

[8] Therefore, the property rights having been finally determined by the interlocutory decree, the court was not divested of jurisdiction to enforce its provisions.

2. Receiver.

[9, 10] Defendant's affidavit in opposition to the motion for appointment of a receiver set forth in addition to the fact of Anna's death, a claim that to allow a sale of the ranch would work a hardship on defendant. Defendant contends the court's reservation of jurisdiction must include the power to determine that no sale should be made, and that the court abused its discretion in appointing the receiver. However, as hereinbefore pointed out, the court did not reserve jurisdiction to change the property award nor to determine that no sale be made. The property rights were determined by the decree. No attack was made upon the decree either by appeal nor under section 473, Code of Civil Procedure. Defendant was seeking a determination that the farm need not be sold. The court had no discretion in the matter. It was its duty to enforce the terms of the decree. The motion to appoint a receiver was made pursuant to statutory authority to enforce and carry a judgment into effect. See Code Civ.Proc. § 564, subd. 3.

3. Attorney's Fees.

[11] Paragraph X of the interlocutory decree provided that out of the proceeds of the ranch $4,000 be paid to Anna's attorneys for "services rendered by them to plaintiff in the above entitled action, as well as for services rendered by them in an action brought by plaintiff and defendant against Claude Lindsay, et al." Defendant contends that the court erred in not striking this award from the interlocutory decree on the ground that the award covered services in a totally separate action. Section 137.3, Civil Code, authorizes an award of attorney's fees "as may be reasonably necessary for the prosecution or defense of the action *or any proceeding relating thereto*." (Emphasis added.) An examination of the transcript of the proceedings at the end of the divorce trial shows that the parties stipulated that the court might fix the attorney's fees for services in both the divorce action and the Lindsay case. Defendant contends that his attorney had no authority to stipulate as he did, citing Price v. McComish, 1937, 22 Cal.App.2d 92, 97, 99, 70 P.2d 978. While the circumstances here were quite different from those in the Price case, we deem it unnecessary to decide the question of the attorney's authority, for the reason that on other grounds the award cannot be attacked in this proceeding. Concerning it the court stated it considered the Lindsay case "to be in a way part and parcel of the services necessary in this divorce proceeding * * *" But more important is the fact that defendant did not appeal from the decree making such award. He cannot attack it collaterally. Wells Fargo & Co. v. City and County of San Francisco, 25 Cal.2d 37, 40, 152 P.2d 625.

[12] Defendant's contention that the obligation to pay attorney's fees out of the fund to be obtained by sale of the ranch could not mature until the fund came into existence and that the court by reason of the death of Anna lost jurisdiction to bring that fund into existence, is unfounded. As we have heretofore shown, the court had full jurisdiction to enforce the terms of the interlocutory decree.

The orders are affirmed.

FRED B. WOOD and TOBRINER, JJ., concur.

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172 Cal.App.2d Supp. 812

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Jane DOE, true name Jean Frances Fisher, Defendant,

National Automobile and Casualty Insurance Co., Appellant.

Cr. A. 3976.

Appellate Department, Superior Court, Los Angeles County, California.

July 15, 1959.

Proceedings on bail bondsman's motion for order vacating order forfeiting bail and its motion for its exoneration as surety. The Municipal Court of Culver Judicial District, Lawrence P. Scherb, J., denied the motion, and the bondsman appealed The Appellate Department held that by order for probation, conditioned upon service of jail sentence and payment of fine in monthly installments, defendant was committed to custody of the "proper officer of the county", to wit, first the jailer, then the court, and, upon making of probation order, bail was exonerated by operation of law, and held that order forfeiting bail when defendant failed to pay fine installment was not merely erroneous but was void.

Order reversed with directions.

1. Bail 🔑39

Obligation of bail bond is contractual and it serves a three-fold purpose: (1)

permitting release of defendant from incarceration, (2) delivering custody of defendant to bail bondsmen, and (3) guaranteeing personal appearance of defendant for trial, and in execution of any judgment; and the latter is its primary purpose. West's Ann.Pen.Code, § 1459.

2. Bail 🔑74(1)

Commitment to jail terminates obligations of bail, and defendant was not still on bail even while committed to jail as condition of grant of probation. West's Ann. Pen.Code, §§ 1191, 1305.

3. Bail 🔑74(1)

Where, upon defendant's failure to meet probation condition, court summarily ordered that she be rearrested on bench warrant and directed forfeiture of her bail, and probation was revoked and sentence was imposed upon defendant in absentia, surety's motion for vacation of order forfeiting bail and its motion for exoneration were proper. West's Ann.Pen.Code, §§ 1166, 1306; West's Ann.Rules on Appeal from Municipal Courts—Civil Cases, rule 2.

4. Bail 🔑79(2)

An order refusing to set aside forfeiture of bail is appealable.

5. Bail 🔑79(2)

Appeal from order refusing to set aside forfeiture of bail is a civil, and not a criminal, appeal, and therefore appeal taken on December 26 from order entered on motion made on December 17 was timely. West's Ann.Pen.Code, §§ 1166, 1306; West's Ann.Rules on Appeal from Municipal Courts—Civil Cases, rule 2.

6. Bail 🔑75

Bail bondsman's guaranty that defendant would hold herself amenable to orders of court related solely to her appearance when required, and when defendant violated terms of probation by failing to pay monthly installments of her fine, her liability did not become liability of bondsman. West's Ann.Pen.Code, § 1459.

7. Bail 🔑76

A bail bondsman does not undertake by statutory bond to guarantee payment of any fine assessed against defendant. West's Ann.Pen.Code, § 1459.

8. Bail 🔑74(1)

Obligation of bail bond continues in cases where sentence is pronounced but execution thereof is suspended to certain date. West's Ann.Pen.Code, § 1459.

9. Bail 🔑74(1, 2)

Obligation of bail bond continues pending hearing upon defendant's application for probation, or upon delay in trying cause. West's Ann.Pen.Code, §§ 1166, 1305, 1383.

10. Criminal Law 🔑982.9(6)

A defendant's presence is not required at an ex parte revocation of probation, or before sentence can be pronounced upon revocation of probation. West's Ann.Pen. Code, §§ 1166, 1193, 1203.1, 1203.2, 1215, 1300, 1459.

11. Bail 🔑74(1)
Criminal Law 🔑982.6(5)

By order for probation, conditioned upon service of jail sentence and payment of fine in monthly installments, defendant was committed to custody of the "proper officer of the county", to wit, first the jailer, then the court, and upon making of probation order, bail was exonerated by operation of law, and order forfeiting bail when defendant failed to pay fine installment was not merely erroneous but was void and, accordingly, Penal Code section, providing for exoneration of bail even after forfeiture upon timely showing, was not applicable to, and did not limit, bail bondsman's right to relief. West's Ann.Pen.Code, § 1305.

12. Criminal Law 🔑982.6(5)

An order granting probation without imposing incarceration as a term thereof frees from jail a defendant who has been unable to post bail.

13. Motions 🔑61

A void order may be attacked at any time, the invalidity appearing upon record before court.

Joseph Joblin, Los Angeles, for appellant.

Harold W. Kennedy, County Counsel, Los Angeles, Robert W. Garcin, Deputy County Counsel, No. Hollywood, for respondent.

Before SWAIN, Acting P. J., and DAVID and HULS, JJ.

BY THE COURT.

Defendant Fisher was arrested on a morals charge, and the appellant insurance company became surety on a corporate bail bond, in the sum of $250.

[1] The obligation of the bail bond is contractual. The surety undertakes (Pen. Code sec. 1459) "that the above-named defendant will appear in the above-named court on the date above set forth to answer the complaint filed against him/her and all duly authorized amendments thereof, in whatever court it may be prosecuted, and will at all times hold him/herself amenable to the orders and process of the court and, if convicted, will appear for pronouncement of judgment * * *."

A bail bond serves a three-fold purpose: (1) it permits release of a defendant from incarceration; (2) it delivers the custody of the defendant to the bail bondsmen; (3) it guarantees the personal appearance of the defendant for trial, and in execution of any judgment. County of Los Angeles v. Maga, 1929, 97 Cal.App. 688, 690, 276 P. 352. The last above stated is the primary purpose. Sawyer v. Barbour, 1956, 142 Cal.App.2d 827, 833, 300 P.2d 187.

Penal Code sec. 1305 provides in part: "If, without sufficient excuse, the defendant neglects to appear for arraignment or for trial or judgment, or upon any other occasion when his presence in court is lawfully required, or to surrender himself in execution of the judgment, the court must direct the fact to be entered upon its minutes and the undertaking of bail * * * must thereupon be declared forfeited."

[2] When a defendant pleads guilty, or is found guilty, the judgment or sentence is required to be pronounced at a time fixed by the Court, "which must be within 21 days after the verdict, finding or plea of guilty, during which time the court shall refer the case to the probation officer for a report if eligible to probation * * *." Pen.Code sec. 1191. At the time fixed by the Court in this case for judgment and report on the application for probation, the defendant did "appear for pronouncement of judgment." She was granted summary probation, as a condition of which she was committed to jail to serve (and she did serve) 30 days. Upon completion of this imprisonment she left jail pursuant to the order for probation, and not by reason of bail. It cannot be that she was still on bail while committed to jail. Commitment to jail terminates the obligations of bail. Pen.Code sec. 1166; People v. McReynolds, 1894, 102 Cal. 308, 36 P. 590.

[3] Upon her release from jail, defendant entered upon the discharge of a second obligation of probation, which was that she should pay a fine of $250, in five monthly installments. Not having paid the third installment when due, the court summarily ordered that she be rearrested on a bench warrant, and directed forfeiture of her bail. Upon granting probation, further proceedings had been suspended. On December 17, 1958, probation was revoked, and sentence imposed upon defendant in absentia. On the same day, the surety company moved for an order vacating the order forfeiting bail, and an order for its exoneration as surety, which motions were denied. The motions made were proper (People v. Hodges, 1928, 205 Cal. 476, 271 P. 897). On December 26, 1958, the surety appealed from denial of its motions.

[4, 5] An order refusing to set aside forfeiture of bail is appealable. People v. Oppenheimer, 1956, 147 Cal.App.2d Supp. 827, 305 P.2d 306; cf. Los Angeles Surety Co., Inc. v. Municipal Court, 1931, 111 Cal. App. 133, 295 P. 591. We conclude that such an appeal is a civil, and not a criminal, appeal. The proceedings in People v. Bannister, 1957, 153 Cal.App.2d 480, 314 P.2d 577, and People v. Calvert, 1954, 129 Cal. App.2d 693, 277 P.2d 834, seem to support

such an inference by reason of the fact that each bears a civil number. When forfeiture has been decreed, a *civil* judgment is entered, upon which execution is authorized. Pen.Code sec. 1306. This appeal, therefore, was taken in time. Rules on Appeal from Municipal Courts in Civil Cases, Rule 2.

The respondent People contends, that since further proceedings were suspended when probation was granted, the bill bond continued in effect until judgment (sentence) finally was pronounced; and although defendant had appeared to answer the complaint, for trial, and at the time fixed for pronouncement of judgment in the first instance, she was still subject to the obligation to appear upon any other occasion when her presence was lawfully required, and to surrender herself in execution of the judgment, and to hold herself amenable at all times to the orders and process of the court.

[6, 7] The theory that she had not held herself amenable to such orders, by failing to make the payment under the probation order, with consequent liability of the bail, cannot be sustained. Where defendant violated the terms of probation by failing to pay monthly installments of her fine, her liability did not become the liability of the bondsman. The guaranty that defendant will hold herself amenable to the orders of the court relates solely to her appearance when required. A bail bondsman does not undertake by the statutory bond to guarantee the payment of any fine assessed against the defendant (cf. Rodman v. Superior Court, 1939, 13 Cal.2d 262, 267, 89 P.2d 109, cash deposit).

[8, 9] We do not doubt that the obligation of the bail bond continues in cases where sentence [the judgment] is pronounced, but the execution thereof is suspended to a certain date (United States Fidelity & Guaranty Co. v. Justice Court, 1950, 99 Cal.App.2d 683, 222 P.2d 292); or if defendant is on bail, pending the hearing upon his application for probation (People v. Fidelity & Deposit Co., 1930, 107 Cal.App. 160, 290 P. 59); or upon delay in trying the cause (Pen.Code sec. 1383). Such instances involved a failure to appear at a time which was fixed and certain. Nor is the matter at issue resolved by United States Fidelity & Guaranty Co. v. Justice Court, supra, 99 Cal.App.2d 683, 687, 222 P.2d 292, since now an order granting or revoking probation is appealable, and Penal Code sec. 1166 was not therein considered.

[10] But even if the People's contentions were correct, the bail bond herein was improperly forfeited, under Pen.Code sec. 1305, since there was no showing that the defendant *neglected to appear for judgment or at any time her presence was lawfully required.* A defendant's presence is not required at an ex parte revocation of probation. It is not required before sentence can be pronounced, upon revocation of probation. Pen.Code secs. 1193, 1203.2. Upon revocation of probation, the procedure is to rearrest the defendant. Pen.Code sec. 1203.2. Upon such revocation, there is no provision for notice to bail to surrender him or her. If the defendant is rearrested, the bail previously posted is inoperative because the defendant must be committed under the sentence. Pen.Code sec. 1215.

The People's construction of Penal Code section 1459, however plausible at first blush, involves such inherent inconsistencies and anomalies that we do not believe the legislative intention embraces it.

Penal Code sec. 1166 provides that "If a general verdict is rendered against the defendant, or a special verdict is given, he must be remanded, if in custody, or if on bail he may be committed to the proper officer of the county to await the judgment of the court upon the verdict. When committed his bail is exonerated * * *."

[11] We conclude that by the order for probation, defendant had been committed to the custody of the "proper officer of the county", to wit, first the jailer, then the court; and upon making of the probation order, the bail was exonerated by operation of law.

That such was the legislative intention is also indicated by Pen.Code sec. 1203.1, providing that a judge in granting probation may require another bond "for the faithful observance and performance of any or all of the conditions of probation." Pen.Code sec. 1203.1. If it were the legislative intention that the bail bond given to procure release of the defendant before trial should continue in force, or that bail should be posted after trial if the defendant then for the first time was released on probation, the statute certainly would have stated this in fixing the form of the bond obligation.

Pen.Code sec. 1300, respecting surrender of a defendant and exoneration of bail, requires that the defendant be surrendered "to the officer to whose custody he was committed at the time of giving bail * *." Ordinarily, at any time during the continuance of bail, the sureties are entitled to arrest a defendant, and redeliver custody of him to the court. Pen.Code secs. 1300–1301. But if the court has granted the defendant probation, the power to surrender the defendant not only would defeat the purpose of probation, but would impair its operation, as both the court and the sureties would have the control of the defendant. This anomaly, we are sure, was neither intended nor enacted by the legislature.

If bond were still in effect after a probation order was made which did not impose incarceration as a term thereof, a surrender of the defendant to the jailer by the bondsmen would be an idle act; because the jailer would then have no authority to imprison the defendant, she being free by the terms of the probation order.

[12] An order granting probation without imposing incarceration as a term thereof, frees from jail a defendant who has been unable to post bail. It is inconsistent that a defendant, who is on bail, should be in a less favorable position than such a prisoner, or that he should continue in the technical custody of his bondsmen.

In Rodman v. Superior Court, supra, 13 Cal.2d 262, 89 P.2d 109, the court held that when a defendant appears at the "time for pronouncement of judgment" under Pen.Code sec. 1191 (which is also the time for hearing of an application for probation), the surety is entitled to be exonerated upon application. This is inconsistent with the theory that if at the time of such appearance and hearing, the defendant is granted probation, the bail bond still continues in a state of suspended animation, to be revived if ever probation is revoked.

[13] Under the circumstances of this case, the provisions of Penal Code sec. 1166 are self-operating. The order forfeiting the bail was not erroneous but void. The proceeding to vacate such an order provided by Pen.Code sec. 1305, whereby bail may be exonerated even after forfeiture, upon a timely showing that the "absence of the defendant was not with the connivance of the bail" and the defendant and bail satisfactorily "excuse the defendant's neglect" by its terms does not apply to, nor limit, the relief sought. The void order may be attacked at any time, the invalidity appearing upon the record before us. Jellen v. O'Brien, 1928, 89 Cal.App. 505, 508, 264 P. 1115; Olivera v. Grace, 1942, 19 Cal.2d 570, 574, 122 P.2d 564, 140 A.L.R. 1328.

The order denying the motion to vacate the order for forfeiture of bail is reversed, with directions to grant the motion and to order the bail exonerated.

HULS, Judge.

I concur in the judgment on the authority of Penal Code sec. 1166 and People v. McReynolds, 1894, 102 Cal. 308, 36 P. 590. Defendant's commitment to jail exonerated the bail by operation of law.

171 Cal.App.2d Supp. 876

PEOPLE of State of California, Plaintiff and Appellant,

v.

John WINTERS et al., Defendants, Melvin Chambers, Defendant and Respondent.

Cr. A. 4066.

Appellate Department, Superior Court, Los Angeles County, California.

June 30, 1959.

Prosecutions for gambling. The Municipal Court, Los Angeles Judicial District, David W. Williams, J., entered orders dismissing the complaints, without trial, in furtherance of justice on ground that there had been a discriminatory enforcement of the gambling laws, and the people appealed. The Superior Court, Appellate Department, David, J., held that, where trial judge revealed that he had personally charged chief of police with discriminatory law enforcement on basis of race, had rejected official statement in response to the charge, and had, without receipt of evidence or a hearing, acted upon his own extrajudicial belief that there was discriminatory enforcement of gambling laws, the dismissals were void and transcended bounds of trial judge's discretion.

Orders reversed with directions.

1. Constitutional Law ⚿250

Where laws have been enforced in a discriminatory manner, with intent and purpose to deny equal protection of the law to any persons or groups of persons, a discriminatory enforcement of a statute fair on its face, when established by adequate proof, may invalidate an otherwise proper conviction.

2. Criminal Law ⚿1024(1)

A dismissal for any cause by a municipal court, including a dismissal in reliance upon Penal Code provision permitting a dismissal of action in the furtherance of justice, is appealable by the people so long as defendant has not been placed in jeopardy. West's Ann.Pen.Code, §§ 1385, 1387, 1466, 1469.

3. Criminal Law ⚿302(1)

Penal Code provision requiring that minute order set forth reasons for dismissal of criminal prosecution is not merely directory and may not be disregarded. West's Ann.Pen.Code, § 1385.

4. Criminal Law ⚿302(1)

Objection that court's minute dismissal order failed to recite reasons for dismissal of criminal prosecution was no technical objection to the proceedings, as term "technical" is commonly understood, but related to an important rule of procedure provided by legislature for court's guidance, and omission to observe rule could not be held to be innocuous without an invasion of authority of a co-ordinate branch of the government. West's Ann.Pen.Code, § 1385.

5. Criminal Law ⚿302(1)

A trial judge who, upon his own motion, dismisses criminal charges without a trial, must record his reasons so that all may know why such great power was exercised, and such public declaration is a purposeful restraint, lest magistral discretion sweep away the government of laws. West's Ann.Pen.Code, § 1385.

6. Criminal Law ⚿302(1)

If municipal court's minute order incorrectly or insufficiently states municipal court's action in dismissing criminal charges without trial, municipal court has power to amend it to conform to order actually made, but inclusion of any or all of municipal court's reported statements will not infuse validity into an invalid order which exceeds discretion confided in municipal court. West's Ann.Pen.Code, §§ 1385, 1387, 1466, 1469.

7. Criminal Law ⚿1148

To sustain upon review a dismissal of a criminal prosecution on ground that dismissal was in furtherance of justice, showing must be made that there has been an exercise of a valid legal discretion, amounting to more than substitution of trial judge's predilections for alleged peace officers' predilections. West's Ann.Pen.Code, §§ 1385, 1387, 1466, 1469.

8. Criminal Law ⚷302(1), 322

In absence of contrary judicial proof, it would be presumed that official duty had been fully and regularly performed by public authorities in regard to bringing of gambling prosecutions, and, therefore, it was an abuse of discretion for municipal judge, without a hearing, to hold that there had been deliberate or intentional unequal enforcement of gambling laws. West's Ann.Pen.Code, §§ 330, 1385, 1387, 1466, 1469.

9. Criminal Law ⚷31

In criminal prosecution, basic question is whether defendant is guilty, not whether there are other lawbreakers who have escaped detection and punishment.

10. Criminal Law ⚷338(1)

Upon trial in gambling prosecutions, defendants would be entitled to present proof, if any, that there had been an intentional discrimination in enforcement of gambling laws against defendants. West's Ann.Pen.Code, §§ 330, 1385, 1387, 1466, 1469.

11. Constitutional Law ⚷250, 257

To constitute want of due process of law and denial of equal protection of the laws, discriminatory law enforcement must be intentional and purposeful, and it will not be presumed but must be established by proof judicially made. West's Ann.Pen. Code, §§ 1385, 1387, 1466, 1469.

12. Criminal Law ⚷302(1)

Where, in prosecutions for gambling, trial judge revealed that he had personally charged chief of police with discriminatory law enforcement on basis of race, had rejected official statement in response to the charge, and had, without receipt of evidence or a hearing, acted upon his own extrajudicial belief that there was discriminatory enforcement of gambling laws, trial judge's dismissals of the prosecutions "in the interest of justice" were void and transcended bounds of his discretion. West's Ann.Pen.Code, §§ 330, 1385, 1387, 1466, 1469.

13. Criminal Law ⚷302(1)

As ground for dismissal of criminal prosecution, "furtherance of justice" requires consideration of both defendant's constitutional rights and interest of society as represented by the people. West's Ann. Pen.Code, § 1385.

14. Judges ⚷49(1)

Where trial court judge had dismissed gambling prosecutions "in the furtherance of justice" on basis of his own extrajudicial belief that there had been discriminatory enforcement of gambling laws, upon retrial of causes following reversal of orders of dismissal, trial judge would be subject to formal disqualification at instance of plaintiff or defendants. West's Ann. Code Civ.Proc. § 170; West's Ann.Pen. Code, §§ 330, 1385, 1387, 1466, 1469.

◆

Roger Arnebergh, City Atty., Philip E. Grey, Asst. City Atty., William E. Doran, Deputy City Atty., Los Angeles, for appellant.

Walter L. Gordon, Jr., Los Angeles, for respondent.

Loren Miller, A. L. Wirin, Los Angeles, Edward Mosk and Norman G. Rudman, Hollywood, amici curiae.

DAVID, Judge.

This is one of ten cognate cases, involving a total of twenty-eight defendants, of whom Melvin Chambers is one. The complaints charged the defendants with violations of California Penal Code sec. 330, making illegal, among others, the game of stud horse poker; of Los Angeles Municipal Ordinance 36674 (N.S.), prohibiting certain games not included in Pen.Code, sec. 330; and of Los Angeles Municipal Code (Ord. No. 77,000) sec. 43.13.2, prohibiting visits to a place where gambling is carried on.

The defendants were duly arraigned, and entered pleas of "not guilty." Prior to March 5, 1959, some defendants named in the complaints had been tried, convicted and fined; some others had entered pleas of "guilty" but on the morning of March 5, 1959, were permitted to change their pleas to "not guilty." The cases were called for trial and it was determined they were ready for trial. The defendants to be tried were present, with counsel, and the People were represented by counsel. Without any other preliminaries, the court requested the defendants to step inside the bar, made the statements which are hereinafter related, and terminated the cases, saying, "I am dismissing these cases, and I am dismissing them because of the reason that I believe that it constitutes discriminatory enforcement." The People have appealed from such order of dismissal in each case.

[1] Beyond doubt, where the laws have been enforced in a discriminatory manner, with the intent and purpose to deny the equal protection of the law to any persons or group of persons, a discriminatory enforcement of a statute fair on its face when established by adequate proof may invalidate an otherwise proper conviction. This is an appeal from a dismissal of an action without putting intentional discrimination in issue, and without the receipt of proof in an adversary trial.

The reporter's transcript reflects the following proceedings:

> "Court: I want the following defendants to step forward, come inside the rail:
>
> "Warner Isadore, Matthew Harrison, Roy Benson, William Flowers, George Barton, Isaac Johnson, Wilhem Ford, Alvin Armstrong, James Hutcherson, James Allen, John Hall, Craig Wilson, Oliver Moss, Leonido Easter, Prince Clay, Eural Bradford, Robert Lewis, Edward J. Davis, Melvin Chambers, Leon Scott, Marion Thomas, Frank Warren, Burrell Ford, Arthur Wilson, Hayne Chick, Roosevelt Jones, Edgar Askey, John Millender.
>
> "Some three weeks or a month ago, this Court had the occasion to write a letter to the Chief of Police calling attention to the fact that, in this Court's opinion, the gambling laws of this city are enforced mainly against members of the Negro race.
>
> "The Chief took exception to that statement and pointed out, by his statistics, that in the last two years 12,000 Negroes were arrested for gambling and 1,200 Caucasians. Of course, I know that the figures are deceptive because of the fact that the 1,200 Caucasians mentioned were arrested in areas other than the Central Los Angeles area: In Van Nuys and San Pedro and other areas.
>
> "But, I also take great exception to what I term a discriminatory pattern of enforcement of the gambling laws of this city. It is my opinion they are enforced mostly against members of the Negro race. If I were to take the Chief's figures as they speak to this, it would lead me to believe that Negroes, who constitute 10% of the population of this city, are responsible for 90% of the gambling in this city. I refuse to believe that as the truth. I refuse to believe that the people who make their money off of gambling in this city are making it from the penny-ante gambling that goes on in Negro homes and Negro districts.
>
> "The Chief has also invited me to point out to him instances where gambling is going on unraided. Of course, I don't have to do that because that isn't my job. That is his job to ferret out gambling.
>
> "But, I only have to say that gambling is going on in all sections of our city: All private clubs; it is going on in fraternal organizations; it is going on in every fight stadium on fight night in the first few rows of the ringside. Where men wave dollar bills at each other openly and notoriously, and under the view of the very officers that are present. And the exchange of money at the end of the bout—I strongly suspect it must be gambling.
>
> "And I find some comfort in the case of People v. Gordon, recorded in

105 Cal.App.2d, District Court of Appeals—The page number is quite significant—Page 711 [234 P.2d 287]—Where that Court, on passing on another type of case, states that the deliberate or intentional discriminatory enforcement of the statute is a denial of the proper equal protection guaranteed by the Constitution.

"I take the view in this case, where, in one morning, we have twenty-five defendants that are here are all of one race, that constitutes nothing more, and nothing less, than discriminatory enforcement of the law.

"I am dismissing these cases, and I am dismissing them because of the reason that I believe that it constitutes discriminatory enforcement.

"This, of course, is not to say to these defendants that this Court is granting any license or privilege for you to go out and gamble. Because, I am against gambling in all its forms. But, I hope that the Chief will arrest you again if you go out and repeat your act of gambling. Because, I think that each and everyone of you are guilty of what you are here charged with. But, you are no guiltier than others who go unraided and do the same thing.

"I am not going to stand by and let these things go unnoticed."

"(Applause by Court spectators.)"

Penal Code sec. 1385 provides: "The court may, either of its own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. The reasons of the dismissal must be set forth in an order entered upon the minutes. No dismissal shall be made for any cause which would be ground of demurrer to the accusatory pleading."

Penal Code sec. 1387 provides: "An order for the dismissal of the action, made as provided in this chapter, is a bar to any other prosecution for the same offense if it is a misdemeanor, but not if it is a felony."

The minute order in each of these cases reads: "Dismissed as to (naming defendant) in interest of justice"; or (in one case): "Dismissed as to all defendants in interest of justice."

[2] A dismissal for any cause by a municipal court, including a dismissal in reliance upon Pen.Code sec. 1385, is appealable by the People so long as the defendant has not been placed in jeopardy. Pen.Code sec. 1466; People v. Baxter, 1953, 119 Cal.App.2d 46, 50, 258 P.2d 1093; cf. People v. Ring, 1957, 26 Cal.App.2d Supp. 768, 70 P.2d 281; People v. Banat, 1940, 39 Cal.App.2d Supp. 765, 100 P.2d 374.

In Penal Code sec. 1469, the powers of this reviewing court are stated: "Upon appeal by the people the superior court may review any question of law involved in any ruling affecting the judgment or order appealed from, without exception having been taken in the trial court. * * * The superior court may reverse, affirm or modify the judgment or order appealed from, and may set aside, affirm or modify any or all of the proceedings subsequent to, or dependent upon, such judgment or order, and may, if proper, order a new trial. * * *"

It will appear, therefore, that in contrast to the uncontrolled discretion of a trial judge in a superior court, under Penal Code sec. 1385, the exercise of such a great power is fully subject to review upon appeal when an order of dismissal is made in the municipal court.

Even where the power of review is more limited, the appellate courts have not hesitated to state that dismissals made by trial judges under Pen.Code sec. 1385 have been an abuse of discretion, in view of the reasons which have been assigned to justify them.

In a gambling case, People v. Valenti, 1957, 49 Cal.2d 199, 316 P.2d 633, a witness interrogated by the judge in chambers stated he had arrested the defendant at night without a warrant, and thereafter had seized certain real evidence. As stated in the opinion, (49 Cal.2d at page 202, 316 P.2d at page 634): "Without motion by or suggestion of either counsel, the judge ruled as follows: 'The Court is going to dismiss the information. I feel there was sufficient information that, had the Sheriff's Department wanted to obtain * * * a warrant * * * they could have done so and then that there would have been no question as to illegal [arrest and] search and seizure. * * * I am dismissing the information at this time for insufficiency of the evidence, * * * based on the lack of reasonableness of the arrest.' * * * The jury were discharged. The minutes state that the order is one 'dismissing said Information on the grounds of illegality of the arrest of the defendant'." Reviewing this order, the Supreme Court affirmed the dismissal. It held that the defendant could not be retried, because he had been placed in jeopardy, and that in the Superior Court a dismissal under Pen. Code sec. 1385, was not appealable. Nevertheless, it devoted many lines to the characterization of the judge's action (49 Cal.2d at page 204, 316 P.2d at page 635) as "egregiously erroneous".

In People v. Disperati, 1909, 11 Cal.App. 469, 472, 105 P. 617, 618, the district attorney made a motion to dismiss a case in furtherance of justice after the jury disagreed. The motion was made on the grounds, among others, that it was important to apprehend the defendant's accomplices; and that "the trial of this action will be very expensive, and might burden the county general fund; that money due for other county expenses and contracts might thus be consumed, thereby causing *bona fide* claimants to lose their legal rights * * *." The trial court granted the motion. The appellate court stated, (11 Cal. App. at page 476, 105 P. at page 619): "The legislature has not attempted to define the expression 'in furtherance of justice,' and therefore it is left for judicial discretion, exercised in view of the constitutional rights of the defendant and the interests of society, to determine what particular grounds warrant the dismissal. As far as the depleted condition of the treasury is concerned, we cannot give our adherence to the view that this is a sufficient ground for the course pursued. * * *"

[3] Pen.Code sec. 1385 requires that the minute order must set forth the reasons for the dismissal. We have no authority to disregard this requirement or to hold that it is merely directory. People v. Disperati, supra, 11 Cal.App. 469, 476, 105 P. 617, 619. Here, there is no pretense that the minute order of the court recited the reasons on which it was based. It is true the reporter's transcript shows the trial court's motivation for the action, but the *minutes* do not reflect the reasons why the dismissals were "in the interest of justice".

[4] As was said in People v. Disperati, supra, 11 Cal.App. 469, 477, 105 P. 617, 620: "It is to be observed that this is no 'technical' objection to the proceedings, as the term 'technical' is commonly understood, but it relates to an important rule of procedure which the Legislature has provided for the guidance of the courts, and the omission to observe it cannot be held to be innocuous without an invasion of the authority of a co-ordinate branch of the government. If the practice of which complaint is made is to be continued, it is manifest that great abuse is likely to follow, more dangerous to society than even the acquittal of the guilty."

[5] A judge dismissing criminal charges without trial, upon his own motion, must record his reasons so that all may know why this great power was exercised, and such public declaration is indeed a purposeful restraint, lest magistral discretion sweep away the government of laws.

[6] We have been urged to permit the trial court to amend the minute order, to incorporate therein the substance of the judge's statements. If the minute order incorrectly or insufficiently states the action of the court, the trial court itself has the power to amend it, to conform to the order actually made. But it is clear that the inclusion of any or all of the reported statements would not infuse validity into the invalid order, which under the circumstances exceeded the discretion confided in

the municipal court under Pen.Code sec. 1385.

[7, 8] A dismissal "in furtherance of justice", upon review, must show that there has been the exercise of a valid legal discretion, amounting to more than the substitution of the predilections of a judge for the alleged predilections of the peace officers. It is an abuse of discretion for a judge without a hearing to hold there is deliberate or intentional unequal enforcement, since in all cases it is presumed that official duty has been fully and regularly performed by the public authorities until there is judicial proof to the contrary.

[9] The basic question is, "Are defendants guilty?", not whether there are other lawbreakers who have escaped detection and punishment. cf. Morgan v. Sylvester, D.C.1954, 125 F.Supp. 380, 387; Saunders v. Lowry, 5 Cir., 1932, 58 F.2d 158, 159; People v. Hess, 1951, 104 Cal.App.2d 642, 685, 234 P.2d 65, appeal dismissed 342 U.S. 880, 72 S.Ct. 177, 96 L.Ed. 661.

[10] Upon trial, defendants are entitled to present proof, if any, that there has been intentional discrimination, based on any improper consideration.

[11] Discriminatory law enforcement, to constitute a want of due process of law, and a denial of the equal protection of the laws, must be intentional, and purposeful. It will not be presumed, and before it can be established, proof thereof must be judicially made. In Snowden v. Hughes, 1943, 321 U.S. 1, 8–9, 64 S.Ct. 397, 88 L.Ed. 497, 401, it is said: "The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination. * * * But a discriminatory purpose is not presumed * * *. Thus the denial of equal protection by the exclusion of negroes from a jury may be shown by extrinsic evidence of a purposeful discriminatory administration of a statute fair on its face. [citing cases] But a mere showing that negroes were not included in a particular jury is not enough; there must be a showing of actual discrimination because of race. * * *"

In Ah Sin v. Wittman, 1905, 198 U.S. 500, 506, 25 S.Ct. 756, 49 L.Ed. 1142, wherein it was claimed that Chinese were discriminated against in enforcement of the San Francisco gambling ordinance, the refusal of habeas corpus by the California court was affirmed. It was pointed out that the doctrine of Yick Wo v. Hopkins, 1886, 118 U.S. 356, 373, 6 S.Ct. 1064, 30 L.Ed. 220, 227, related to lawful, and not unlawful, activities. Speaking of discriminatory enforcement, the Court stated at page 508 of 198 U.S., at page 759 of 25 S.Ct.: "This is a matter of proof; and no fact should be omitted to make it out completely, when the power of a Federal court is invoked to interfere with the course of criminal justice of a state."

In People v. Flanders, 1956, 140 Cal.App. 2d 765, 296 P.2d 13, the trial court on its own motion set aside a portion of a grand jury indictment charging defendant with conspiracy to violate the gambling laws. From the opinion it appears (140 Cal.App. 2d at page 767, 296 P.2d at page 14): "It is appellant's contention * * * that the court erred in holding that it was a denial of equal portection of the law to prosecute some while others escaped prosecution for breaking the same laws. * * * After further discussion of the evidence required to constitute a conspiracy the court stated that his reason for dismissing the conspiracy charge was aside from that, stating that he could take judicial notice of the fact that similar offenses were practiced widespread in San Francisco referring to church 'bingo' lotteries which were allowed to run without interference and which were even advertised. He cited the case of Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220, to the effect that if the law is administered so as to make unjust and illegal discriminations between persons in similar circumstances, the denial of equal justice is within the constitutional prohibition. The court admitted that the record before the Grand Jury did not show that other forms of gambling were being conducted widespread throughout San Francisco in practically every parish. No proof was offered by respondent either at the hearing or before the Grand Jury that there was discrimination practiced in the enforcement of the gambling law. This issue was interjected by the court. The court stated that he could take judicial notice of the fact that such offenses were practiced by church organizations and were even advertised. * * *" The appellate court continued (140 Cal.App.2d at pages 769–770, 296 P.2d at page 16): "Even if it be assumed that it is proper to raise the question of discriminatory enforcement of the gambling laws on a motion made under section 995, it appears that the rule of the case of Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 does not stand for the proposition that persons violating the law are to have equal protection from prosecution, but rather for the proposition that equal protection of the law will be extended to all persons in pursuit of their lawful occupations regardless of their race. * * * In People v. Darcy, 59 Cal.App.2d 342, 139 P.2d 118, 125 the same argument based on the Yick Wo case was raised, as is now urged by respondent herein. The court there stated that if such an argument was accepted it would lead to the rule that 'if some guilty persons escape, others who are apprehended should not be prosecuted.' * * * In People v. Montgomery, 47 Cal.App.2d 1, 117 P.2d 437, 446, it was observed that appellant therein argued that 'equal protection should also be extended to any person to enable him to commit a crime on a basis of equality with all other persons.' The court noted that the remedy for unequal enforcement of the law 'does not lie in the exoneration of the guilty at the expense of society.' It commented on the Yick Wo case, stating that there was an obvious distinction between extending protection to persons of the Chinese race in pursuance of the business of laundering, and extending protection to those engaged in pandering, and that while equal protection will be extended to all in the pursuit of lawful occupations, no one has the right to demand protection in the commission of a crime. The court concluded that the only possible extension of the doctrine of the Yick Wo case to a criminal matter would be an instance where a person was under prosecution for the commission of some otherwise harmless act which ordinarily had not theretofore been treated as a crime. It was also noted in that case that appellant therein had not attempted to defend on the basis of discriminatory enforcement of the law even if such a defense were available to him." The appellate court reversed the order of dismissal.

In People v. Van Randall, 1956, 140 Cal.App.2d 771, 296 P.2d 68, the trial court dismissed charges of violating gambling laws, after indictment by the grand jury, and the order was reversed on appeal since the trial court acted of its own motion, without proof, in respect to alleged discriminatory enforcement. It is said such a question cannot be raised by motion to dismiss, where the law itself is not alleged to be unconstitutional (140 Cal.App.2d at pages 776–777, 296 P.2d at page 72, wherein the court stated it was "the duty of the court below * * * to test the evidence * * *").

In People v. Darcy, 1943, 59 Cal.App.2d 342, at page 353, 139 P.2d 118, at page 125, it is stated: "Appellant sought to inject a false issue into the trial of the charge, which, if approved, could easily lead to a rule that if some guilty persons escape, others who are apprehended should not be prosecuted. * * * Among other defenses appellant sought, by way of offer of proof, an acquittal upon the claim that others equally guilty had not been prosecuted and that he had been prosecuted because he is a communist. The first claim would be equally meritorious if presented in connection with a traffic violation, and the second would establish a precedent that nationality, race or creed might be used in all criminal cases as a defense. Both claims would simply cloud the real issue. * * *"; citing People v. Montgomery, 1941, 47 Cal.App.2d 1, 117 P.2d 437.

This appellate department, in People v. Sipper, 1943, 61 Cal.App.2d Supp. 844, at page 848, 142 P.2d 960, at page 963, in respect to a cognate contention, stated: "As was pointed out in People v. Montgomery, 1941, 47 Cal.App.2d 1, 14, 117 P.2d 437, 446, 'It should be borne in mind that in the Yick Wo case the equal protection of the law was extended to persons of a particular race to enable them to engage in a lawful business on a basis of equality with all other persons. Appellate now in effect argues from this that equal protection should also be extended to any person to enable him to commit a crime on a basis of equality with all other persons. While all persons accused of crime are to be treated on a basis of equality before the law, it does not follow that they are to be protected in the commission of crime. It would be unconscionable, for instance, to excuse a defendant guilty of murder because others have murdered with impunity. The remedy for unequal enforcement of the law in such instances does not lie in the exoneration of the guilty at the expense of society. * * * Protection of the law will be extended to all persons equally in the pursuit of their lawful occupations, but no person has the right to demand protection of the law in the commission of a crime.'"

In People v. Oreck, 1946, 74 Cal.App.2d 215, at page 221, 168 P.2d 186, at page 190, it appears: "The appellants next contend that the trial court erroneously sustained objections to certain questions aimed at showing that the police discriminated against horse race betting in that the police did not raid certain establishments specializing in election and other types of bets. Appellants did not offer to prove that they were being prosecuted because of their race, color, religion, or political beliefs. They simply sought to show that others equally guilty were not being prosecuted. They contend that under the rules announced in Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220; Williams v. Mississippi, 170 U.S. 213, 18 S.Ct. 583, 42 L.Ed. 1012; and the dissenting opinion in People v. Darcy, 59 Cal.App.2d 342, 354, 139 P.2d 118, such facts, if proved, would demonstrate that they had been denied equal protection of the laws. In the cases cited it was claimed that the persons involved were being prosecuted because of their race, color, religion or political beliefs. * * * It is not a denial of equal protection that one guilty person is prosecuted while others equally guilty are not. This is clearly pointed out in the majority opinion in the Darcy case, and likewise in the dissent in that case. In 59 Cal.App.2d at page 358, 139 P.2d at page 128, in the dissent it is stated: 'It is, of course, the law that a person committing a crime cannot claim an unlawful discrimination upon a mere showing that other persons or classes of persons have committed the same offense and have not been prosecuted therefor. The cases cited in the majority opinion clearly and properly establish that principle. [Citing cases.] The proffered evidence for these reasons was inadmissible."

In People v. Hess, supra, 104 Cal.App.2d 642, at pages 684–685, 234 P.2d 65, at page 92, appeal dismissed 342 U.S. 880, 72 S.Ct. 177, 96 L.Ed. 661, it appears: "As a further ground for reversal, appellants urge that they were denied the equal protection of the laws in that the chief right-of-way agent of the state who allegedly, 'had bought property in the path of the freeway, signed his own appraisal and the property was resold to the state at a hiked price' was not prosecuted, but that 'petty agents (appellants Rose and Hess) were singled out for prosecution'. Appellants offered an instruction that such was their contention and, that if the jury found such to be true, appellants were entitled to an acquittal. For reasons about to be advanced, the instruction was properly refused and the claim of appellants must be rejected. Aside from the fact that there is considerable evidence in the record showing no parallel between the transaction of the chief right-of-way agent with the state and the activities of appellants, the latter sought to inject a false issue into the trial of the instant case, which, as is stated in People v. Darcy, 59 Cal.App.2d 342, 353, 139 P.2d 118, 125, 'if approved, could easily lead to a rule that if some guilty persons escape, others who are apprehended should not be prosecuted'. It is not a denial of equal protection that one guilty person is prosecuted while others equally guilty are not. People v. Darcy, supra, 59 Cal.App.2d at page 353, 139 P.2d at page 118; People v. Oreck, 74 Cal.App.2d 215, 222, 168 P.2d 186; People v. Montgomery, 47 Cal.App.2d 1, 11, 117 P.2d 437. The case of Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220, and other cases by appellants are distinguishable from the case at bar, see People v. Darcy, supra, 59 Cal.App.2d at pages 353, 358, 139 P.2d at page 118."

[12] The dismissals were void because the trial judge acted in a matter where he openly declared his bias and prejudgment, without disqualifying himself.

[13, 14] The "furtherance of justice" requires consideration both of "the constitutional rights of the defendant and the interests of society" represented by the People, in determining whether there should be a dismissal. People v. Disperati, supra, 11 Cal.App. 469, 476, 105 P. 617. The scales of justice must be kept in balance. Even as the trial judge stated of the alleged discrimination, "I am not going to stand by and let these things go unnoticed," this Court must review the fairness of the proceeding.

The trial judge revealed that he personally had charged that there was discriminatory law enforcement by the Chief of Police in an exchange of correspondence before these cases were called for trial; that he rejected the official statement in response to his charge; and acted upon his own extrajudicial belief that there was discriminatory enforcement of the gambling laws against Negroes, without receipt of evidence, or hearing.

The reporter's transcript indicates that the proceeding ended as follows: "This, of course, is not to say to these defendants that this Court is granting any license or privilege for you to go out and gamble. Because, I am against gambling in all its forms. But, I hope that the Chief will arrest you again if you go out and repeat your act of gambling. Because, I think that each and everyone of you are guilty of what you are here charged with. But, you are no guiltier than others who go unraided and do the same thing. I am not going to stand by and let these things go unnoticed. (Applause by Court spectators.)"

How can it be contended on the one hand that the present arrests were discriminatory, but that defendants should be arrested by the Chief of Police if they repeat the offense? The trial judge unfortunately approached these cases with a state of mind prejudicial to a trial which would be fair to the People. He had already negatived the presumption that official duty is regularly performed; but likewise, without evidence or hearing, he asserted of the defendants: "I think that each and every one of you are guilty of what you are here charged with," thereby negativing the presumption of innocence. Upon the present state of the record, the defendants have not been prejudiced, but the People have been. Under such circumstances, we must hold that the court transcended the bounds of discretion. Pratt v. Pratt, 1903, 141 Cal. 247, 251–252, 74 P. 742; Evans v. Superior Court, 1930, 107 Cal.App. 372, 381, 290 P. 662. Upon retrial of this cause, the trial judge would be subject to formal disqualification, at the instance of plaintiff or defendants. C.C.P. sec. 170; Calhoun v. Superior Court, 1959, 51 Cal.2d 257, 331 P.2d 648; Keating v. Superior Court, 1955, 45 Cal.2d 440, 446, 289 P.2d 209; Shasta Water Co. v. Croke, 1954, 128 Cal.App.2d 760, 276 P.2d 88; McVey v. McVey, 1955, 132 Cal.App.2d 120, 123, 281 P.2d 898.

Pursuant to Pen.Code sec. 1469, the order of dismissal entered is reversed; and trial of the defendant is ordered to proceed; without prejudice to the right of the defendant as a matter of defense, to assert and offer proof that any conviction would deny him equal protection of the laws because of any proven intentional or deliberate discrimination in enforcement of the law.

SWAIN, Acting P. J., and HULS, J., concur.

52 Cal.2d 521

PEOPLE of State of California, Respondent,
v.
Robert THOMAS, Appellant.
Cr. 6455.

Supreme Court of California.
In Bank.
July 24, 1959.

Prosecution for possession of heroin. From an order of the Superior Court, Los Angeles County, Edward R. Brand, J., denying defendant's motion to vacate judgment which sentenced him to state prison and to reinstate a county jail sentence, the defendant appealed. The Supreme Court, Schauer, J., held that where court, on date set for defendant's application for probation, inadvertently left open issue of a prior conviction and sentenced defendant to county jail, and county sheriff took defendant from court room to county jail, but defendant was removed from jail for change of sentence before remanding order had been made of record at jail booking office and before county jail sentence had become of record in the minutes, and order had been previously entered with authorized sheriff to hold defendant pending such further disposition as the court might order, defendant did not begin service of his sentence and sheriff continued to act as an officer of the court restraining defendant for the court and did not begin to act as an executive officer carrying out execution of sentence, and court did not err in recalling defendant, vacating county jail sentence, completing determination of issues, and pronouncing new sentence to state prison on the same day.

Order affirmed.

Opinion, 334 P.2d 227, vacated.

1. Criminal Law ⟹1023(12)

Ordinarily no appeal lies from an order denying a motion to vacate judgment of conviction on a ground which could have been reviewed on appeal from the judgment. West's Ann.Pen.Code, § 1237, subd. 3.

2. Criminal Law ⟹998

Fundamental jurisdictional defects, like constitutional defects, do not become irremediable when a judgment of conviction becomes final without appeal or even after affirmance on appeal. West's Ann.Pen. Code, § 1237, subd. 3.

3. Criminal Law ⟹998, 1023(12)

Where court rescinded a county jail sentence and entered a judgment sentencing to state prison, a motion to vacate judgment was proper manner of presenting question of whether court had jurisdiction to rescind county jail sentence and to sentence defendant to state prison, and order denying motion was appealable even though facts which constituted claimed jurisdictional defects were known to all concerned, including trial court, when sentence was pronounced. West's Ann.Pen.Code, § 1237, subd. 3.

4. Criminal Law ⟹1182

When question of jurisdiction is presented by motion to vacate judgment and by appeal from order of denial, appellate court's determination as to appealability of order will ordinarily depend upon its decision of the merits of the appeal, but where appellant in good faith presents serious jurisdictional problems, appeal will not be dismissed but rather reviewing court will affirm order appealed from with a statement that its action is not to be considered general authority for appealability of order which denies a motion to vacate a judgment on grounds which could have been presented on appeal from the judgment.

5. Criminal Law ⟹994(1)

Where Superior Court sentenced defendant to county jail and later in the day rescinded county jail sentence and sentenced defendant to state prison, there was no duty imposed upon clerk to enter first sentence of court before adjournment of court for that day.

6. Criminal Law ⟹1209

Where Superior Court sentenced defendant to county jail for six months and defendant was transported to and at once returned from the jail, defendant was not in any substantial sense punished under jail sentence and lapse of few hours between pronouncement of original sentence and pronouncement of corrected sentence whereby defendant was sentenced to state prison did not prejudice defendant and he was not subjected to double punishment for same offense. West's Ann.Pen.Code, §§ 1202, 1237, subd. 3, 1265.

7. Criminal Law ⚿998

Where court, on date set for defendant's application for probation, inadvertently left open issue of a prior conviction and sentenced defendant to county jail, and county sheriff took defendant from court room to county jail, but defendant was removed from jail for change of sentence before remanding order had been made of record at jail booking office and before county jail sentence had become of record in the minutes, and order had been previously entered with authorized sheriff to hold defendant pending such further disposition as court might order, defendant did not begin service of his sentence and sheriff continued to act as an officer of court restraining defendant for court and did not begin to act as an executive officer carrying out execution of sentence, and court did not err in recalling defendant, vacating county jail sentence, completing determination of issues, and pronouncing new sentence to state prison on same day. West's Ann.Pen.Code, §§ 1237, subd. 3, 1265, 2900, 4000, subds. 2, 4; West's Ann.Gov.Code, §§ 26603, 26605, 26611.

8. Criminal Law ⚿998

A defendant sentenced to county jail does not mechanically pass from control of court to control of executive, for sheriff is both a ministerial officer of court for purpose of keeping defendant until service of sentence begins and also executive officer who executes jail sentence. West's Ann. Pen.Code, §§ 2900, 4000, subds. 2, 4; West's Ann.Gov.Code, §§ 26603, 26605, 26611.

◆

Spiegel, Turner & Wolfson and Gerald G. Wolfson, Santa Monica, for appellant.

Edmund G. Brown and Stanley Mosk, Attys. Gen., Elizabeth Miller and David B. Allen, Deputy Attys. Gen., for respondent.

SCHAUER, Justice.

Defendant appeals from an order denying his motion (1) to vacate a judgment, rendered in the afternoon of April 7, 1958, which sentences him to state prison and (2) to reinstate a county jail sentence announced in the morning and "rescinded" in the afternoon of that day. He contends that the judgment is void under the italicized portion of the following rule stated in People v. McAllister (1940), 15 Cal.2d 519, 526 [2], 102 P.2d 1072 (the bracketed numbers are inserted for convenience of subsequent reference): "[1] If the sentence has been entered in the minutes of the court, or [2] *if the defendant has begun serving said sentence* or [3] *has been restrained by the sentence* imposed, then *the court is without jurisdiction to* vacate, add to, or in any manner *modify the sentence* originally pronounced. On the other hand, if the sentence pronounced has not been entered by the clerk in his minutes, and no legal restraint has been imposed upon the defendant by reason of said sentence, then it is proper for the court to change the sentence originally pronounced." (Italics added.)

The People urge that the order denying defendant's motion is not appealable because his contention could have been raised by appeal from the judgment of conviction. Also they urge that clause [2] of the rule stated in the McAllister case is not applicable to the facts of this case, and that literal application of clause [3] would give defendant the undeserved benefit of a technicality which did not prejudice him.

For the reasons hereinafter stated we have concluded that the order is appealable. Consideration of the merits of the appeal leads to the further conclusion that the superior court had power to set aside the jail sentence and impose the prison sentence and that it did not err in the exercise of such power.

Defendant was charged with possession of heroin in violation of section 11500 of the Health and Safety Code and with having suffered a previous conviction of violating the same section and having served a state prison term therefor. He pleaded not guilty and he and counsel for both parties waived a jury trial. Defendant was tried in a Santa Monica department of the Los Angeles county superior court. On March 17, 1958, the court found him guilty of the substantive offense, received in evidence a certified copy of the record of his prior conviction and imprisonment, and continued the question of disposition of the allegation of such prior conviction to April 7, 1958, the date set for hearing on defendant's application for probation. Defendant was remanded without bail and confined in the Los Angeles county main jail. (This jail, and the main office of the county clerk where judgments of all Los Angeles superior courts are entered, are in the Civic Center, City of Los Angeles. As will appear, the facts of geographical distance between the sentencing court and courtroom clerk on the one hand and the main jail and clerk's office on the other hand have practical relation, in circumstances such as those here, to the determination of the time when the court loses jurisdiction to change a valid sentence.)

On the morning of April 7 a deputy sheriff brought defendant from the Los Angeles jail to the Santa Monica court. Without mention of the previous conviction (and therefore without determination of the issue of fact which had been reserved for decision at this time) the court denied probation and sentenced defendant to six months in jail. A notation of this sentence was made by the clerk in what he termed his "rough notes" but such sentence was not entered in the minutes. A deputy clerk who acted as the courtroom clerk's assistant prepared a remanding order, directed to the county sheriff, which states: "The court having remanded the above named defendant, you are now authorized to hold said defendant pending such further disposition as the court may order"; "No Bail"; "6 Months County Jail." The deputy sheriff *began* the transportation of defendant back to the jail. We assume that the remanding order went with them.

The courtroom clerk testified, at the hearing on the motion to vacate, that "[O]n April 7th, which is Monday, our criminal calendar day, we normally have fifty, sixty, or even more cases, and in the press of the morning, no one * * * caught the fact that the prior had not been disposed of [until after the deputy sheriff had left with the defendant, but] * * * As I was about to prepare the minutes from my rough notes to be transmitted to the Criminal Division of the County Clerk's Office [in the Civic Center, City of Los Angeles], I noticed that a prior had not been disposed of on Robert Thomas." The clerk called the omission to the attention of the prosecuting attorney, defendant's counsel, and the judge, all of whom were still in the courtroom or chambers, and telephoned the sheriff's office and asked that defendant be returned to the Santa Monica court as soon as he arrived at the jail.

Defendant reached the jail at 3:15 p. m. and was checked out for return to court at 3:35 p. m. At 3:39 p. m., after defendant had left the jail, the above described remanding order was received at the sheriff's booking office of the jail. Thus defendant, so far as the sheriff's records disclose, was at no time held in the jail in service of the jail sentence which had been pronounced at the morning session of the court.

At 4:50 p. m. defendant, with counsel, again appeared in the Santa Monica court. The court stated, "This morning * * *, through the busyness of the calendar, I overlooked the fact that this defendant had a prior narcotics conviction." (Inferentially, the judge meant that he had overlooked disposing of the *allegation and issue* as to the prior conviction.) Defendant admitted that he had suffered the prior conviction (sale of marijuana) and that he was "presently on parole" therefor. The court announced, "The sentence this morning is rescinded" and sentenced defendant to prison, with the finding that the alleged prior narcotics conviction is true.[1] Judgment reciting this finding and imposing the prison sentence was entered in the minutes. Two weeks after the time for appeal from the judgment had passed, defendant, through new counsel, noticed the motion above described and, as stated, he now appeals from the order denying such motion.

[1] To the statutory rule that "An appeal may be taken by the defendant * * * from any order made after judgment, affecting the substantial rights of the party" (Pen.Code, § 1237, subd. 3), there is a well established qualification upon which the People rely: Ordinarily no appeal lies from an order denying a motion to vacate a judgment of conviction on a ground which could have been reviewed on appeal from the judgment. (People v. Bowles (1933), 135 Cal.App. 514, 516 [3], 27 P.2d 411; People v. Zolotoff (1941) 48 Cal.App.2d 360, 363 [1], 119 P.2d 745; cases announcing this qualification and exceptions to it are collected in 7B McKinney's New Cal.Dig. (1958), Crim.Law, § 1053(2).) In such a situation appeal from the judgment is an adequate remedy; allowance of an appeal from the order denying the motion to vacate would virtually give defendant two appeals from the same ruling and, since there is no time limited within which the motion may be made, would in effect indefinitely extend the time for appeal from the judgment. (People v. Carkeek (1939), 35 Cal.App.2d 499, 505–506, 96 P.2d 132.) The considerations are the same whether the matters sought to be presented by motion to vacate actually were presented to the trial court prior to judgment of conviction, or whether such matters should have been but were not so presented. (See People v. Reid (1924), 195 Cal. 249, 256, 260 [7], 232 P. 457, 36 A.L.R. 1435; People v. Shorts (1948), 32 Cal.2d 502, 514, 515, 197 P.2d 330.[2])

Defendant relies upon People v. Walker (1901), 132 Cal. 137, 141–142, 64 P. 133, and People v. Miller (1934), 140 Cal.App. 241, 242–243, 35 P.2d 229, which allowed the remedy of motion to correct the minutes and vacate the judgment of conviction, and appeal from the ensuing order of denial, because the appellate courts concluded that, in the circumstances there present, an appeal from the judgment would have afforded no relief for it would not have brought up a record showing the error of which defendant complained. Here, defendant asserts, the question whether the trial court had jurisdiction to vacate the jail sentence and impose the prison sentence could not have been reviewed on appeal from the judgment imposing the latter sentence because the record on such an appeal would not have disclosed the fact, essential to his presentation of such question, that after pronouncement of the jail sentence and before pronouncement of the prison sentence defendant had actually been in jail. This fact, however, was known to all concerned at the time the jail sentence was "rescinded." Defendant could have made the fact of record and presented his arguments concerning its effect to the trial court before it pronounced the prison sentence, but he did not do so. Thus the claimed inadequacy of the remedy of appeal was not due to any deficiency in the remedy itself but rather resulted from defendant's failure to make a sufficient record in the trial court.

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[1] The punishment for one who, like defendant, is convicted of possessing a narcotic with such a finding of a former conviction is confinement in state prison for not less than two years nor more than 20 years. (Health & Saf.Code, § 11712.)

[2] The Reid and Shorts cases, and some of the other cases hereinafter cited, are usually indexed, in digests and texts, under "*coram nobis*" rather than under "motion to vacate." In this state the writ of error *coram nobis*, when sought in the trial court, is a court-made remedy adapted from the common law; it is in effect a motion to vacate the judgment and can appropriately be so designated. (People v. Vernon (1935), 9 Cal.App.2d 138, 140–141 [2], 49 P.2d 326; In re Paiva (1948), 31 Cal.2d 503, 510, 190 P.2d 604.)

The Legislature drastically changed the nature of *coram nobis* and motion to vacate the judgment by its 1949 amendment of Penal Code section 1265 to provide that when a judgment of conviction has been affirmed on appeal the writ cannot be sought or the motion made in the trial court but application for the writ can be made to the affirming court. But the cases as to *coram nobis* and motion to vacate are still pertinent to our present inquiry, which concerns attack on a judgment which became final (insofar as a criminal judgment can ever become final) without appeal.

[2, 3] The remedy here sought is available, however, because the basis of defendant's attack on the judgment is that it is void. Fundamental jurisdictional defects, like constitutional defects, do not become irremediable when a judgment of conviction becomes final without appeal (or even after affirmance on appeal; see Mooney v. Holohan (1935), 294 U.S. 103, 112–113, 55 S.Ct. 340, 79 L.Ed. 791; People v. Gilbert (1944), 25 Cal.2d 422, 444 [16], 154 P.2d 657). There is sometimes uncertainty as to whether such defects should be raised by motion to vacate the judgment or by application for habeas corpus. (People v. Adamson (1949), 34 Cal.2d 320, 327, 210 P.2d 13.) But we have no doubt that a motion to vacate was a proper manner of presenting the jurisdictional problem in this case. (This procedure was accepted without question in People v. McAllister (1940), supra, 15 Cal.2d 519, 102 P.2d 1072.) And when such a motion is proper the ensuing order of denial is appealable even though the facts which constitute the claimed jurisdictional defect were known to all concerned, including the trial court, when sentence was pronounced. (See People v. Schwarz (1927), 201 Cal. 309, 313, 257 P. 71; People v. Campos (1935), 3 Cal.2d 15, 18, 43 P.2d 274.)

[4] When the question of jurisdiction is presented by motion to vacate and by appeal from the order of denial, the appellate court's determination as to the appealability of the order will ordinarily depend upon its decision of the merits of the appeal, i. e., upon its determination whether there was indeed a jurisdictional defect. But where, as here, the appellant in good faith presents serious jurisdictional problems, we think it is appropriate, not to dismiss the appeal, but rather to affirm the order appealed from with a statement that our action in this regard is not to be considered general authority for the appealability of an order which denies a motion to vacate a judgment on grounds which could have been presented on appeal from the judgment. (See People v. Ramirez (1934), 139 Cal.App. 380, 384, 33 P.2d 848.)

We now turn to the question whether the trial court lacked jurisdiction to vacate the first and impose the second sentence. In the McAllister case (1940), supra, 15 Cal.2d 519, 102 P.2d 1072, and in this case, the jurisdictional problem, as limited by the facts, is that of the trial court's power, after rendition of judgment,[3] to change a valid sentence[4] so as to increase the punishment.[5] The holding of the McAllister case is that the trial court could change the originally announced sentence; that holding was based on the facts that, at the time of change, [1] such sentence had not been entered in the minutes, and defendant McAllister [2] had not begun to serve the sentence and [3] had not been restrained by it.[6] The rule announced in McAllister and quoted ante was, therefore, in part dictum. But the dictum was not gratuitous; it was the statement of the reasons for not applying previous decisions, marshaled in the opinion, to preclude the proper change of McAllister's sentence.

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[3] In a California criminal case, judgment is rendered when sentence is orally announced. (See Pen.Code, § 1202; People v. Terrill (1901), 133 Cal. 120, 123, 65 P. 303; People v. Camp (1919), 42 Cal. App. 411, 422, 183 P. 845.)

[4] The jail sentence here was valid. (See People v. Burke (1956), 47 Cal.2d 45, 50–53, 301 P.2d 241 [sentencing court could strike prior conviction]; People v. Schneider (1939), 36 Cal.App.2d 292, 297 [8], 98 P.2d 215 [failure to find on prior conviction amounts to sentencing defendant as first offender].)

[5] Literal application of the McAllister rule would forbid mitigation of punishment in circumstances where mitigation is otherwise proper. (United States v. Benz (1931), 282 U.S. 304, 307, 51 S.Ct. 113, 75 L.Ed. 354; see also Yates v. United States (1958), 356 U.S. 363, 366, 78 S. Ct. 766, 2 L.Ed.2d 837; City of Vernon

Clause [1] of the rule stated in McAllister and quoted ante, at page 1–2 [342 P.2d 890] is the California version, adapted to the operation of our courts (which, since adoption of our 1879 Constitution, no longer have terms), of the common law rule that ordinarily a court can change its judgment during the term at which it was rendered but not thereafter. (See Ex parte Von Vetsera (1907), 7 Cal.App. 136, 138, 93 P. 1036; Commonwealth v. Weymouth (1861), 2 Allen [Mass.] 144 [79 Am. Dec. 776].)

[5] Here, as in the McAllister case, at page 527 of 15 Cal.2d at page 1075 of 102 P.2d, we are not confronted with any problem of asserted failure by the clerk to perform his duty of entering the judgment "within a reasonable time"; "Usually the practice of the courts of this state is for the clerk to make up his minutes following the adjournment of the court for the day. [Concerning a related problem of *entry* as distinguished from *making up* the material to be entered, in a large county, see Wilson v. Los Angeles County Employees Ass'n (1954), 127 Cal.App.2d 285, 273 P.2d 824.] It is not necessary for us to pass upon the question as to what is a reasonable time for the clerk to perform this duty as we are satisfied that in this case when the two acts of the court occurred on the same day, no duty was imposed upon its clerk to enter the first sentence of the court before adjournment of the court for that day."

[6] Clause [2] of the McAllister case, quoted ante, at page 1–2 [342 P.2d 890] represents a familiar rule, said to be in accord with the "weight of authority" in this country (see annotation (1947), 168 A.L.R. 706; 5 Wharton's Crim.Law and Proc. (Anderson, 1957), § 2191), that after execution of a valid sentence has commenced, the court cannot change it so as to increase punishment, even though the original sentence was erroneous and even though it had not been finally made of record at the time of the attempted change. Such alteration of sentence is forbidden, the United States Supreme Court says, "not * * * upon the ground that the court has lost control of the judgment * * *, but upon the ground that to increase the penalty is to subject the defendant to double punishment for the same offense in violation of the Fifth Amendment to the Constitution, which provides that no person shall 'be subject for the same offense to be twice put in jeopardy of life or limb.'" (United States v. Benz (1931), supra, 282 U.S. 304, 307, 51 S.Ct. 113; see Ex parte Lange (1873), 18 Wall. [85 U.S.] 163, 168, 173, 21 L.Ed. 872; In re Bradley (1943), 318 U.S. 50, 52, 63 S.Ct. 470, 87 L.Ed. 500; Bozza v. United States (1947), 330 U.S. 160, 167, footnote 2, 67 S.Ct. 645, 91 L.Ed. 818.) But constitutional double jeopardy, whatever the stage of the proceeding, should be a substantial rather than a mechanical concept. (See Bradley dissent, at page 53 of 318 U.S., at page 471 of 63 S.Ct. comment (1948), 36 Cal.L.Rev. 431.) Here defendant was not in any substantial sense punished under the jail sentence by being transported to, and at once returned from, the jail. The lapse of a few hours between the pronouncement of the original sentence and the pronouncement of the corrected sentence could not

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v. Superior Court (1952), 39 Cal.2d 839, 843 [3], 250 P.2d 241.)

[6] In the morning of March 2, 1936, McAllister was sentenced to pay a fine in installments commencing June 1. In the afternoon of March 2, before this sentence had been entered in the minutes, it was changed to provide for the alternative of imprisonment in the event the fine was not paid. It is apparent that at the time of the alteration McAllister had not begun execution of and had not been restrained under the original sentence. (Cf. In re Garrity (1929), 97 Cal.App. 372, 376 [2], 275 P. 480.)

have prejudiced defendant. It would be absurd to speculate that he might have arrived at state prison at a substantially earlier date, so as to start the running of time toward his eventual release (under Pen.Code, § 2900), if he had been sentenced to prison in the morning rather than in the afternoon.

[7, 8] Nor does it appear that defendant had begun service of the county jail sentence under tests which have been suggested in answer to the question "What constitutes commencement of service of sentence, depriving court of power to change sentence" (annotation (1945), 159 A.L.R. 161). So far as we have discovered this question has not been previously discussed in the California reports. In other jurisdictions it has been said generally that the test is whether "the prisoner has actually passed from the control of the court into the control of the executive" (Cisson v. United States (4 Cir., 1930), 37 F.2d 330, 332 [5]). A California defendant sentenced to county jail does not mechanically pass from the control of the court to the control of the executive, for the sheriff is both a ministerial officer of the court for the purpose of keeping defendant until service of sentence begins (Pen.Code, § 4000, subd. 2; Gov.Code, §§ 26603, 26605, 26611) and also the executive officer who executes the jail sentence (Pen.Code, § 4000, subd. 4). Particular tests which the courts of other jurisdictions have thought might govern the end of the sentencing court's power are not here applicable. There is no California statute defining the point of beginning of a county jail term for the guidance of the sheriff and the prisoner in computing its end (cf. Oxman v. United States (8 Cir., 1945), 148 F.2d 750 [159 A.L.R. 155, 160]; Pen.Code, § 2900). And a court-made rule that the prisoner passes from the control of the court when he is delivered, with a commitment paper, to an executive officer, or "when the prisoner is delivered into the custody of the officer at the prison where the sentence is to be served" (Hynes v. United States (7 Cir., 1929), 35 F.2d 734, 735) would not apply here because, as we have stated, the jail records show that defendant had been removed from the jail for change of sentence before the remanding order had been made of record at the jail booking office.

Furthermore, under California procedure, after pronouncement of a judgment of imprisonment the sheriff continues to detain the prisoner, whether or not such officer has a copy of a paper stating that the prisoner is to be held under such judgment, until he is discharged in legal manner. E. g., the sheriff here held defendant under the remanding order which noted the county jail sentence that had been pronounced; if no such remanding order had been made, the sheriff would have continued to hold defendant under the prior order which remanded him without bail pending the probation and sentence hearing; even if a judgment invalid on its face had been entered, as in Ex parte Walker (1901), 132 Cal. 143, 144, 64 P. 135 (cf. Ex parte Bernert (1881), 62 Cal. 524, 533–534), the sheriff could have held defendant under the original commitment by the magistrate and the subsequent superior court proceedings had prior to judgment.

If, throughout the day when the sentence of this defendant was changed, the sheriff, because of administrative problems connected with transportation, had continued to hold defendant in Santa Monica, where the sentencing court sat, it seems clear that defendant would have remained in the power of the court, exercised through its ministerial officer, the sheriff. In the circumstances here presented we think that the sheriff, in moving defendant about the county, and into and out of the jail, under an order which authorized him "to hold said defendant pending such further disposition as the court may order," continued to act as an officer of the court restraining defendant for the court and did not begin to act as an executive officer carrying out execution of a sentence which had not yet been entered in the minutes.

But, defendant says, he was "restrained" under the original sentence, and clause [3] of the McAllister rule (at page 526 [2] of

15 Cal.2d, at page 1075 of 102 P.2d) states that "if the defendant * * * has been restrained by the sentence imposed, then the court is without jurisdiction to vacate, add to, or in any manner modify the sentence originally pronounced." This clause [3] was stated to comprehend two decisions (In re Sullivan (1906), 3 Cal.App. 193, 197, 84 P. 781; In re Garrity (1929), supra, 97 Cal. App. 372, 375, 275 P. 480), relied upon by the defendant McAllister, which said that "The moment legal restraint was imposed as a means of enforcing the payment of the fine, that moment the execution of the judgment was commenced, and the power of the court was then exhausted, and its jurisdiction to recall, annul, or change its judgment was at an end."

That statement was not necessary to the Sullivan and Garrity decisions that the second sentences there attacked were invalid.[7] We have already seen that the statement as to restraint was dictum as applied to McAllister, who was originally sentenced only to pay a fine. The McAllister dictum of clause [3] has been repeated, still as dictum, in the cases of In re Pedrini (1949), 33 Cal.2d 876, 878–880 [1], 206 P.2d 699; People v. Kersten (1943), 59 Cal.App.2d 172, 173–174 [1], 138 P.2d 780; People v. Williams (1949), 93 Cal.App.2d 777, 779 [1], 209 P.2d 949; and In re Graham (1958), 160 Cal.App.2d 845, 846 [1], 325 P.2d 499. Also the Sullivan and Garrity cases and People v. Ysabel (1938), 28 Cal.App.2d 259, 261 [4], 82 P.2d 476, and In re Fontino (1933), 135 Cal.App. 466, 468 [2], 27 P.2d 413, suggest that the sentencing court exhausts its jurisdiction by announcing judgment, i. e., by simply speaking, no matter how inadvertently or erroneously. Those cases, in our opinion, were manifestly not intended to have the absurd and injurious consequence of precluding a trial judge from timely correction of either a slip of the tongue or an announcement of sentence which is based on a mistake of fact or law, which has not become of record in the minutes, and which has not affected the defendant. Such dicta, in so far as they suggest a result contrary to that reached here, are disapproved. People v. Reimringer (1953), 116 Cal.App.2d 332, 343 [19], 253 P.2d 756, upon which defendant relies, rests entirely upon a statute and is not relevant to the problem before us.[8]

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[7] In the Sullivan case it is implicit from, although not expressly noted in, the opinion that the sentencing court attempted to change a judgment which had been entered in the minutes, for on the day the original judgment was pronounced a commitment in regular form under seal of the court issued; that commitment, presumably, was the "certified copy of the entry thereof upon the minutes" required by Penal Code section 1213 as it then read. Furthermore, in Sullivan's case there was a substantial double punishment problem. His original sentence was to pay a $700 fine, with an invalid, severable provision that if the fine was not paid it should be satisfied by imprisonment in the state prison at the rate of $2 per day. After Sullivan had been restrained for five days of "dead time" by the sheriff, who was holding him for delivery to state prison, the court attempted to change the sentence by providing for satisfaction of the fine by imprisonment in the county jail at the rate of $2 per day. Manifestly, Sullivan suffered five days' restraint which should have been but were not credited toward satisfaction of his fine.

At the time of the questioned change of sentence as to one of the several counts on which Garrity had been convicted, an application for probation was pending and he had not been committed to the service of any term of imprisonment in execution of judgment on any count. Judgment originally was pronounced on October 31, 1928, and as to the questioned count was for fine only. Concerning the subsequent (or resumed) proceeding on December 6, 1928, the minutes stated, "by stipulation, matter of probation and sentence is reopened," and the court ordered that if the fine was not paid by December 20 defendant should be remanded to jail to satisfy the fine at a stated rate. From the December 6 minute order recording a stipulation that the matter of sentence be "reopened," the District Court of Appeal perhaps inferred, notwithstanding the pendency of the probation hearing, that the matter as to the one count had been "closed"; and the McAllister case (at page 524 of 15 Cal.2d, at page 1074 of 102 P.2d) says, "It can hardly be assumed that during * * * a period of over five weeks, the first sentence had not been entered by the clerk in the minutes."

It may be noted that the Garrity decision was reached notwithstanding the fact that the pendency of the probation proceeding was recognized. The appellate court stated (at page 373 of 97 Cal.App., 275 P. 480): "Although the record herein does not disclose the fact, it is conceded by respective counsel that at the time of the conviction of the defendant of the said crime of conspiracy he was also convicted of the commission by him of certain other offenses, as to which, under certain specified conditions, the execution of the judgment was suspended; that after judgment had been pronounced by the trial court, and pending an investigation relative to a decision by the trial court as to whether 'probation' (or suspension of the judgment) should be granted to the defendant as to his conviction of the charge of conspiracy [to violate the Corporate Securities Act], a stipulation was entered into between counsel respectively representing the defendant and the prosecution to the effect that a delay by the trial court beyond the statutory period in reaching a conclusion as to the matter of 'probation' for the defendant, would in nowise affect the power of the court in the premises."

It is further to be observed that the trial judge here, on March 17, 1958, after finding defendant guilty on the substantive charge, expressly continued disposition of the allegation of the prior conviction and of defendant's application for probation to April 7. In this regard the reporter's transcript shows the following: "The Court: So far as the priors on both of them [a co-defendant was being tried jointly with appellant] are concerned, they are submitted for disposition to the time of the hearing on probation, and the hearing on probation will be April 7th as to each defendant. The defendants are remanded." The continuance as to the prior conviction, it may be inferred, was to enable the judge, after he had received the information in the probation report, to consider whether he should find the charge to be true or not true or whether he might properly strike or dismiss the allegation of the prior conviction (see People v. Burke (1956), supra, 47 Cal.2d 45, 53, 301 P.2d 241). Thus on the morning of April 7 the pronouncement of sentence was not the only function remaining for the court to perform. Before judgment could properly be pronounced an issue was to be determined. But when he pronounced the jail sentence, the judge inadvertently left open that issue, which had been raised by the information and which had previously been expressly held open for disposition at this time. We conclude that in the circumstances of this case the trial judge did not err when he recalled the defendant, vacated the county jail sentence, completed the determination of issues, and pronounced the new sentence on the afternoon of April 7.

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[8] In the Reimringer case the trial court's originally entered judgment provided, "Sentences on counts 2, 3 and 4 to run consecutively to sentence on count 1; the sentence on count 5 to run concurrently with count 1." More than a month later, outside the presence of defendants and after they had begun to serve time, the court entered an amended judgment which specified "that the second count was to be served after the first, the third after the second, the fourth after the third all consecutively, the fifth concurrently with the first." (at page 342 of 116 Cal.App.2d, at page 763 of 253 P.2d.) Whether the trial court had intended by the language it used on the first occasion to impose the same sequence of terms which it delineated in the later pronouncement does not appear, but the construction which the District Court of Appeal placed on the trial court's judgment, together with the ground for the appellate court's holding, are clearly stated in its opinion. The District Court (at page 343 [19] of 116 Cal.App.2d, at page 763 of 253 P.2d) says, "Appellants contend that the first formulation makes counts 2, 3 and 4 run concurrently (In re Sweet, 113 Cal. App.2d 413 [248 P.2d 94]) whereas the new formulation makes them run consecutively. Such modifying of a judgment as to a felony cannot take place without the defendant being present (Pen.Code, § 1193, subd. 1) and cannot take place at all when the sentence has been entered in the minutes of the court or defendant has begun serving said sentence. (People v. McAllister, 15 Cal.2d 519, 525 [102 P.2d 1072].) Respondent contends that although the original formulation showed the intention of the court that only the fifth count should run concurrently with the first, * * * there was no express determination in what manner counts 2, 3 and 4 should be served with respect to each other and that on the failure of such determination section 669, Penal Code, gave the court power to make such determination within 60 days from the actual commencement of imprisonment and in the absence of the defendant. On its face the provision relates to prior existing judgments at the time of the pronouncing of a later judgment only, but respondent relies on People v. Finkel, 94 Cal.App.2d 813 [211 P. 2d 888], and People v. Carr, 6 Cal.2d 227 [57 P.2d 489], for the application of this provision also to judgments on separate counts of one information. * * * There is no reason conceivable why a different rule should apply to the correction of a failure to determine the manner in which a sentence should run with respect to a prior sentence known to the court than to the same failure with respect to the manner of running of sentences on different counts of the same judgment.

"We hold that the court had power to make the modification in the manner it did." (Cf. In re Pedrini (1949), 33 Cal. 2d 876, 879, 206 P.2d 699.)

For the reasons above stated, the order appealed from is affirmed.

GIBSON, C. J., and SHENK, SPENCE, McCOMB and PETERS, JJ., concur.

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52 Cal.2d 620

CITY OF PALM SPRINGS, Petitioner,

v.

Mary G. RINGWALD, as City Clerk, etc., Respondent.

L. A. 25251.

Supreme Court of California,
In Bank.
Aug. 18, 1959.
Rehearing Denied Sept. 16, 1959.

Proceeding by city for writ of mandate compelling city clerk to cause ordinance to be published. The Supreme Court, McComb, J., held that under constitutional provision prohibiting city from incurring any indebtedness exceeding in any year income and revenue provided for such year without assent of two-thirds of electors, proposed bond issue and ordinance purporting to pledge as trust fund part of city sales and use revenue to be received in future years to supplement income from operation of parking areas to be acquired and parking meters to be installed pursuant to ordinance were invalid notwithstanding provision of Streets and Highways Code to effect that city may make additional contributions to project before or after issuance of bonds therefor.

Writ denied.

Opinion, 337 P.2d 153, vacated.

1. Mandamus 🔑78

Mandamus was a proper remedy to compel a city clerk to publish an ordinance whereby city was attempting to set up a parking district if proposed ordinance met requirements of law, since act demanded was a ministerial duty.

2. Municipal Corporations 🔑867(2)

Under constitutional provision prohibiting city from incurring any indebtedness exceeding in any year income and revenue provided for such year without assent of two-thirds of electors, proposed bond issue and ordinance purporting to pledge as trust fund part of city sales and use revenue to be received in future years to supplement income from operation of parking areas to be acquired and parking meters to be installed pursuant to ordinance were invalid notwithstanding provision of Streets and Highways Code to effect that city may make additional contributions to project before or after issuance of bonds therefor. West's Ann.Const. art. 11, § 18; West's Ann. Streets & High.Code, § 35255.

3. Municipal Corporations 🔑867(2)

Revenue bonds or other obligations of the governmental body payable solely from a special fund do not violate constitutional prohibition against governmental body acquiring any indebtedness or liability for any purpose exceeding in any year income and revenue provided for such year without assent of two-thirds of qualified electors thereof, if governmental body is not liable to maintain special fund out of its general fund, or by tax levies should special fund prove to be insufficient, and if that revenue is supplied by agency to be benefited. West's Ann.Const. art. 11, § 18.

4. Municipal Corporations ⚷865(1)

Constitutional provision prohibiting governmental body from incurring indebtedness or liability in any matter or for any purpose exceeding in any year income and revenue provided for such year, without assent of two-thirds of qualified electors thereof encompasses not only property taxes but also other types of income and revenue taxes that produce revenue for the general fund of governmental body. West's Ann.Const. art. 11, § 18.

5. Municipal Corporations ⚷867(1)

Purpose of constitutional article prohibiting governmental body from incurring any indebtedness or liability exceeding in any year the income and revenue provided for such year without assent of two-thirds of electors thereof was not to interfere with city's exercise of its discretion in determining for what objects of public convenience and welfare its power shall be designed or for which money may be appropriated but was designed to afford people who were required to pay cost of providing such objects of public convenience and welfare an opportunity to express their approval or disapproval of a long-term indebtedness, and provision does not prohibit legislative body of city from spending any or all of its current income for whatever it may deem proper. West's Ann. Const. art. 11, § 18.

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Jerome J. Bunker, City Atty., Palm Springs, Kirkbride, Wilson, Harzfeld & Wallace and Ernest A. Wilson, San Mateo, for petitioner.

Thompson & Colegate, Roy W. Colegate and F. Gillar Boyd, Jr., Palm Springs, for respondent.

McCOMB, Justice.

Petitioner is a general law city governed by a city council. An ordinance was enacted by the council pursuant to the Parking District Law of 1951 (Sts. & Hy.Code, § 35100 et seq.) providing for a proposed parking district to be known as Parking District No. 1 of the city of Palm Springs.

To pay the cost of acquiring property for the parking lots and to construct improvements and install parking meters, the ordinance provides that bonds shall be issued in the amount of $1,400,000. It further provides that the bonds and interest thereon are not to be a debt of the city, or a charge, lien, or encumbrance, legal or equitable, on any of the city's property or upon any of its income, receipts or revenues, other than the revenues pledged to the payment thereof.

The revenues to be pledged are to be derived from the following sources: (1) the net revenue from parking facilities to be acquired; (2) the net revenue from street parking meters existing or to be installed within the proposed district; (3) contributions of money by the city to the district; and (4) the creation of a special fund to be supplied from future revenue from the city's sales and use taxes.

The first three proposed methods of financing the parking district bonds are specifically enumerated in section 35411 of the Streets and Highways Code. There is no provision in the act for the pledge of sales and use tax revenue for such purpose.

Respondent city clerk refuses to publish the ordinance, upon the ground that it and the bonds proposed to be issued pursuant to it are and will be invalid. Petitioner seeks a writ of mandate compelling the city clerk to cause the ordinance to be published.

These questions are presented:

[1] First: *Is mandamus a proper remedy to compel a city clerk to publish an ordinance whereby a city is attempting to set up a parking district?*

Yes. Mandamus is an appropriate remedy in such a case if the proposed ordinance meets the requirements of the law, since the act demanded is a ministerial duty. (Cf. City of Walnut Creek v. Silveira, 47 Cal.2d 804, 807[1], 306 P.2d 453; City of Oxnard v. Dale, 45 Cal.2d 729, 731 [1], 290 P.2d 859.)

Second: *Do the ordinance and the proposed bond issue violate the constitutional limitations on municipal debt contained in article XI, section 18, of the California Constitution?*

[2] *Yes.* The city proposes to pledge as a trust fund part of city sales and use tax revenue to be received in future years. This sales and use tax revenue is to supplement the income from the operation of the parking areas to be acquired and the parking meters, because such income alone will be insufficient to discharge the bond payments as they become due.

There is no provision in the law for the pledge of sales and use tax revenue for such purpose. Section 35255 of the Streets & Highways Code reads: "The statement of the amount of city contribution in the petition or in the resolution of intention shall not prevent the city from making additional contributions to the project before or after the issuance of bonds therefor and shall not prevent the city from paying all or any part of the incidental expenses in connection with the proceedings under this part."

Petitioner's theory is that if it is empowered to make contributions under section 35255 of the Streets & Highways Code "after the issuance of bonds," it has implied authority to pledge those contributions in futuro, as proposed.

Petitioner's contention is unsound, for the reason that diversion of future sales and use tax revenue from the general fund of the city without advance approval of two thirds of the electorate would violate the provisions of article XI, section 18, of the California Constitution, which reads in part: "No county, city, town, township, board of education, or school district, shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose, nor unless before or at the time of incurring such indebtedness provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also provision to constitute a sinking fund for the payment of the principal thereof. * * *"

It is conceded that petitioner does not propose to hold a bond election or seek the approval of the bonds by two thirds of the electors, asserting that such election is unnecessary because the sales and use tax revenues are to be pledged to a special fund and therefore section 18 of article XI of the California Constitution is not applicable. However, as hereinafter appears, the present case does not fall within the special fund doctrine.

[3] California has recognized the special fund doctrine, which holds that revenue bonds or other obligations of a governmental body payable solely from a special fund do not violate section 18 of article XI of the California Constitution, provided the governmental body is not liable to maintain the special fund out of its general fund, or by tax levies, should the special fund prove insufficient.

This doctrine is recognized by decisions of the courts of this state and not by statute. The cases that have recognized and defined the doctrine in this state have placed certain limitations upon its applicability. It has been held, first, that the indebtedness so created must not be an indebtedness or obligation of the governmental body concerned, which in this case is a city. This requirement has been satisfied by petitioner, as the ordinance provides in section 2930 thereof: "The bonds and interest thereon are not a debt of said City, nor a charge, lien or encumbrance, legal or equitable, upon any of its property or upon any of its income or receipts or revenues, other than the revenues which have been pledged to the payment thereof as herein provided."

The second requirement is that payments into the special fund beyond the current year, that is, payments in futuro, cannot be a charge upon the general fund; rather, the revenue must be supplied by the agency to be benefited.

In each case upholding the special fund doctrine, the payments pledged to be paid into the special fund have been from the revenue of the particular project to be benefited or the district or agency of which the project was to become a part.*

Prior to the decision in City of Oxnard v. Dale, 45 Cal.2d 729, 290 P.2d 859, there had been some doubt whether the source of revenue for the special fund had to be restricted to the improvements for which the bonds were issued or whether there could be a pledge of revenue from the entire facility or agency to be benefited. The broader view was adopted by this court, and the special fund doctrine in California was clarified accordingly. The rule governing the source of the special fund was stated by Mr. Chief Justice Gibson, 45 Cal. 2d at page 733, 290 P.2d at page 861: "The cases in California are not entirely clear as to the extent of the operation of the special fund doctrine, and there is a conflict of authority on the subject in other states. Some of the courts in other jurisdictions have held that revenue bonds payable solely from a special fund will not be free from the constitutional limitation unless the fund is restricted to the revenues from the particular improvement which is to be constructed out of the proceeds of the bonds in question, but under the prevailing view the doctrine may be applicable where the revenues of the entire existing system, as well as those of the proposed improvement, are pledged. See Joint Report of Committees of the American Society of Civil Engineers, the Section of Municipal Law of the American Bar Association and others (1951), 12 Ohio State L.J. 147, 182 et seq.; 38 Am.Jur. 155–156."

City of Walnut Creek v. Silveira, 47 Cal. 2d 804, 306 P.2d 453, did not overrule the holding in City of Oxnard v. Dale, supra, and the other cases referred to in the footnote on page 901 of 342 P.2d.

In the Walnut Creek case this court upheld the constitutionality of an act authorizing cities of less than 4,000 population to issue limited obligation bonds to be paid solely from sales and use taxes, provided the proceeds from the bonds were used for the acquisition, construction, and completion of certain types of municipal improvements. However, the Limited Obligation Bond Law specifically made a favorable vote of two thirds of the electors voting a prerequisite to the issuance of the bonds (Gov.Code, § 43614), and compliance with this requirement was had in the Walnut Creek case. It was therefore unnecessary to determine whether the special fund doctrine made the requirements of section 18 of article XI of the Constitution inapplicable.

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* California cases that have recognized and defined the special fund doctrine reveal the following in relation to the source of revenue or the project benefited:

In Ryan v. Riley, 65 Cal.App. 181, 190, 223 P. 1027, the Motor Vehicle Department benefited; the special fund was derived solely from the use of highways. In Shelton v. City of Los Angeles, 206 Cal. 544, 546, 275 P. 421, the department of water and power benefited; the special fund was provided from revenue derived from the department of water and power. In California Toll Bridge Authority v. Wentworth, 212 Cal. 298, 301, 298 P. 485, the Toll Bridge Authority benefited; the special fund was provided from revenues collected as tolls by the Toll Bridge Authority. In California Toll Bridge Authority v. Kelly, 218 Cal. 7, 13, 21 P.2d 425, the special fund was provided from tolls to be collected from use of a particular bridge for which bonds were issued. In Department of Water and Power of City of Los Angeles v. Vroman, 218 Cal. 206, 211, 217, 22 P.2d 698; power facilities of the city benefited; the special fund was derived from the sale or use of electricity. In Housing Authority of Los Angeles County v. Dockweiler, 14 Cal.2d 437, 460, 94 P.2d 794, the Housing Authority benefited; the revenue was derived from the housing project and any annual contributions made by the federal authorities to the Housing Authority. In City of Glendale v. Chapman, 108 Cal.App.2d 74, 76, 79, 238 P.2d 162, existing waterworks benefited; the special funds were supplied by revenue collected by the waterworks. In Board of State Harbor Commissioners for San Francisco Harbor v. Dean, 118 Cal.App.2d 628, 631, 258 P.2d 590, the San Francisco Harbor benefited; the special fund was provided from revenue derived from harbor facilities. In City of Oxnard v. Dale, 45 Cal.2d 729, 732, 290 P.2d 859, a sewer system benefited; the special fund was derived from the gross revenues from the sewer system.

As hereinabove set forth, in order for the special fund doctrine to apply, payments in futuro cannot be a charge upon the general funds. As was said in City of Oxnard v. Dale, supra: "* * * an obligation which is payable out of a special fund is not an 'indebtedness or liability' of a governmental body within the meaning of section 18 of article XI of the Constitution if the governmental body is not required to pay the obligation from its general funds, or by exercise of its powers of taxation, should the special fund prove insufficient." (45 Cal.2d at page 737, 290 P.2d at page 863.)

The words "not required to pay the obligation from its general funds" are here controlling. The sales and use taxes which petitioner proposes to pledge are excise taxes and will constitute general funds of petitioner unrelated to the parking district. Therefore, the fund established by the ordinance here in question does not meet the requirements of the special fund doctrine. Accordingly, the sales and use taxes may not be diverted from petitioner's general funds for the purpose proposed for a period beyond the year in which received unless there has been compliance with section 18 of article XI of the Constitution.

Third: *Is section 18 of article XI of the California Constitution applicable only to property taxes?*

No. Section 18 of article XI uses the language "exceeding in any year the *income and revenue* provided for such year." (Italics added.)

[4] It may be true as argued, that at the time section 18 of article XI was adopted a city or county received very little income or revenue other than from property taxes. This fact, if true, does not support an implication that would justify a restrictive interpretation of the words "income and revenue," which are clear and unambiguous. The foresight of those who framed the constitutional provision has been demonstrated. Cities and counties have developed into more and more complex governmental organizations, offering many new and widely varying types of service. The increase in volume, as well as variety, of services demanded by an evolving society has added to the cost of government. Cities and counties have found it increasingly difficult to meet such costs by property tax revenue alone. Necessity has required them to devise ways of supplementing that source of income, and the sales and use tax with which we are concerned is a pertinent example of such a tax. The scope of section 18 of article XI clearly encompasses not alone property taxes but also the other types of "income and revenue" taxes that produce revenue for the general fund.

There is no merit in petitioner's argument that "If the city makes reasonable provisions for its creditors, it should be permitted, in the exercise of its taxing power, to determine for what objects of public convenience and welfare its power shall be exercised and to appropriate moneys to those objects."

[5] The purpose of section 18, article XI, of the Constitution is not to interfere with the city's exercise of its discretion in determining for what objects of public convenience and welfare its power shall be exercised or for which money may be appropriated. It is designed to afford the people who are required to pay the cost of providing such objects of public convenience and welfare an opportunity to express their approval or disapproval of a long-

term indebtedness. The constitutional provision does not prohibit the legislative body of the city from spending any or all of its current income for whatever it deems proper or necessary objects of public convenience or welfare. It simply provides that the legislative body may not encumber the general funds of the city beyond the year's income without first obtaining the consent of two thirds of the electorate.

The writ is denied.

GIBSON, C. J., and TRAYNOR, SCHAUER, SPENCE and PETERS, JJ., concur.

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172 Cal.App.2d 784

Anthony KRALYEVICH, Plaintiff and Respondent,

v.

Arthur MAGRINI, Defendant and Appellant.

Civ. 18332.

District Court of Appeal, First District, Division 1, California.

Aug. 11, 1959.

Hearing Denied Oct. 8, 1959.

Action for injuries sustained by motorist when his automobile was struck in rear by vehicle which defendant was driving, wherein it was admitted that plaintiff sustained over $4,000 in special damages, and he sought award of $25,000 but jury awarded only $2,500. The Superior Court, County of Santa Clara, Raymond G. Callaghan, J., rendered order granting new trial on question of damages alone and defendant appealed. The District Court of Appeal, Wagler, J. pro tem., held that evidence, both on issue of damages and on issue of liability, revealed that it was error for trial court, in granting new trial, to limit issues to damages alone.

Reversed and remanded.

1. New Trial 🔑163(1)

Order granting new trial could not be amended by nunc pro tunc order, filed more than ten days after the order, so as to show that new trial was granted on grounds that evidence was insufficient to justify verdict and that verdict was against the law. West's Ann.Code Civ.Proc. § 657.

2. New Trial 🔑163(1)

Under statute providing that when new trial is granted on grounds of insufficiency of evidence, order must so specify or it will be conclusively presumed that new trial was not based on such ground, for order to show that it was based on insufficiency of evidence, no particular words or language are required, and if nature of order is such that it can be reasonably construed as including insufficiency of evidence, it is sufficient. West's Ann.Code Civ.Proc. §§ 657, 659.

3. New Trial 🔑163(2)

For purposes of interpreting language used in order granting new trial, to ascertain whether it shows that new trial was granted because of insufficiency of evidence, not only language of order itself may be considered but language of notice of motion, together with statutory presumption that notice should be deemed to be motion for new trial on all grounds stated in notice may be looked to as well. West's Ann.Code Civ. Proc. §§ 657, 659.

4. New Trial 🔑66

A decision can be said to be "against law" only where there is failure to find on material issue, where findings are irreconcilable, and where evidence is insufficient in law and without conflict on any material point.

See publication Words and Phrases, for other judicial constructions and definitions of "Against Law".

5. New Trial 🔑66

When general verdict only is returned, it can be said to be "against law" only when it is unsupported by any substantial evidence.

6. New Trial 🔑163(1)

Order granting new trial "insofar as the question of damages only is concerned", under the circumstances, sufficiently showed that it was granted because of insufficiency of evidence, where notice of motion had asserted that evidence was insufficient and verdict was against law, and it was evident that verdict was not against law. West's Ann.Code Civ.Proc. §§ 657, 659.

7. Appeal and Error ⚿301

As either order granting new trial because of excessive damages or because of inadequate damages is to be construed as based upon insufficiency of evidence, that order granting new trial, standing alone, did not indicate whether court considered award inadequate or excessive, did not preclude review on appeal. West's Ann.Code Civ. Proc. §§ 657, 659.

8. Appeal and Error ⚿977(3)

On appeal from order granting new trial on question of damages, in injury action, construed as based upon insufficiency of evidence, it was necessary for reviewing court to consider evidence both on issue of liability and on damages in order to determine whether trial court abused its discretion in limiting new trial to issue of damages alone.

9. New Trial ⚿9

When jury fails to compensate plaintiff for special damages indicated by evidence, and despite fact his injuries have been painful, makes no award or allows only trifling sum for general damages, only reasonable conclusion is that jurors compromised issue of liability and that a new trial limited to damages alone is improper.

10. Automobiles ⚿245(15, 60)

When one motor vehicle runs into rear of another, questions of negligence and proximate cause of collision are questions of fact and not of law. West's Ann.Vehicle Code, §§ 531, 544(c), 546(c).

11. New Trial ⚿9

In action for injuries sustained by motorist when his automobile was struck in rear by vehicle which defendant was driving, wherein it was admitted that plaintiff sustained over $4,000 in special damages, plaintiff's evidence showed that he sustained whiplash type injury with resulting damage to joints in neck causing numbness and pain in right arm and weakness in hand with lasting pain and suffering, and he sought award of $25,000 but jury awarded only $2,500, evidence, both on issue of damages and on issue of liability, revealed that it was error for trial court, in granting new trial, to limit issues to damages alone. West's Ann. Code Civ.Proc. §§ 657, 659; West's Ann. Vehicle Code, §§ 531, 544(c), 546(c).

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Bronson, Bronson & McKinnon, San Francisco, for appellant.

Bressani & Hansen, San Jose, for respondent.

WAGLER, Justice pro tem.

This is an appeal by defendant from an order granting a new trial on the issue of damages alone.

By his complaint plaintiff sought damages for personal injuries, in the sum of $25,000, which he claimed he sustained when his vehicle was struck in the rear by a vehicle operated by the defendant. Both parties agree that the special damages proved at the trial exceeded $4,000. The jury, by a vote of 10 to 2, returned a verdict in plaintiff's favor in the sum of $2,500. Plaintiff thereupon moved for a new trial upon the issue of damages alone, specifying as grounds therefor: "1. Insufficiency of the evidence to justify the verdict of the jury in that the amount of the verdict is inadequate, damages appearing to have been given under the influence of passion and prejudice; 2. That the verdict is against law." With his motion plaintiff filed points and authorities all of which were addressed to the question of the inadequacy of the award.

In due time the court filed a "memorandum decision" dated March 17, 1958, which read as follows, "A new trial is hereby granted in the above entitled matter insofar as the question of damages only is concerned." A minute order using the same language was entered on the same date.

More than 10 days after the granting of said motion, and after notice of appeal had been filed, the trial court signed and filed an order attempting to amend nunc pro tunc, as of the date originally entered, the previous order granting a new trial. The nunc pro tunc order was made on the ground of clerical error; it recited that the new trial was granted on the grounds of: "1. Insufficiency of the evidence to justify the verdict of the jury, and 2. That the verdict is against law."

[1] It was held in Roth v. Marston, 110 Cal.App.2d 249, 242 P.2d 375 (hearing denied by Supreme Court), that a nunc pro tunc order entered under the circumstances disclosed by the record herein is void and of no effect. We will therefore consider only the order entered on March 17th, which specified no grounds but did recite that the new trial was granted *"as to the question of damages alone."* (Emphasis added.)

In 1939 the Legislature amended Code of Civil Procedure, section 657, by providing that when a new trial is granted on the ground of insufficiency of the evidence "the order shall so specify *this in writing and shall be filed with the clerk within ten days after the motion is granted*; otherwise, on appeal from such order it will be *conclusively* presumed that the order was not based upon that ground." [1]

The appellate courts of this state have consistently held that section 657 should be liberally construed. Since the 1939 amendment they have been particularly liberal in attempting to relieve a party from a defective order to avoid what might otherwise result in a manifest miscarriage of justice.

In Cox v. Tyrone Power Enterprises, 49 Cal.App.2d 383, 121 P.2d 829, for example, it was held that no formal order subscribed by the court was required by the statute; that a clerk's minute order was sufficient.

A number of cases which are further illustrative of this liberal attitude on the part of the appellate courts are collected in Piru Citrus Ass'n v. Williams, 95 Cal.App.2d 911, 915, 214 P.2d 426. Since the decision in Piru additional decisions [2] have been handed down which are illustrative of this same attitude.

In Ice-Kist Packing Co. v. J. F. Sloan Co., 157 Cal.App.2d 695, 696, 321 P.2d 840, 841, for example, a notice of motion which was based upon "insufficiency of the evidence to justify the verdict and that said verdict is against law in that said verdict * * * awarded damages which were grossly inadequate and in complete variance with the evidence presented and completely contrary to all the evidence" was construed as being a motion based exclusively upon ground of the "insufficiency of the evidence." As such it served to rescue a purely general order from the provisions of Code of Civil Procedure, section 657.

[2] The rule seems now to be well established that if the language used in the order is reasonably susceptible of being interpreted as an intent to grant a new trial on account of the insufficiency of the evidence to sustain the verdict, or if it may be fairly inferred from the language used that such was the ground upon which the order was made, it will be held that there has been a sufficient compliance with Code of Civil Procedure, section 657. Bray v. Rosen, 167 Cal.App.2d 680, 335 P.2d 137.

No particular words or language are required if the nature of the order itself is such that it can reasonably be construed as including insufficiency of the evidence. Legg v. Mutual Benefit Health and Accident of Omaha, 136 Cal.App.2d 887, 289 P.2d 550, 290 P.2d 87; Van Ostrum v. State, 148 Cal.App.2d 1, 306 P.2d 44.

[3] For the purpose of interpreting the language used and ascertaining the intent thereof not only the language of the order itself may be considered, but the language of the notice of motion, as well as the pre-

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[1] Italicized portion added in 1939.

[2] See: People ex rel. Department of Public Works v. McCullough, 100 Cal.App.2d 101, 223 P.2d 37; Bridgford v. Sawyer, 105 Cal.App.2d 631, 234 P.2d 95; Lee v. Cranford, 107 Cal.App.2d 677, 237 P.2d 986; Van Ostrum v. State, 148 Cal.App.2d 1, 306 P.2d 44; Ice-Kist Packing Co. v. J. F. Sloan Co., 157 Cal.App.2d 695, 321 P.2d 840.

sumption declared by Code of Civil Procedure, section 659 [3] may also be considered. Cox v. Tyrone Power Enterprises, 49 Cal. App.2d 383, 121 P.2d 829, supra; Ice-Kist Packing Co. v. J. F. Sloan Co., 157 Cal. App.2d 695, 321 P.2d 840, supra. The points and authorities in support of the motion may also shed some light upon the intent of the language used, particularly if but a single proposition is urged.

[4, 5] The notice of motion in the instant case set forth two grounds: (1) insufficiency of the evidence, and (2) that the verdict is against law. The latter ground is of very limited application. A decision can be said to be "against law" only: (1) where there is a failure to find on a material issue; (2) where the findings are irreconcilable; and (3) where the evidence is insufficient in law and without conflict in any material point. Renfer v. Skaggs, 96 Cal. App.2d 380, 215 P.2d 487; Townsend v. Gonzalez, 150 Cal.App.2d 241, 309 P.2d 878; Williams v. Fairview Hospital Ass'n, Cal. App., 332 P.2d 791 (hearing granted); Bray v. Rosen, 167 Cal.App.2d 680, 335 P.2d 137, supra. When a general verdict only is returned it can be said to be "against law" only when it is unsupported by any substantial evidence, i. e., when the entire evidence is such as would justify a directed verdict against the party in whose favor the verdict is returned. "[T]he words 'against the law' do not import a situation in which the court weighs conflicting evidence and merely finds a balance against the judgment." Bray v. Rosen, 167 Cal.App.2d 680, 335 P.2d 137, 139, supra.

[6] The order in the instant case granted the new trial "insofar as the question of damages only is concerned." This language carries the inescapable inference that in the opinion of the trial court sitting as the thirteenth juror, there was sufficient evidence to hold the defendant liable but that the amount of the damages awarded was either too large or too small. This inference is irreconcilable with the second ground specified in the notice of motion, i. e., "verdict is against law" because, as we have already pointed out, to be "against law" a verdict must be *without* any substantial evidentiary support. Here the court in effect recited in the order that the evidence did support a verdict for the plaintiff in some amount. Thus the language of the order negates the idea that the order could have been granted upon the second ground. Since only two grounds were specified in the notice of motion, we must therefore look to the first ground—insufficiency of the evidence—for aid in interpreting the language used. When this is done we find that it is entirely consistent with the language of the order and furnishes the only ground upon which the order could have been based. See Ice-Kist Packing Co. v. J. F. Sloan Co., 157 Cal.App. 2d 695, 321 P.2d 840, supra. Had the notice specified any other ground at all which would be reconcilable with a re-examination of the amount of the award (as for example, error in law) we would, of course, be required to assume that the new trial was not granted upon insufficiency of the evidence. Code of Civil Proc. § 657; Bray v. Rosen, 167 Cal.App.2d 680, 335 P.2d 137, supra.

[7] An examination of the points and authorities and arguments filed in support of the motion will disclose that they too support this interpretation of the order. The only point urged by respondent in his points and authorities was the inadequacy of the damages. The order granting new trial, standing alone, of course, does not indicate whether the court considered the award inadequate or excessive. Under the decisions however this is unimportant since it has been held that both an order granting a new trial because of inadequate damages (Secreto v. Carlander, 35 Cal.App.2d 361, 95 P.2d 476), and one granting a new trial because of excessive damages (Griffey v. Pacific Electric R. Co., 58 Cal.App. 509, 209 P. 45), are to be construed as being

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[3] Code of Civil Procedure, section 659 reads: "Said notice shall be deemed to be a motion for a new trial on all the grounds stated in the notice."

based upon the insufficiency of the evidence. See also Pierce v. Nash, 126 Cal.App.2d 606, 272 P.2d 938; Sinz v. Owens, 33 Cal. 2d 749, 205 P.2d 3, 8 A.L.R.2d 757.

The views hereinabove expressed are not inconsistent with the case of Bray v. Rosen, 167 Cal.App.2d 680, 335 P.2d 137, supra, which is relied upon by appellant. In Bray it was held that an order using language very similar to that used in the instant case could *not* be construed as one based upon the insufficiency of the evidence. In the instant case however the motion was based upon only two grounds; in Bray, upon five grounds, to wit: (1) misconduct of jury, (2) inadequate damages, (3) insufficiency of the evidence, (4) verdict and judgment against law, and (5) error in law. In Bray the language of the order (as in the instant case) was irreconcilable with the fourth ground, to wit: verdict against law. This left remaining, however, four other grounds upon which the order might have been based, all of which were in harmony with the language of the order. Under such circumstances the court said, "[T]here is no possible means by which this court can accurately say that the trial court in its purely generalized order did not base its order on misconduct of the jury or errors in law occurring at the trial, and excepted to by the party making the application. Nor can we tell whether or not the trial court felt that one of these matters had misled the jury and that for that reason the damages were too much, or too little." In the instant case, on the contrary, only one inference is possible, i. e., that the trial court felt after weighing the evidence that while it was sufficient to support a verdict for the plaintiff, it was insufficient to support a verdict for the particular sum awarded, and for that reason it granted a new trial on the ground of the insufficiency of the evidence.

[8] Since we have interpreted the order, when considered with the motion, as one based upon the insufficiency of the evidence, and since the new trial was limited to the issue of damages, it becomes necessary to review the evidence on both the issue of liability and damages in order to determine whether the trial court abused its discretion in limiting the new trial to the issue of damages alone. Harper v. Superior Air Parts, Inc., 124 Cal.App.2d 91, 268 P.2d 115; Bakurjian v. Pugh, 4 Cal.App.2d 450, 41 P.2d 175.

Both parties concede that respondent's special damages exceeded $4,000. Respondent's doctor described his injuries as a sprain of the lower back and a whiplash type injury to the neck resulting in damage to the joints in the neck between the vertebrae and damage to the tendons and muscles which hold those vertebrae together. The injury involved the nerves of the neck and caused numbness and pain in the right arm and weakness of the right hand. Respondent had undergone the usual treatment of medication, traction, and physiotherapy, and at the end of two years was still suffering from "repeated bouts of very severe pain, low back pain, neck pain, trouble with his arm, trouble with his neck and face." Respondent prayed for general damages in the sum of $25,000. The jury awarded $2,500.

[9] In Rose v. Melody Lane, 39 Cal.2d 481, 489, 247 P.2d 335, 340, the court said: "When the jury fails to compensate plaintiff for the special damages indicated by the evidence, and despite the fact that his injuries have been painful, makes no award or allows only a trifling sum for his general damages, the only reasonable conclusion is that the jurors compromised the issue of liability, and a new trial limited to the damages issue is improper. See Hughes v. Schwartz, 51 Cal.App.2d 362, 367–368, 124 P.2d 886; McNear v. Pacific Greyhound Lines, 63 Cal.App.2d 11, 16, 146 P.2d 34; Adams v. Hildebrand, 51 Cal.App.2d 117, 118–119, 124 P.2d 80. A contrary conclusion is justified only when the evidence of defendant's negligence is 'overwhelming.' See Taylor v. Pole, 16 Cal.2d 668, 675, 107 P.2d 614; Crandall v. McGrath, 51 Cal.App. 2d 438, 440–442, 124 P.2d 858." To this statement we add that the evidence must also overwhelmingly support the conclusion

that plaintiff was himself free from contributory negligence. Crandall v. McGrath, 51 Cal.App.2d 438, 124 P.2d 858.

Appellant contends that the evidence on the issue of liability was not "overwhelmingly" in favor of respondent. We agree. There were no witnesses to the accident except the litigants. Their testimony was in sharp conflict. Appellant in substance testified that both vehicles were moving in the normal flow of traffic when a child ran into the street and passed in front of respondent's car; that his attention was diverted by the child; when he looked back, respondent had stopped; he "hit the brakes" but it was too late and he "rammed into him." He saw respondent give no signal. Respondent's version was quite different. He saw no child, he signaled for a stop, and had been stopped for a full minute before he was struck. The parties also gave conflicting testimony as to what each said after the accident. The case was submitted to the jury with instructions on negligence and contributory negligence. The court instructed in the language of Vehicle Code, section 531 (following too closely); Vehicle Code, section 544(c) (sudden stop or decrease of speed); and Vehicle Code, section 546(c) (signal for stop or sudden decrease of speed).

[10, 11] As said in Lowenthal v. Mortimer, 125 Cal.App.2d 636, 638, 270 P.2d 942, 943, "It is now well established that when one motor vehicle runs into the rear of another vehicle, negligence is a question of fact and not of law. Turkovich v. Rowland, 106 Cal.App.2d 445, 447, 235 P.2d 123; Wohlenberg v. Malcewicz, 56 Cal.App.2d 508, 133 P.2d 12. It is also the province of the jury to determine the proximate cause of an accident." See Donahue v. Mazzoli, 27 Cal.App.2d 102, 80 P.2d 743. It would appear that the evidence here would have supported a verdict for either party and since the verdict was less than the uncontroverted special damages a new trial should have been granted on all the issues.

Respondent points out that the jury was instructed to first determine the question of liability before undertaking to determine the amount of damages. From this he argues that the jurors must have found liability against appellant, otherwise they violated this instruction. The argument is based entirely upon speculation. In view of the evidence, the issues framed, and the amount of the verdict, which was arrived at by a vote of 10 to 2, it would appear more probable that the verdict was the result of a compromise.

Tornell v. Munson, 80 Cal.App.2d 123, 181 P.2d 112, cited by respondent does not strengthen his position. In Tornell the verdict was in the sum of $3,000. The court held that under the evidence over one-half of this amount could be considered general damages. Under such circumstances the inference that the issue of liability was compromised by the jury did not arise.

Since the inference in the instant action is that the issue of liability has never been properly determined, the order granting a new trial on the issue of damages only is reversed. The cause is remanded to the trial court with directions to vacate the judgment and order a new trial on all issues. See Hamasaki v. Flotho, 39 Cal.2d 602, 248 P.2d 910.

BRAY, P. J., and TOBRINER, J., concur.

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Betty W. MENGE, Plaintiff and Appellant,
v.
Louis A. BROWN, Jr. and Robert W. Magdlen, Defendants and Respondents.
Civ. 23502.

District Court of Appeal, Second District,
Division 1, California.
Aug. 12, 1959.

Rehearing Denied Aug. 28, 1959.
Hearing Denied Oct. 7, 1959.

Action by former wife against former husband and trustee for declaratory relief and to invalidate a trust dated February 8, 1954, under terms of which trust was to be made a part of interlocutory decree of divorce and trustee was to pay for benefit of husband and wife in equal shares all of income from trust estate which included a certain lot. From portion of judgment of Superior Court, Los Angeles County, William E. Fox, J., amending interlocutory judgment decree nunc pro tunc on his own motion, the former wife appealed. The District Court of Appeal, White P. J., held that evidence that there was mistake, negligence or inadvertence causing delay in dating, signing, filing or entering of interlocutory judgment in a divorce action dated February 23, 1954, was insufficient to support an order that judgment in divorce action be entered nunc pro tunc as of December 21, 1953, on which date husband and wife had entered into a stipulation in open court, and former wife was prejudiced thereby and admission of parol evidence of intention of parties and their counsel at time of execution of declaration of trust was error.

Portion of judgment appealed from reversed with directions and other portions of judgment affirmed.

1. Divorce ⚷162

Where there is no claim by any party or showing of any kind that signing, filing, or entry of an interlocutory or final decree divorcing two of the parties would have been earlier except for mistake, negligence or inadvertence, court in a subsequent action for declaratory relief is without power to order that judgment in divorce action be entered nunc pro tunc as of an earlier date. West's Ann.Civ. Code, § 131.5.

2. Divorce ⚷162

The existence or nonexistence of mistake, negligence or inadvertence resulting in an interlocutory judgment not being entered as soon as it could have in divorce action if applied for and, if it does exist, whether it was cause of delay in dating, signing, filing or entering an interlocutory judgment are questions of fact to be determined by trial court. West's Ann.Civ.Code, § 131.5.

3. Divorce ⚷162
Evidence ⚷461(1)

In action by former wife against former husband and trustee for declaratory relief and to invalidate a trust dated February 8, 1954, under the terms of which trust was to be made a part of interlocutory decree of divorce and trustee was to pay for benefit of husband and wife in equal shares all of income from trust estate which included a certain lot, evidence that there was mistake, negligence or inadvertence causing delay in dating, signing, filing or entering of interlocutory judgment in a divorce action dated February 23, 1954, was insufficient to support an order that judgment in divorce action be entered nunc pro tunc as of December 21, 1953, on which date husband and wife had entered into a stipulation in open court, and former wife was prejudiced thereby and admission of parol evidence of intention of parties and their counsel at time of execution of declaration of trust was error. West's Ann.Civ. Code, § 131.5.

4. Divorce ⚷254

Interlocutory divorce decree dated, signed, filed and entered later than a trust agreement and speaking of trust agreement as something to be done in the future was not approval of the declaration of trust assigned by the parties, and where declaration of trust was in conflict with interlocutory judgment, the latter controlled.

Joseph W. Fairfield, Ethelyn F. Black, Los Angeles, for appellant.

Greenbaum, Baker & Ancel, Irwin E. Sandler, Los Angeles, for respondents.

WHITE, Presiding Justice.

Plaintiff Betty W. Menge (formerly Betty W. Brown, wife of the defendant Louis A. Brown, Jr., and at the time of trial Betty W. Chapman) appeals from certain portions of the judgment in an action brought by her against her former husband and one Robert J. Magdlen "for declaratory relief and to invalidate a trust", of which appellant and her former husband were trustors and said Magdlen was trustee.

Prior to the trial the parties resolved most of their controversies, terminated the trust by agreement, and, in order to expedite the sale of a portion of the trust properties then in escrow, waived their respective rights to appeal except as to certain limited questions.

The portion of the judgment from which the instant appeal was taken and of which appellant, in her briefs, seeks reversal is: "Item 2a (5) of the judgment * * * that the net proceeds of the sale of Lot 34 * * * shall be divided and paid over by the Trustee equally" to plaintiff and defendant Brown.

In her action for divorce, on December 21, 1953, plaintiff and her then husband, defendant Brown, stipulated in open court that plaintiff should be awarded "the use of lot 34 located in Palmdale, and *all of the income* to be derived from said real property. In the event said property is leased for commercial purposes, Mrs. Brown is to have the right to remove the main house located upon said real property and to retain title to said house as her separate property." (Emphasis added.) Brown v. Brown, 162 Cal.App.2d 314, 316, 328 P.2d 4, 5.

The interlocutory judgment dated, signed and filed February 23 and entered February 24, 1954, provides that, pursuant to said stipulation, certain specified assets are awarded to husband and wife as their respective sole and separate properties. Included in such award as the sole and separate property of plaintiff wife is "the use of said Lot 34 * * * and the *residential rental income* derived therefrom. In the event the said property is leased for commercial purposes * * * the right to remove the house * * * and retain title thereto as her separate property, *whereupon her right to the income from said real property shall terminate*". Said judgment in the divorce action provides further that "all the balance of the property of which the parties are possessed", listing said Lot 34 and five other items *"shall be placed in trust* with the trustee * * * the terms of said trust shall be reduced to writing and executed by both parties and said trust to be operated *for the benefit of the plaintiff Betty W. Brown and defendant Louis A. Brown, Jr. sharing equally* in the benefits of said trust". (Emphasis added.)

Both the Declaration of Trust between the parties plaintiff and defendant Brown, as trustors, and defendant Magdlen, as trustee, and the Grant Deed from plaintiff and defendant Brown to said Magdlen, as trustee, are dated and acknowledged February 8, 1954 (after the stipulation made in open court and entered in the minutes of the divorce action and before the interlocutory decree was made). Said Declaration of Trust provides that "this trust and the terms thereof are created and made a part of that certain interlocutory decree of divorce between the trustors herein named" (plaintiff and defendant Brown in the instant action), "dated the 21st day of December, 1953" (the date of the stipulation in open court, but not the date of said interlocutory decree).

The trust property described in an exhibit attached to said Declaration of Trust and referred to therein includes said Lot 34 and the other items of community property ordered by the divorce court to "be placed in trust". By said Declaration of Trust it is agreed that "the trustee shall pay to or apply for the benefit of both of the trustors herein, *in equal shares* all of the income from the trust estate". (Emphasis added.)

At all times since December 21, 1953, plaintiff has remained in the exclusive possession of said Lot 34, continued to reside in the main house and to collect rents for the two smaller houses thereon. Such rentals were not then, and are not now, claimed to be a part of the trust estate. Neither the declaration of trust or the deed from the Browns to the trustee mentions plaintiff's right to the use and/or rentals of said lot.

None of the assets awarded by the court to the parties as their separate properties are mentioned in said Declaration of Trust. Neither plaintiff nor defendant Brown has claimed any interest in the properties awarded to the other, except that in the instant action defendant Brown contends that the value of his interest in said Lot 34 is equal to the value of the interest of plaintiff therein.

April 29, 1957, the superior court denied plaintiff's motion to amend nunc pro tunc said interlocutory judgment by substituting "all of the income" for the "residential income" of said Lot 34, and by striking the clause terminating her right to income from said lot in the event it should be leased for commercial purposes. Judge Paonessa, before whom said stipulation had been made and who granted the interlocutory decree, also heard said motion to amend the interlocutory decree. He then clearly stated that the interlocutory decree contained no clerical error, that the stipulation of December 21, 1953, was ambiguous, that the parties had the right to clarify it, that the interlocutory judgment upon his order was thereafter prepared by plaintiff's counsel, examined and approved by the attorney for defendant Brown, and it expressed the intention and agreement of the parties as he then understood it. His order denying plaintiff's motion to amend was affirmed by the District Court of Appeal (Brown v. Brown, supra, 162 Cal.App.2d at page 317, 328 P.2d at page 6) and hearing was denied by the Supreme Court, September 17, 1958.

Not only were plaintiff and defendant Brown the Trustors in said Declaration of Trust, but they were also the beneficiaries and at all times during their lifetime and competency retained in their own hands the right to make and control sales or exchanges of trust property and investments of trust funds, and the right, by their agreement in writing, to amend or revoke said trust.

December 18, 1957, plaintiff, defendant Brown and defendant Magdlen, their said trustee, executed an agreement providing for the disposition of the property of the trust which agreement they later stipulated "shall be incorporated as a portion of the pre-trial order herein and * * * shall be made a part of the final judgment herein".

They thereby agreed that said trust shall be terminated and dissolved and the properties distributed by order of court; that said Lot 34 is to be sold by the trustee and the funds remaining after payment of the expenses of sale shall be distributed by court order, it being expressly agreed that such sale "shall in no way prejudice any of the rights" of plaintiff "over and above the one-half interest in said Lot 34 or proceeds thereof".

"(b) That in the present action, at the trial of said action, it shall be determined by the court, the interest of Chapman (plaintiff) in and to Lot 34 according to the terms of the interlocutory decree between Chapman and Brown dated the 23rd day of February, 1954. If it is determined that said Chapman has only a one-half interest in Lot 34 and no more, then the proceeds allocated to said Lot 34 shall be divided equally between Chapman and Brown. If the Court shall determine that Chapman has a further present interest in Lot 34 in addition to her half interest in Lot 34, then the Court shall thereupon determine the value of such excess interest over and above Chapman's one-half interest, and the resulting sum, if any, shall be paid to Chapman and the remaining proceeds of said Lot 34 shall be divided equally between Chapman and Brown. That this stipulation shall not preclude an appeal by either party on this issue".

In the pre-trial stipulation and agreement, signed by the attorneys for the respective parties and by reference made a part of the pre-trial order, it is said that one of the issues remaining to be tried is "the amount and type of estate" the plaintiff has in said Lot 34.

At the opening of the trial of the instant action, Attorney Fairfield representing plaintiff stated that plaintiff had no evidence to present, that the pre-trial stipulation had taken care of that, that the question of plaintiff's estate in Lot 34 is a question of law, and "I don't think this Court has jurisdiction to hear and determine it since the matter of the interlocutory decree has settled that". The court then called counsel's attention to their pre-trial stipulation which had been made a part of the pre-trial order and specified the issues to be tried as including "The amount and type of estate the plaintiff * * * has in that parcel of property described as Lot 34, being parcel (a) of Exhibit 'A' of the declaration of trust". After discussing the other items, the following occurred:

> "The Court: * * * The next item is the type of estate that Betty Chapman has in part of parcel described, Lot 34.
>
> "Mr. Fairfield: That can only be answered by referring to the interlocutory decree of divorce. * * *
>
> * * * * * *
>
> "The Court: This is set forth in the interlocutory decree of divorce. I don't see why it isn't res judicata. How could I pass on it?
>
> "Mr. Fairfield: That is our position, Judge.
>
> "Mr. Zabel (attorney for defendant Brown): Well, your Honor, if you will read the interlocutory decree it refers to this trust which is a part of the present action. It is our position that the trust instrument itself gives this particular property to the trustee to be held for the equal benefit of both of the parties and that is the only provision the trust makes."

After some discussion of the then pending appeal from the order denying plaintiff's motion in the divorce action to amend the interlocutory decree hereinabove referred to, the court said: "* * * if the Appellate Court should reverse the ruling of Judge Paonessa then the matter would come before him to amend the judgment."

Attorney Zabel then argued that, since the documents were ambiguous, the court should hear evidence of the intention of the parties and surrounding circumstances and interpret the declaration of trust. Plaintiff's counsel countered with the statement that the pre-trial order and stipulation disposed of all questions concerning the declaration of trust and left the question of plaintiff's interest in Lot 34 to be determined from the interlocutory decree of divorce, "dependent upon the decision of the District Court of Appeal."

Defendant's attorney Zabel insisted that the trust was executed before the interlocutory decree was signed, that the deeds from the parties to the trustee named in the interlocutory decree are absolute in form, without reservation, and reading the declaration of trust with the interlocutory decree there is an uncertainty as to plaintiff's interest in Lot 34. He then said: "Certainly she had a right to remove the house from it. How long was she to have the right to the residential income? What is meant by the 'use of Lot 34'? None of those questions can be answered by looking at this instrument."

Both parties then informed the court that their agreement terminating the trust was for the sale or other disposition of the properties but left to be decided plaintiff's interest in Lot 34 or what portion of the proceeds of any sale of Lot 34 was to be distributed to her.

The court said "I think your issue should be determined who has the right to determine whether or not this property should be leased for commercial purposes. That certainly is a valuable right to somebody." The defendant then urged that "it is proper for the court at this time to inquire into the circumstances of the drawing of these documents, the execution, what was the intention of the parties at the time they were executed.", and plaintiff's counsel asked that he be heard on the law against that procedure.

> "The Court: This trust agreement refers to the fact that it is made a part of that certain interlocutory decree of divorce dated December 21, 1953 and the decree of divorce was dated February 23, 1954.
>
> "Mr. Zabel: Your Honor, that arose by reason of the fact that on December 21, 1953 the court held that hearing pursuant to which the interlocutory decree of February was prepared and signed.
>
> "Mr. Fairfield: The interlocutory decree also refers to the creation of the trust * * * (quoting)."

After considerable further argument of counsel, Attorney Zabel asked that Mr. Olstyn, plaintiff's attorney in the divorce action subpoenaed by defendant, be permitted to testify out of turn because he was leaving that night for San Francisco. The court indicated its willingness to do so "if there is no objection", after which Attorney Fairfield objected to the admission in evidence of any conversations prior to the interlocutory decree citing cases to the effect that the decree "would have to stand by itself"; and Attorney Zabel argued that said interlocutory decree based upon the stipulation of the parties "with respect to the disposition of the property was nothing more than a property settlement agreement". Thereupon the testimony of Mr. Olstyn was taken "subject to the striking in its entirety".

Attorney Olstyn, who represented plaintiff in the divorce action, testified on behalf of defendant that on December 21, 1953, Mr. Brown, Attorney Reitz representing him, plaintiff and himself as her attorney, on order of the judge conferred in the attorneys' conference room concerning the disposition of the property of plaintiff and defendant Brown; they particularly discussed Lot 34, and the improvements thereon "to be used and occupied by Mrs. Brown, and she was to derive the income from the two cabins or bungalows upon the property" and "at such time as the property were sold or leased for commercial purposes" she would have "the right to remove the improvements, that is, the houses on the property" and they would be "her own separate property from there on out"; "a life estate for Mrs. Brown" was not discussed; he prepared the interlocutory decree.

After considerable argument by counsel and several recesses, the trial judge stated:

> "Well, I think that the solution of this problem lies in this situation: The proceedings on this divorce matter were heard on the 21st day of December 1953. Now, I see no reason at all even though the judgment was thereafter signed and dated on the 23rd day of February 1954, and it was entered on February 24, 1954, I see no reason why I shouldn't decree that the judgment be entered nunc pro tunc as of the 21st day of December, 1953. *There would be no necessity then to have to do anything at all about this judgment, the entire matter would then be covered by this declaration of trust.*" (Emphasis added.)
>
> "Mr. Fairfield: I am a little puzzled, Judge. I couldn't follow what you had in mind.
>
> "The Court: This declaration of trust is dated the 8th of February and it refers to the interlocutory decree of divorce and the rights under that, as though it had actually been signed, dated and entered as of the 21st day of December and I think that we would then be governed by this declaration of trust entirely. *We wouldn't have to do anything at all about this interlocutory judgment.* (Emphasis added.)
>
> "Mr. Fairfield: Would the question then before the Court then be an interpretation of the trust agreement?
>
> "The Court: Well actually that is all it would be."

It was again called to the attention of the court that by pre-trial stipulation and order the trust had been terminated and dissolved, the disposition of the trust property provided for, and that the only question remaining undetermined was how much more than half of the proceeds of Lot 34 plaintiff should receive. The court then indicated that the declaration of trust provided for an equal division; and that the "interlocutory decree of divorce doesn't enter the picture".

Plaintiff's objection to Attorney Olstyn's testimony was then overruled, and the court said "We will proceed to take the testimony only relating to the Declaration of Trust. * * *

> "I will make an order at this time decreeing this interlocutory judgment of divorce be entered nunc pro tunc, so the record will be straight, good cause appearing to the court. Therefore the interlocutory judgment of divorce heretofore entered on February 24, 1954 be dated, signed, filed and entered nunc pro tunc as of December 21, 1953 and the clerk is ordered to make said entry."

Plaintiff then moved that the prior testimony of Mr. Olstyn be stricken as it was entirely in reference to the stipulation and the interlocutory decree.

The court answered, "Well, no. * * * This all goes to the Declaration of Trust ultimately. We are not going to do anything about altering the interlocutory judgment of divorce."

Mr. Olstyn testified that he did not prepare the Declaration of Trust; that it was prepared by Mr. Magdlen, the Trustee; that in the conversation of the parties and their attorneys just prior to their stipulation of December 21, 1953, the plaintiff and defendant Brown told him that their properties were to be placed in trust under a trust agreement to be drawn by Mr. Magdlen (the trustee) and "they were each to share equally and have a common interest in those properties"; that he first saw the declaration of trust when Mr. Magdlen mailed it to him for his examination subsequent to his having prepared the interlocutory decree of divorce and having submitted the interlocutory decree of divorce to Mr. Jim Reitz for his examination but before the signing of the interlocutory decree by Judge Paonessa; that he made no changes in the proposed declaration of trust; that he and Mr. Reitz had decided between themselves to recommend to Mr. Magdlen that the trust agreement be executed by the parties prior to the submission of the interlocutory decree for signature of the court; that, after he was informed that the declaration of trust had been signed, he submitted the interlocutory decree to the court; that in the conference just before their stipulation of December 21, 1953, it was agreed that certain items of community property were to be awarded to each party, and that the balance was to be put in trust to be operated for the parties "sharing equally". On cross-examination he produced and read his notes made during the pre-stipulation conference, which included the following: "To Mrs. Brown. Use of Lot 34 and all income therefrom. In event said property is leased for commercial purposes Mrs. Brown has right to remove said house and retain title thereto as her separate property."

Mr. Olstyn testified that he never at any time discussed with Mr. Magdlen, the trustee, what was to go into the trust. He did send him a letter enclosing a copy of the interlocutory decree to be submitted to the court for signature after the declaration of trust had been signed. He did receive a copy of the trust agreement after it had been signed by the parties. He testified that "The form of the trust agreement was acceptable as far as I was concerned by reason of the fact that Mr. Brown and Mrs. Brown had formerly gone to Mr. Magdlen before they had started their divorce proceedings. It was my understanding that their arrangements relative to the property were to be set forth in the property settlement agreement more so than in the interlocutory decree of divorce. Therefore, I did not question the contents of the Declaration of Trust as prepared by

Mr. Magdlen because both Mr. Brown and the then Mrs. Brown both expressed, they had unfailing and the utmost of confidence in Mr. Magdlen".

Mr. Olstyn testified further that, after two and a half hours of heated discussion on September 21, 1953, the parties and their attorneys stepped from the conference room into the court and "endeavored to cover as thoroughly as possible the agreement as arrived at". The court at that time ordered that the interlocutory judgment be prepared by him and "approved as to form and content by Mr. Reitz".

Mr. Olstyn further testified that, after Mr. Reitz had examined his rough draft of the interlocutory decree, and Mr. Reitz' letter suggesting modifications and changes had been considered by him, he telephoned Mr. Reitz, discussed the proposed interlocutory judgment, and inserted into the rough draft the following phrase "Whereupon her right to the income from said property shall terminate". He then so prepared the interlocutory decree.

Mr. Olstyn also testified that "Mrs. Brown was being represented by Mr. Magdlen on that trust agreement. I had nothing to do with the preparation of the trust agreement or the formulation of its terms."

Plaintiff, at the end of Mr. Olstyn's testimony, asked the Court to rescind its order filing the interlocutory decree nunc pro tunc on the 21st day of December, 1953, because "the trust agreement should precede in point of time the interlocutory decree of divorce." The court said, "Not according to the trust agreement as written", and denied the motion without prejudice.

Robert J. Magdlen, trustee and defendant in the instant action, called as a witness by defendant Brown, testified that the grant deed of Lot 34 by plaintiff and defendant Brown to him in trust was prepared by him, signed by them, and delivered to him; that he also prepared the declaration of trust after the requests by telephone from Mr. Reitz and Mr. Olstyn; that his first conversations regarding such a trust agreement were with Mr. and Mrs. Brown together about the early part of 1953; that the reason for the trust was that both Mr. and Mrs. Brown believed the properties would increase in value if held and they would both lose money by any early sale; that he prepared the declaration of trust early in 1953 when he was representing both Mr. and Mrs. Brown; that he later drew it "finally for—at the call of Mr. Reitz and Mr. Olstyn" and would be in the same position; that the declaration of trust as finally executed by them was identical with the one first drawn "with the exception of certain inclusions as a result of the forwarding to (him) of the interlocutory decree"; that his first conversation with them was in March or April 1953; then later each retained counsel and the divorce action was commenced; he next heard by telephone from their respective attorneys in December 1953; that he then forwarded to both lawyers copies of the declaration of trust already prepared by him; that Mr. Olstyn did forward him a copy of the proposed interlocutory decree; that he never discussed with him "the use of Lot 34 that Mrs. Brown was supposed to have"; that he was not told to incorporate into the declaration of trust the terms of the proposed interlocutory decree; that he was told by Attorneys Reitz and Olstyn that the parties were settling on the basis of the "original trust agreement I had drawn"; that he wanted the copy of the proposed interlocutory decree "for the purpose of having the date, time and place and, of course their proceedings"; that he received no "instructions as to the carry-over of the provisions of the interlocutory decree into the trust agreement"; that in December 1953 and thereafter he was not representing plaintiff; he did not talk with the parties and had no knowledge that they had made any agreement respecting Lot 34 different from the terms of the original declaration of trust prepared by him in the spring of 1953; that the parties came separately and executed the declaration of trust in his office; at the same time they signed the deed of Lot 34; that he knew that Mrs. Brown was receiving the income from Lot 34 at all times; that that was part of their original discussion; that at "the time of the original discussion on the original * * * trusteeship" the use and income of Lot 34 was discussed; that Mrs. Brown was to live on the property and receive the income from the tenancy boarders on the property and take the house off when the lot was leased or sold was an agreement between them and it was left out of the trust as a matter of accommodation; that he knew nothing at all about any stipulation in court or any agreement of the parties other than the one in the spring of 1953 when they had their original discussion concerning the creation of the trust; that Mrs. Brown is still using Lot 34 and receiving all the income from it; that it had never been leased or anything; and "that the trustee receives none of the income off the property on Lot 34 or the houses".

Defendant Brown testified in his own behalf that in April 1953, he and plaintiff had tried to reach an agreement for the division of their properties but had not been able to do so; that he was present in court on December 21, 1953, when Mr. Olstyn read their stipulation that "the use of Lot 34 * * * and all of the income to be derived from said real property" should be awarded to plaintiff and "in the event said property is leased for commercial purposes Mrs. Brown is to have the right to remove the main house located upon said real property and to retain title to said house as her separate property"; that that was his understanding of their agreement at that time.

At the end of the testimony of defendant's witnesses, plaintiff renewed her motion that the court rescind its order filing the interlocutory decree in the divorce action nunc pro tunc, and the court took "that matter under advisement".

Appellant urges that, since no part of the divorce action, except the interlocutory decree as an exhibit, was before the court in her action for declaratory relief, the amendment of the interlocutory decree nunc pro tunc upon the court's own motion was in excess of jurisdiction, and was error prejudicial to her.

Respondent replies that "such action by the trial court * * * is not the correction of any error, whether clerical or judicial, but is merely the entering of such a decree as of a prior date" and "is specifically authorized by Civil Code, Section 131.5". Respondent also "submits that the trial court, in order to dispose of all of the issues before it, acted within its sound equitable discretion in ordering the Interlocutory Decree entered nunc pro tunc as of December 21, 1953" and cites as authority the case of Byrd v. Mutual Benefit Health and Accident Ass'n, 73 Cal.App.2d 457, 465, 166 P.2d 901, 905, where, with reference to an entirely different factual situation, it is said: "An action for declaratory relief is an equitable proceeding. * * * Equity does not look with favor upon litigation by piece-meal, and whenever possible will * * * settle and determine all differences between the parties in the action, leaving nothing for future litigation between the same parties and upon the same subject matter. * * *"

Section 131.5 of the Civil Code provides that, "* * * The court may cause such interlocutory judgment to be entered nunc pro tunc as aforesaid, even though an interlocutory judgment or final judgment or both judgments may have been previously entered, *where by mistake, negligence or inadvertence the interlocutory judgment was not entered as soon as it could have been entered under the law if applied for* * * *". (Emphasis added.)

[1] Where, as in the instant action for declaratory relief, there is no claim by any party or showing of any kind that the signing, filing, or entry of an interlocutory or final decree divorcing two of the parties would have been earlier except for "mistake, negligence or inadvertence", the court in such subsequent action for declaratory relief is without power to order that the judgment in the divorce action be entered nunc pro tunc as of an earlier date. **Berry**

v. Berry, 140 Cal.App.2d 50, 59, 60, 294 P.2d 757; Hull v. Hull, 102 Cal.App.2d 382, 385, 227 P.2d 546; Hamrick v. Hamrick, 119 Cal.App.2d 839, 847, 848, 260 P.2d 188.

[2, 3] The existence or non-existence of "mistake, negligence or inadvertence", and if it does exist whether it was the cause of any delay in dating, signing, filing or entering an interlocutory judgment in a divorce action, are questions of fact to be determined by the trial court. There being no evidence before the trial court in support of the affirmative determination required to uphold the order, such order should not have been made.

[4] We cannot agree with respondent, that, assuming such order for the entry of the interlocutory decree nunc pro tunc as of a prior date to be erroneous, appellant was not prejudiced thereby. According to the uncontroverted testimony of respondent's witnesses hereinbefore narrated, appellant was represented by an attorney in her action for divorce, but she was without counsel with reference to the trust agreement. The declaration of trust was in reality a portion of the property settlement and under the circumstances shown by the record on the instant appeal is enforceable only so far as approved by the divorce court. The interlocutory decree dated, signed, filed and entered later than such trust agreement and speaking of the trust agreement as something to be done in the future is not an approval of the declaration of trust as signed by the parties. Where the declaration of trust is in conflict with the interlocutory judgment, the latter must control.

The interlocutory decree has become final as to its provisions awarding items of community property to husband and wife as their respective separate properties. The use and residential income of Lot 34 until said lot shall be "leased for commercial purposes" having been awarded to plaintiff as her separate property, it is in the same category as the automobiles, bank accounts, trust deed notes and other items likewise awarded as separate property.

The provision of the interlocutory judgment that "all the balance of the property of which the parties are possessed" shall be put in trust does not include the properties therein awarded to the spouses as their separate properties.

Appellant's interest in said Lot 34 being controlled and defined by the interlocutory judgment, and not by the declaration of trust, and, it having been adjudicated in Brown v. Brown, supra, that the community property of the parties was, pursuant to their stipulation and agreement, divided between them exactly as stated in the interlocutory decree, the admission of parol evidence of the intention of the parties and their then counsel in that respect was error. The respective interest in said Lot 34 must be determined from the interlocutory decree itself.

Appellant, as stated in the interlocutory decree, in addition to her undivided one-half interest in said Lot 34, owns the "use and residential income therefrom" until said lot is leased for commercial purposes, and at such time has the right to remove the houses therefrom.

The portion of the judgment appealed from designated as "Item 2a(5)" is reversed with directions that, if and when the matter shall again be brought to trial, the court proceed to determine the value of plaintiff's interest in excess of the interest of defendant in said Lot 34.

The other portions of the judgment, from which plaintiff has appealed and in connection with which no errors are pointed out in appellant's briefs, or found by us, are affirmed.

The court below is further ordered to annul and set aside its order in the instant action directing that the interlocutory judgment in action entitled Betty W. Brown v. Louis A. Brown, Jr., and numbered SF D 3468, be dated, signed, filed and entered nunc pro tunc as of December 21, 1953; and said court is further ordered to restore said interlocutory judgment to its former condition to show that it is dated, signed and filed February 23, 1954 and entered February 24, 1954.

The parties shall bear their respective costs on appeal.

FOURT and LILLIE, JJ., concur.

Hearing denied; WHITE, J., not participating.

172 Cal.App.2d 666

William R. STOUT, Petitioner and Appellant,

v.

DEPARTMENT OF EMPLOYMENT of the State of California; Los Angeles Transit Lines, a corporation, Defendants and Respondents.

Civ. 23706.

District Court of Appeal, Second District, Division 1, California.

Aug. 7, 1959.

Employee, who had been discharged by employer for writing and distributing allegedly false and derogatory literature concerning employer and union, brought mandamus proceeding against Department of Employment of the State of California and the employer to inquire into the validity of administrative decision denying employee's claim for unemployment compensation benefits. The Superior Court of Los Angeles County, Bayard Rhone, J., entered judgment adverse to the employee, and he appealed. The District Court of Appeal, Fourt, J., held that referee in compensation proceeding properly admitted in evidence documents typed on typewriter, where typewriting expert testified that documents were written on employee's typewriter, and held that employee was not denied due process, on ground that order denying benefits was based on incompetent hearsay evidence.

Judgment affirmed.

1. Mandamus 🔑172

In reviewing orders or decisions of administrative tribunals, courts in mandamus proceedings are charged with duty to ascertain if there was a fair trial, and if such orders or decisions are supported by substantial evidence, in light of the whole record. West's Ann.Code Civ.Proc. § 1094.5.

2. Evidence 🔑373(1)

In proceeding by employee, who had been discharged by employer for writing and distributing allegedly false and derogatory literature concerning employer and union, to recover unemployment compensation benefits, referee properly admitted in evidence certain documents, which a handwriting and typewriting expert testified were written on employee's typewriter. West's Ann.Unempl.Ins.Code, §§ 1256, 1260, 1952.

3. Constitutional Law 🔑318

In proceeding by employee, who had been discharged by employer for writing and distributing allegedly false and derogatory literature concerning employer and union, employee was not denied due process, on ground that order denying benefits was based on incompetent hearsay evidence. West's Ann.Unempl.Ins.Code, §§ 1256, 1260, 1952.

◆

Henry M. Luppi, Clarence E. Nelson, Los Angeles, for appellant.

Stanley Mosk, Atty. Gen., William L. Shaw, Deputy Atty. Gen., for respondent, John E. Carr, Director of Employment (sued as Department of Employment of California).

Gibson, Dunn and Crutcher, James J. Ryan, Los Angeles, for respondent, Los Angeles Transit Lines.

FOURT, Justice.

This is an appeal by William R. Stout, who was discharged by his employer, Los Angeles Transit Lines, on August 5, 1955, for misconduct connected with Stout's most recent work with the employer. On

August 7, 1955, Stout filed a claim for unemployment insurance benefits with the Department of Employment. On August 30, 1955, the Department issued and served its determination that unemployment insurance was not payable for the five week period beginning August 7, 1955 and ending September 10, 1955, stating as its reason for decision: "Although there is some conflict in details between employer and claimant, established claimant printed unauthorized handbills which caused company harm in prestige and public relations. On this basis claimant was discharged for misconduct within the meaning of the California Unemployment insurance code."

The provisions of the Unemployment Insurance Code under which Stout was held to be disqualified are:

Section 1256: "An individual is disqualified for unemployment compensation benefits if the director finds that he left his most recent work voluntarily without good cause or that he has been discharged for misconduct connected with his most recent work.

"An individual is presumed to have been discharged for reason other than misconduct in connection with his work and not to have voluntarily left his work without good cause unless his employer has given written notice to the contrary to the director within five days after the termination of service, setting forth facts sufficient to overcome the presumption. If the employer files such notice, the question shall immediately be determined in the same manner as benefit claims."

Section 1260: "If an individual is disqualified under Section 1256, under a determination transmitted to him by the department, he is ineligible to receive unemployment compensation benefits for the week subsequent to the occurrence of the cause of his disqualification in which he first registers for work and for not more than four weeks which immediately follow that week. If an individual is disqualified under Section 1257, under a determination transmitted to him by the department, he is ineligible to receive unemployment compensation benefits for the week subsequent to the occurrence of the cause of his disqualification in which he first registers for work and for not more than nine weeks which immediately follow that week. An individual so disqualified shall be required to report at a public employment office as provided in subdivision (b) of Section 1253 and an additional week of disqualification shall be imposed for each week during which he does not so report unless good cause for such failure is shown."

Stout filed an appeal to a Referee and a hearing on this appeal was had on October 19, 1955, on November 23, 1955, and on January 31, 1956, before Referee C. B. Cowgill. Stout was represented at each of the above hearings by counsel, and a verbatim transcript of the proceedings was made by a reporter. By a decision dated February 8, 1956, Referee Cowgill found that Stout "authored, posted, distributed, or otherwise caused to be published to employees, union officials, and the public, derogatory literature containing statements, charges and allegations against the employer and the union which were not true." The Referee further found "the literature was widely discussed among employees", and he affirmed the determination and ruling of the department that Stout was disqualified for benefits for five weeks as provided in sections 1256 and 1260 of the Unemployment Insurance Code.

A written appeal from the decision of the Referee was thereafter filed on behalf of Stout acting through his counsel to the California Unemployment Insurance Appeals Board, and the matter was orally argued before an appeal board of three members on July 10, 1956. The decision of the referee was affirmed on August 3, 1956.

Thereafter and on August 19, 1957, an alternative writ of mandate was issued by the Superior Court for the purpose of inquiring into the validity of the administrative decision made as a result of said proceedings. A third amended complaint was filed on December 26, 1957, which was entitled "Petition for a Writ of Mandate, Pursuant to the Provisions of Section 1094.5, Code of Civil Procedure." The matter was heard on April 14, 1958, and on May 8, 1958, the court ordered the alternative writ quashed, and denied the peremptory writ. Findings of Fact and Conclusions of Law and Judgment were filed on June 6, 1958. Said Findings of Fact included the following:

"V. That prior to his final termination of employment with the employer, Stout authored, posted, distributed, and otherwise caused to be published to the employer's employees and to union officials and to the public at large, derogatory literature containing statements, charges, and allegations against the employer; that these publications in great part were not true in fact; that some of the allegations set forth by Stout in his writings against the employer were in the nature of grievances; that as to alleged grievances affecting the employer and a union member such as Stout, there is an established grievance procedure in effect at all times here involved relative to the handling and processing of such grievances; that Stout did not file or launch any alleged grievances through the established employer-union procedures; but, rather, elected to publish and distribute his 'grievances' to fellow employees, the employer, the union and the public in general.

"That on March 21, 1955, Stout was interviewed by the employer's General Superintendent of Transportation; that for about two hours, Stout's activities (in the matter of publication and distribution to the public and to union members and to fellow employees, as referred to above) were discussed personally by Stout and the employer's representative; that in this connection, many hand bills and notices originating with Stout were examined and the contents discussed and analyzed; that the employer's representative made it clear to Stout at this time that Stout would be discharged in the future if Stout ever again posted, distributed, or caused to be published, similar defamatory material directed by Stout against the employer.

"That subsequent to the employer's warning, and preceding his termination of employment with the employer, however, Stout again distributed or caused to be published at least five or more separate pieces of literature in great volume to employees and to the public; that this new literature contained statements and allegations that were and are not true and contains criticisms of the employer not founded on fact; that the untrue and unfounded statements were derogatory to the employer's general interests with the public and the union members and the employees of the employer; that Stout's literature came to the attention of many members of the union and to the attention of many fellow employees and to the attention of an unknown number of members of the public at large;

"VII. That the referee at all times in the conduct of the hearing or hearings affecting Stout and in the receipt of oral and documentary evidence acted with regard to all applicable provisions of the Code and the statute and the case laws of California.

"IX. * * * That the Appeals Board in its consideration and decision upon the record before the Appeals Board, at all times, in connection with the issuance of Benefit Decision 21161, acted in complete conformity with regard to the Code and the statute and case law of California and the facts of the herein controversy as developed by the referee affecting Stout, the employer and the Department.

"X. That during the existence of a trade dispute between the employer and the union, there did not arise a justification in fact or an excuse in Stout to perform misconduct directed against the permanent interest of the employer and without advance opinion, knowledge or concurrence in the union as to Stout's activities by way of Stout's release of diverse and derogatory pamphlets and publications directed against the employer; that Stout, during a trade dispute, could not so conduct himself as to condemn, libel and slander the employer without regard to the truth or lack of truth of his publications through pamphlets and other printed matter; that Stout, if he believed himself personally aggrieved, could have redress through the union through well known grievance procedure, but that Stout elected to ignore the grievance procedure within the union and to communicate in writing directly to the public and to the union members and to fellow employees against the employer.

* * * * * *

"XII. That the exhibits received by the referee in the course of hearing were properly received and considered by the referee as tending to establish or to deny any rights in Stout to the receipt of unemployment insurance benefits under the Code; that the referee and/or the Appeals Board in the receipt and consideration of evidence complied with the provisions of Section 1952 of the Code in the conduct of administrative hearings.

"XIII. * * * that it is not true that Appeals Board Decision 21161 is in excess of the statutory jurisdiction of the Appeals Board or is arbitrary, capricious or abusive of discretion vested under the Code and by general law in the Appeals Board; that it is not true that at the referee's hearing there was any violation of any constitutional rights existing in Stout; that at all times here involved, Stout was not entitled to the receipt of unemployment insurance benefits because of the application of the provisions of Section 1256 of the Code."

In this appeal it is contended that the Referee committed prejudicial error by admitting in evidence documents for which no proper foundation was laid, and that an order of an administrative board based upon incompetent hearsay evidence contravenes due process and cannot stand. The documents received and admitted in evidence over objection were typed on a portable Corona typewriter, and consisted of documents captioned as follows: "Petition Demanding High Seniority Holding V Line Man Be Given Adequate and Sufficient Training to Hold Jobs on Other Lines", "Save Your Job", "What Fools We Mortals Be", "Raw Deal Given Old Timers on V Line", "The V Line Abolished", "Let's Keep The V Line", "Trainmen On V Line", "Just Because You Drive the family auto, just because you drive a streetcar up and down stationary still tracts * * * etc.", "Hark the Master's Voice", "Time for a new Contract * * * all we ask Is Decent Working Conditions", "Did You Fight for America * * * etc.", "Work for L.A.T.L., and You Will Run * * * etc." and "Strike, Strike * * * etc." Certain letters were also received and admitted in evidence over objection. The letters were not dated, and no proof was offered of when they were made or signed, nor were the subscribers called to testify. A handwriting and typewriting expert testified that each was written on Stout's Corona typewriter. The letters bear the following signatures: Richard De Mott, 2158 East (11 * * *?) Street, Los Angeles; Eugene Washington, 242 West 48 Str.; W. Dangerfield; Doras Hall, 1015 Leighton; Carol Trammel, 13229 Towne Ave., L.A., 61, Calif.; Mrs. M. Gardenia, 1212 West 37th St., L.A. 7, Calif."

No objection was offered to the introduction of certain circulars or bulletins, as follows: "Speaking of Half-Truths", subscribed to and bearing nine signatures; "Speaking of Half-Truths", subscribed to and bearing ten signatures; "Something We Will Always Remember" by Harry B. Shepard; "Something to Remember" signed B. Shepard, Hellman and Harrison.

[1] Appellant correctly states the rule to be that "in reviewing orders or decisions of administrative tribunals the courts of this state are charged with the duty to ascertain if there was a fair trial, and if such orders or decisions are supported by substantial evidence, in the light of the

whole record." As authority for the above statement of the law, Thompson v. City of Long Beach, 41 Cal.2d 235, 259 P.2d 649, is cited, which involved a judgment affirming an order discharging a stenographer from classified civil service. Therein at page 246 of 41 Cal.2d, at page 655 of 259 P.2d, the court stated: "As had so often been said, questions as to the weight and sufficiency of the evidence, the construction to be put upon it, the inferences to be drawn therefrom, the credibility of witnesses commensurate with their conduct and manner of testifying, and the determination of conflicts and inconsistencies in their testimony are matters for the trial court to resolve. Dillard v. McKnight, 34 Cal.2d 209, 223–224, 209 P.2d 387, 11 A.L.R. 2d 835. The court was not bound to accept appellant's evidence or her conclusion as to her readiness, ability and willingness to perform satisfactory stenographic work in the city's service as of September 7, 1949, and its contrary finding based on substantial evidence is final and conclusive on appeal. Hansen v. Bear Film Co., Inc., 28 Cal.2d 154, 184, 168 P.2d 946."

As authority for the statement that "in examining the record of an administrative board nothing may be treated as evidence that has not been introduced as such", appellant cites La Prade v. Department of Water and Power, 27 Cal.2d 47, 51, 162 P.2d 13. In the above case, the court stated (27 Cal.2d at page 51, 162 P.2d at page 16), "In the instant case no evidence of any kind was introduced before the board. The board must have, as before seen, and as indicated by its minutes, based its determination on the report of its investigator. The question then arises, aside from the question of the sufficiency of that evidence, whether petitioner was accorded the hearing to which he was entitled." In marked contrast is the instant case wherein each of the above-mentioned documents, letters and circulars were introduced into evidence, and extensive oral testimony was adduced.

Appellant cites the case of Kinney v. Sacramento, etc., Retirement System, 77 Cal.App.2d 779, 782, 176 P.2d 775, 777, as authority for the statement, "And an order of an administrative board based upon incompetent hearsay evidence contravenes due process and cannot stand." The language of the court on this matter is as follows: "The rule seems to be clear that, if a local administrative board bases its order *solely* on incompetent hearsay evidence, it acts arbitrarily, capriciously and in abuse of its discretion, and its order cannot stand." (Emphasis added.) In Kinney v. Sacramento, etc., Retirement System, supra, the court further emphasized its point by stating (77 Cal.App.2d at pages 782–783, 176 P.2d at page 777): "Since, as far as the record discloses, *there was no competent evidence* before the Board outside of said report to refute the uniform proof that applicant's disability was due to the performance of his duty (citing case) within the meaning of the charter, there was a clear abuse of discretion on the part of the Board in refusing petitioner's application, and the superior court correctly, as a matter of law upon the undisputed evidence, granted the writ of mandate prayed for by her." (Emphasis added.) Considerable competent testimony was adduced and a number of documents were introduced in the instant case without objection. Any claimed contravention of due process on that basis is, therefore, clearly inapplicable to the proceedings in question.

Similarly inapplicable to any problem before this court are the cases cited by appellant with respect to the unconstitutionality of certain ordinances prohibiting the distribution of literature in the streets or public places.

[2, 3] We have carefully reviewed the entire transcript of the proceedings before the referee and we have examined the exhibits introduced thereat; and we have reviewed the transcript of the oral arguments presented to the appeals board. We agree with the findings of the trial court that the referee at all times in the conduct of the hearing or hearings affecting Stout and in the receipt of oral and documentary evidence acted with regard to all applica-

ble provisions of the Code and the statute and case laws of California. As a matter of fact, in our opinion the hearings were conducted in a most fair and impartial manner, and appellant Stout was accorded far more consideration than is his right under any constitutional guarantee.

The judgment is affirmed.

WHITE, P. J., and LILLIE, J., concur.

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173 Cal.App.2d 131

PEOPLE of State of California, Plaintiff and Respondent,
v.
Charles Michael LOHMAN, Defendant and Appellant.
Crim. No. 6650.

District Court of Appeal, Second District, Division 3, California.
Aug. 19, 1959.

In the Superior Court of Los Angeles County, Joseph M. Maltby, J., a judgment of conviction was entered on defendant's plea of guilty to charge of violating Vehicle Code section, and defendant appealed. The District Court of Appeal, Shinn, P. J., held that court had no duty to, of its own motion, set aside defendant's plea of guilty, and that in absence of showing of facts which would have warranted court in believing plea of guilty was other than voluntary, judgment predicated thereon would not be disturbed.

Affirmed.

1. Criminal Law 🔑274

Court had no duty to, of its own motion, set aside defendant's plea of guilty, and in absence of showing of facts which would have warranted court in believing plea of guilty was other than voluntary, judgment predicated thereon would not be disturbed. West's Ann.Vehicle Code, § 503; 18 U.S.C.A. §§ 2311–2313.

2. Criminal Law 🔑1147

Merits of application for probation were for determination of trial court.

Charles Michael Lohman, in pro. per., for appellant.

Stanley Mosk, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

By amended information, Charles Michael Lohman was charged in Count I with the grand theft of an automobile from Paul's Chevrolet on June 21, 1958, and in Count II with violating Vehicle Code, section 503 on the same date. It was also alleged that he had previously suffered a felony conviction for violation of the Dyer Act, 18 U.S.C.A. §§ 2311–2313. Lohman pleaded not guilty and denied the prior conviction. When the matter came on for trial, he withdrew his plea of not guilty as to Count II and pleaded guilty to that count, and on motion of the People the allegation respecting the prior conviction was stricken. A probation report was ordered; a hearing was held on Lohman's application for probation; Count I was dismissed; probation was denied and Lohman was sentenced to state prison on Count II. He appeals from the judgment.

Upon application of appellant for appointment of counsel, we examined the record in order to ascertain whether the appointment of an attorney would serve any useful purpose. Having determined that the appeal appeared to be without merit we denied the application for appointment of counsel and notified appellant of our order, substantially extending his time to file a brief. No brief having been filed, we have re-examined the record and are disposing of the appeal on the merits.

Lohman was represented by a deputy public defender at the time of his arraignment on the amended information. Trial was set for September 11, 1958. On that date trial was continued to October 17th to allow appellant time to secure the presence of a witness. October 17, 1958, the public defender made a motion to be relieved as counsel for appellant, the motion was granted and Lohman was substituted as his own attorney; trial was continued to November 7th. On that date trial was again continued to December 5th so that appellant might obtain counsel.

December 5, 1958, appellant appeared in court with a deputy public defender. The deputy stated his understanding that he had not been appointed to represent Lohman but that "It is the Court's desire that I confer with the defendant. He wants to represent himself. It is my understanding that he intends to enter a plea of Guilty to Count Two of the information." In response to questioning by the court, appellant stated that he had conferred with the deputy and that he wished to plead guilty to Count II. In response to questioning by the prosecutor, Lohman stated that he was changing his plea voluntarily. Appellant thereupon plead guilty to Count II. He did not make a motion to be permitted to withdraw his plea.

[1, 2] In our opinion, the record furnishes no ground for a disturbance of the judgment. No showing was made of facts which would have warranted the court in believing that the plea of guilty was other than voluntary. 14 Cal.Jur.2d 510–12. The court had no duty to of its own motion set aside the plea of guilty. The merits of the application for probation were for the determination of the trial court. The proceedings were regular and there is no basis for a contention that the court abused its discretion in denying him probation. 29 Cal.Jur.2d 348–49.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

Theorilda Marie BRIDGMAN, Plaintiff and Appellant,
v.
SAFEWAY STORES, INC., Defendant and Respondent.*
Civ. 18411.

District Court of Appeal, First District, Division 1, California.
Aug. 21, 1959.
As Modified on Denial of Rehearing
Sept. 8, 1959.
Hearing Granted Oct. 19, 1959.

Action against owner of self-service store for injuries sustained by customer when stack of pumpkins collapsed and knocked her down. Defendant claimed that customer had first slipped and, in attempting to retain her balance, had grabbed at pumpkins, which fell with her. The Superior Court, Marin County, Thomas F. Keating, J., rendered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Tobriner, J., held that owner of self-service store, by delegating to its customers authority to freely handle merchandise, thereby constitutes them its agents or servants for that purpose, and that owner of such store will be presumed to have knowledge of dangerous condition caused by customer's handling of merchandise; but held that as a prerequisite to imposing liability upon storeowner, it must be shown that dangerous or defective condition was created by negligent conduct of customer.

Affirmed.

1. Negligence 32(1)

Occupier is not insurer of invitees, and there is no liability for harm resulting from conditions which occupier could not, with reasonable care, have discovered.

2. Appeal and Error ⚷882(12)

In action against owner of self-service store, for injuries sustained by customer when stack of pumpkins collapsed and knocked her down, wherein defendant claimed that customer had first slipped and, in attempting to retain her balance, had grabbed at pumpkins, which fell with her, plaintiff, whose own instruction, according to such theory, contained the same defect, was in no position to complain on appeal that another instruction failed to describe absolute liability of storeowner for negligence of its customers.

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* Opinion vacated 2 Cal.Rptr. 146, 348 P.2d 696.

3. Negligence ⚿44, 48

Owner of self-service store, by delegating to its customers authority to freely handle merchandise, thereby constitutes them its agents or servants for that purpose; and owner of such store will be presumed to have knowledge of dangerous condition caused by customer's handling of merchandise; but as a prerequisite to imposing liability upon storeowner, it must be shown that dangerous or defective condition was created by negligent conduct of customer.

4. Appeal and Error ⚿882(12)

Appellant's contribution to alleged error in instructions, by withdrawing proposed instruction, would preclude complaint on appeal.

5. Negligence ⚿136(6)

In action against owner of self-service store, for injuries sustained by customer when stack of pumpkins collapsed and knocked her down, wherein defendant claimed that customer had first slipped and, in attempting to retain her balance, had grabbed at pumpkins, which fell with her, plaintiff's admission that she herself had handled one of pumpkins immediately prior to accident rendered res ipsa loquitur doctrine inapplicable.

6. Appeal and Error ⚿1064(1)
Negligence ⚿140

In action against owner of self-service store, for injuries sustained by customer when stack of pumpkins collapsed and knocked her down, wherein defendant claimed that customer had first slipped and, in attempting to retain her balance, had grabbed at pumpkins, which fell with her, instruction as to unavoidable or inevitable accident was erroneous, but in view of absence of showing of any defective condition, and in view of testimony that customer had either fallen herself and pulled down pumpkins or, after handling pumpkins had restacked them improperly, so that they fell upon her, it could not be concluded that unavoidable accident instruction could have altered final result.

George Olshausen, San Francisco, for appellant.

Ackerman, Johnston, Johnston & Mathews, Willard S. Johnston, San Francisco, for respondent.

TOBRINER, Justice.

Appellant, a customer in a self-service store, seeks reversal of judgment after verdict for defendant in her suit for negligence against the store owner, upon the ground that the court instructed the jury that the store owner would not be liable for a dangerous condition caused by a customer unless it knew or should have known of such condition. Appellant contends the instruction should have charged that the store was conclusively presumed to have knowledge of such a dangerous condition. Although, as we shall point out, additional instructions might have been proper under certain factual situations, neither such a factual situation nor a request for such instructions concurred here. Accordingly, we believe the questioned instructions sufficed for this given case.

Appellant urges a second ground for reversal in the giving of an instruction on inevitable accident. We do not find this error prejudicial.

The facts here, as in most cases, vary according to the predilection of the viewer. In summary, appellant testified as follows: At approximately 1:00 in the afternoon she entered respondent's self-service store and went over to the pumpkin bin. No other customers were around at this time. Appellant *took a pumpkin* from the bin, weighed it and *returned it to the bin.* The pumpkins, stacked on a "fairly high" bin in a pyramid fashion, rose to her eye level; she noticed nothing loose or unstable about the display. As she was standing in front of the bin, appellant felt a sudden blow on the chest which knocked her down, and, when she arose, there were many pumpkins on the floor. As a result of this blow she was hospitalized.

In contrast to appellant's testimony, three employees in the store testified that appellant told them immediately after the accident that she had slipped and, in attempting to retain her balance, grabbed at the pumpkins which fell with her. According to the produce manager of the store, the bin upon which the pumpkins were stacked was only 29 inches high, and pumpkins were never stacked more than two high. However, one of respondent's employees admitted that the merchandise "gets handled quite a bit" and that a series of inspections and rearrangements are required after the initial setup. A produce clerk testified that he came on duty at 12:15 on October 30, 1956, walked around the produce area, and found nothing amiss. By various questions, appellant's attorney intimated that other customers may have restacked the pumpkins too high.

As we have pointed out, appellant makes the point that the instructions erred in distinguishing between the duty of the self-service store for acts of *customers* and acts of *employees* and *owners*. As to the dangerous condition created by the negligent conduct of the owner or the employee, the instructions read, "[T]he law conclusively presumes that the owner had knowledge of said condition from the time of its creation." But, according to the instructions, "if * * * some person other than defendant or its employees so handled the pumpkins as to leave them in an unsteady and dangerous condition" the store is not liable unless the conditions were "actually known" to its owner or employee or the conditions were "permitted to remain for such a space of time * * * as would charge the defendant with notice of this condition and afford it an opportunity to correct it." Appellant summarizes the court's position: "In order to impose liability upon defendant for a dangerous condition created by some other customer, it must appear that defendant knew or should have known of the dangerous condition."

Appellant argues the distinction between the customer-created dangerous condition and the sales force-created dangerous condition is unrealistic because in the self-service store the customer actually performs part of the function of the sales force. If management saves the cost of hiring employees by shifting to customers the work normally performed by employees, it cannot escape the liability resulting from customer work negligently performed. If management endows the customers with the role of the employee, the customer assumes the status of the employee and that relationship between customer and store emerges.

There is then "[s]o far as merchandise may be handled *by a customer* * * *," according to appellant, "a *continuing duty* to keep the merchandise safe for the next customer" and not an "intermittent" duty which arises only upon the store's actual or constructive knowledge of the dangerous condition.

Whatever merit there may be to appellant's argument in a restricted situation, her sweeping application of it here would impose upon the store owner an absolute liability tantamount to that of an insurer. If the store owner is presumed to know of any dangerous condition caused by any customer, the store owner would be exposed to a liability for practically any injury in the store. It is hard to conceive of an injury to an invitee which would not be attributable to a condition caused either by a customer or an employee. If the store owner is "presumed" to know any such dangerous condition, the burden becomes one of perfect and instantaneous inspection. Such a result proceeds far beyond the present decisions and indeed conflicts with appellant's own instructions.

[1] Prosser summarizes the present rule in stating: "The occupier is not an insurer of invitees * * *. There is no liability * * * for harm resulting from conditions * * * which the occupier * * * could

not have discovered with reasonable care." (Prosser on Torts [2d ed. 1955], § 18, p. 459.) The issue of the exercise of the duty of reasonable care of the store owner is expressed in Louie v. Hagstrom's Food Stores, 1947, 81 Cal.App.2d 601, 184 P.2d 708: "It is generally a question of fact for the jury as to whether, under all the circumstances, the defective condition existed long enough so that a reasonable man exercising reasonable care would have discovered it." 81 Cal.App.2d at page 607, 184 P.2d at page 712. In Hatfield v. Levy Brothers, 1951, 18 Cal.2d 798, 117 P.2d 841, the court in discussing the duty owed an invitee in a retail store stated: "[T]he owner must have either actual or constructive knowledge of the dangerous condition or have been able by the exercise of ordinary care to discover the condition, which if known to him, he should realize as involving an unreasonable risk to invitees on his premises." 18 Cal.2d at page 806, 117 P.2d at page 845.

[2] Appellant's contention not only proceeds beyond these cases but is not in accord with appellant's own instruction, which was given, reading: "[T]he responsibility of one having control of the premises is not absolute. It is not that of an insurer. * * *" In the face of this conflict appellant's contention fails even under the rule of Butigan v. Yellow Cab Co., 1958, 49 Cal.2d 652, 320 P.2d 500, holding that a party is in no position to complain of error since "at her request, many other instructions were given which contain the same defect." 49 Cal.2d at page 657, 320 P.2d at page 503. Appellant's attack upon the instruction premised upon its failure to describe an absolute liability for negligence of customers fails because appellant's own instruction, according to this theory, contains "the same defect."

We recognize, however, the possible merit in appellant's position in a limited situation. If the negligence of a customer in handling merchandise should inflict injury upon a succeeding customer, we do not hold that the storeowner could escape liability on the ground that it had neither actual nor constructive knowledge of such condition. If, for example, the record showed here that the pumpkins were stacked in so dangerous a manner by a customer preceding appellant's advance to the bin that her mere steps on the floor were sufficient to cause the pumpkins to fall upon her, it may have been proper that an instruction covering such a contingency be submitted.

[3] While the following quotation from the appellate decision of the Supreme Court of New York in Robinson v. Atlantic & Pacific Tea Co., 1945, 184 Misc. 571, 54 N.Y.S.2d 42, affirmed 269 App.Div. 977, 59 N.Y.S.2d 290, emanates from a res ipsa loquitur case, it is applicable to the described situation: "by delegating to * * customers authority to freely handle the merchandise * * * [services] theretofore rendered by the store clerks * * * the defendant thereby constituted them their agents or servants for that purpose and should be held as much responsible for their acts of carelessness and negligence * * * as in the case of an actual employee * *." 54 N.Y.S.2d at page 44. Consequently, in such a situation the liability of the store owner equates that which flows from negligence of an employee: the store owner is presumed to have knowledge of such a condition. The requisite proof, however, as in the situation of the employee, lies in the showing that the dangerous or defective condition is created by the "negligent conduct" of the customer.

Neither does the record here support such negligent conduct of the customer nor was an instruction requested to cover it. The record is barren of any proof that a customer actually negligently restacked the pumpkins. Appellant herself took a pumpkin from the bin and replaced it. Probably because of this very fact appellant did not request any instruction pertaining to such a situation.

Basically, appellant's case, due to the absence of the described proof, crystallizes into a res ipsa loquitur situation. In reality, the substance of appellant's contention is that an inference of negligence should be drawn from the mere occurrence of the accident. Significantly, the cases upon which appellant relies involve res ipsa loquitur situations. Robinson v. Atlantic & Pacific Tea Co., supra, 54 N.Y.S.2d 42, affirmed 59 N.Y.S.2d 290, to which we previously alluded, pertained to a res ipsa loquitur case in which merchandise fell upon a customer while she was shopping in defendant's supermarket. Francois v. American Stores Co., 1957, 46 N.J.Super. 394, 134 A.2d 799, involved the applicability of the res doctrine to falling merchandise. Leone v. Safeway Stores, 1945, 133 N.J.L. 478, 44 A.2d 913, was a res ipsa loquitur case regarding falling merchandise in a supermarket.

[4, 5] Yet appellant withdrew a proposed res ipsa loquitur instruction. This contribution to alleged error in the instructions precludes complaint here. Butigan v. Yellow Cab Co., supra, 1958, 49 Cal.2d 652, 320 P.2d 500; Zuckerman v. Underwriters at Lloyd's, 42 Cal.2d 460, 267 P.2d 777; Stickel v. San Diego Elec. Ry. Co., 32 Cal.2d 157, 195 P.2d 416. Moreover, this district court of appeal on September 23, 1958, denied appellant's motion to augment the record on appeal in order to insert this withdrawn instruction. Indeed, since appellant admitted that she herself had handled one of the pumpkins immediately prior to the accident, the res doctrine was inapplicable and the instruction as to it properly withdrawn.

[6] We turn to appellant's second ground of error: the instruction as to unavoidable or inevitable accident. The instruction was erroneous. Butigan v. Yellow Cab Co., supra, 1958, 49 Cal.2d 652, 320 P.2d 500; Alarid v. Vanier, 1958, 50 Cal.2d 617, 327 P.2d 897. However, we do not believe that "the probable effect of [the] instruction * * * [misled] the jury * * * so as to require a reversal * * *." 50 Cal.2d at page 625, 327 P.2d at page 901. In the absence of a showing of any defective condition and in the face of testimony that appellant either fell herself and pulled down the pumpkins or after handling a pumpkin restacked them improperly so that they fell upon her, we cannot conclude that the unavoidable accident instruction could have altered the final result. The nature and the overall weight of the facts differ here from those in our recent decision of Borg v. McDonnell, 172 Cal.App.2d 260, 342 P.2d 297. There "all the circumstances, including the evidence and the other instructions given" (Alaird v. Vanier, 1958, 50 Cal.2d 617, 625, 327 P.2d 897, 901), led to the determination that the "probable effect of [the] instruction" had been to mislead the jury. The whole showing of the record gives no such indication here.

The ultimate of appellant's case seems to condense into a res ipsa loquitur situation and her own withdrawal of that instruction indicates that the ultimate itself was insufficient for a recovery.

We affirm the judgment.

BRAY, P. J., and FRED B. WOOD, J., concur.

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173 Cal.App.2d 118

John JUZEFSKI, Plaintiff and Appellant,

v.

WESTERN CASUALTY AND SURETY COMPANY, a corporation, Defendant and Respondent.

Civ. 23789.

District Court of Appeal, Second District, Division 2, California.

Aug. 19, 1959.

Hearing Denied Oct. 15, 1959.

Action against automobile liability insurer to recover balance owing on judgment against defendant's insured for damages sustained in automobile accident, involving automobile owned by insured's father but driven by insured. The Superior Court, Los Angeles County, Wallace L.

Ware, J., rendered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Fox, P. J., held that policy provision excluding from extended liability coverage thereunder any automobile, other than insured vehicle, owned by, or furnished for regular use to named insured or a member of his household was ambiguous and must be construed as referring to a household of which insured was the head and hence did not exclude from coverage casual, occasional use by insured of father's automobile with his special permission, though insured was a member of father's household and automobile was furnished for regular use of insured's mother, who was a member of same household.

Judgment reversed.

Herndon, J., dissented.

1. Insurance ⚷146(1)

The understanding of an ordinary person is the standard used in construing insurance contract. West's Ann.Civ.Code, § 1644.

2. Insurance ⚷146(3)

Any ambiguity or uncertainty in a policy is to be resolved against insurer.

3. Insurance ⚷146(3)

If semantically permissible, policy will be given such construction as will fairly achieve its object of securing indemnity to insured for those losses to which insurance relates.

4. Insurance ⚷146(3)

Where language of policy is ambiguous, any reasonable doubt will be resolved against insurer, and if the doubt relates to extent or fact of coverage, whether as to peril insured against, amount of liability, or person or persons protected, such language will be understood in its most inclusive sense for the benefit of insured.

5. Insurance ⚷146(3)

Exceptions and exclusions are construed strictly against insurer and liberally in favor of insured.

6. Insurance ⚷665(4)

In action against judgment debtor's insurer to recover under provision of automobile policy extending liability coverage to use of other automobiles, evidence was insufficient to support finding that automobile owned by insured's father and used by insured only on special occasions with father's permission, obtained each time insured used automobile, was furnished for regular use to insured within meaning of policy provision excluding from coverage automobile thus furnished to insured.

7. Insurance ⚷435.2

Automobile policy provision excluding from extended liability coverage thereunder any automobile, other than insured vehicle, owned by, or furnished for regular use to named insured or a member of his household was ambiguous in that the household referred to therein might be either a household of which insured was a part or a household of which insured was the head, and such ambiguity must be resolved against insurer.

8. Insurance ⚷435.2

Ambiguous automobile policy provision excluding from extended liability coverage thereunder any automobile, other than insured vehicle, owned by, or furnished for regular use to named insured or a member of his "household" must be construed as referring to household of which insured was the head, and hence did not exclude from coverage casual, occasional use by insured of automobile owned by his father with father's special permission, though automobile was owned by a member of household of which insured was also a member, but not the head, and was furnished for regular use of insured's mother, who was also a member of same household.

See publication Words and Phrases, for other judicial constructions and definitions of "Household".

◆

Lee Freeman, Van Nuys, Earle K. Stanton, Los Angeles, for appellant.

Frank Wickhem, Los Angeles, for respondent.

FOX, Presiding Justice.

This case involves the interpretation of the provisions of an automobile insurance policy extending coverage, with certain exclusions, to accidents occurring while the insured is driving a car other than his own. The trial court held that the coverage of the policy did not extend to the accident in question. From such adverse judgment plaintiff has appealed.

Seymour A. Keyes was the owner in November, 1955, of a Chevrolet car which was insured with defendant. While driving his father's Packard he was involved in an accident with the plaintiff. The father had insurance coverage on the Packard in the amount of $5,000. Plaintiff recovered a $20,000 judgment against Seymour Keyes on account of the accident and the sum of $5,000 and costs was paid on account of the judgment by the company which carried the insurance on the father's Packard. The present action was then brought by plaintiff to recover from defendant company, Seymour's insurance carrier, the balance due on the judgment. Recovery was denied on the theory that certain exclusionary provisions made inapplicable to the instant case a provision of the policy extending coverage to accidents while the insured was driving another car.

The pertinent provisions of the policy read as follows:

> "V. Use of Other Automobiles.
>
> "If the named insured is an individual who owns the automobile classified as 'pleasure and business' or husband and wife each or both of whom own said automobile, such insurance as is afforded by this policy for bodily injury liability, for property damage liability, and for medical payments with respect to said automobile applies to any other automobile, subject to the following provisions: * * *
>
> "(b) This insuring agreement does not apply:
>
> "To any automobile owned by, hired as part of a frequent use of hired automobiles by, or furnished for regular use to the named insured or a member of his household other than a private chauffeur or domestic servant of the named insured or spouse."

Young Keyes, who was the only witness in this case, testified that he was separated from the service in August, 1955, and returned to the home of his parents in Burbank where he was staying at the time of the accident. He married and established his own home the following April. In September, after his discharge from the Army, he started to school and also secured part-time employment. He owned a Chevrolet which he used to go to school and to work. His father owned a Packard and a pick-up truck which he used to go to and from work. Keyes, Sr., used the Packard as a pleasure car and in the evenings. Mrs. Keyes also used it. Seymour drove the Packard on "about four occasions" before he joined the Army. After his discharge and prior to the accident he drove the Packard "on special occasions." He used the Packard on occasions when he went out in the evening with his girl but he did not use it every time he took her out. He used his own car most of the time for this purpose. In response to the question as to how often he used the Packard per week, Seymour testified "that would have to be strictly an estimate due to that there was no set time or no set principle involved in the use of the car. It was up to whether it was available, or my father would let me use it. It might be one time one week; it might be three times another week." It would average around twice a week. There were periods, however, when he did not use his father's car "even once a week." He did not have any regular arrangement with his father for the use of the Packard. It was necessary for young Keyes to ask his father's permission every time he wanted to use it. Permission, however, was granted except when either the father or mother had made previous plans that involved the use of the Packard.

The trial court determined that the policy excluded coverage to the assured when he was driving: (1) "Any automobile furnished for regular use to" him or a member of his household, or (2) any automobile owned by a member of his household; and (3) that the exclusionary provisions of the policy are not ambiguous. The court thereupon held that the accident in question was excluded from coverage and rendered judgment for defendant company.

Plaintiff argues that the decision and judgment do not find support in either the terms of the policy or in the evidence.

[1–5] "The words of a contract are to be understood in their ordinary and popular sense." (Civ.Code, § 1644.) "The understanding of an ordinary person is the standard used in construing a contract of insurance * * *." Arenson v. Nat. Automobile & Cas. Ins. Co., 45 Cal.2d 81, 83, 286 P.2d 816, 818. In Continental Cas. Co. v. Phoenix Const. Co., 46 Cal.2d 423, 437–438, 296 P.2d 801, 809, 57 A.L.R.2d 914, the court stated the cardinal rules of construction of an insurance policy: "It is elementary in insurance law that any ambiguity or uncertainty in an insurance policy is to be resolved against the insurer. [Citations.] If semantically permissible, the contract will be given such construction as will fairly achieve its object of securing indemnity to the insured for the losses to which the insurance relates. [Citation.] If the insurer uses language which is uncertain any reasonable doubt will be resolved against it; if the doubt relates to extent or fact of coverage, whether as to peril insured against [citations], the amount of liability [citations] or the person or persons protected [citations], the language will be understood in its most inclusive sense, for the benefit of the insured." "It is also the rule that exceptions and exclusions are construed strictly against the insurer and liberally in favor of the insured." Arenson v. Nat. Automobile & Cas. Ins. Co., supra [45 Cal.2d 81, 286 P.2d 818]; City of Santa Monica v. Royal Indem. Co., 157 Cal.App.2d 50, 54, 320 P.2d 136. In Osborne v. Security Ins. Co., 155 Cal.App.2d 201, 318 P.2d 94, this court stated in construing an insurance policy that: "The language of the policy is presumed to be that of the insurer and when ambiguous it is to be construed in such manner as to provide full coverage of the indicated risk rather than to narrow the protection." 155 Cal.App.2d at page 207, 318 P.2d at page 99.

We shall first inquire whether there is substantial evidence to support the trial court's determination that the Packard was "furnished for regular use to the named insured," i. e., to young Keyes, for if that finding is adequately supported the accident in question would be excluded from the coverage of his policy and the judgment should be affirmed.

[6] The evidence discloses that the son owned a Chevrolet that he drove to and from school and work and most of the time for social occasions. He used his father's Packard on special occasions to take his girl out in the evening. During some weeks he would use the Packard once; during others it might be three times, while in still others he would not use it at all; "* * * there was no set time or no set principle involved in the use of the car." He did not have any standing arrangement with his father for the use of the Packard; it was necessary to obtain his father's permission each time he drove it. This evidence does not support the trial court's determination that the Packard was furnished for regular use to the son. The use here described is obviously not regular. It was rather a casual and occasional use for which special permission had to be secured each time the car was driven. Travelers Indemnity Co. v. Pray, 6 Cir., 204 F.2d 821, 823.

Next, it is necessary to determine whether the exclusionary provisions in this policy are ambiguous. For convenience we set out these provisions again:

"(b) This insuring agreement does not apply: * * *

"To any automobile owned by, hired as part of a frequent use of hired automobiles by, or furnished for regular use to the named insured or a member of his household other than a private chauffeur or domestic servant of the named insured or spouse * * *."

In Travelers Indemnity Co. v. Pray, supra, the court was called upon to interpret this identical language. The court held that "the exception clause in the policy in question is undoubtedly ambiguous." Later in the opinion the court referred to these provisions as "quite ambiguous." A mere reading of the exclusionary provisions quoted above demonstrates the correctness of the court's characterization of them. They are obviously unclear.

[7, 8] Illustrative of the ambiguity of the exclusionary provisions is that aspect of the policy which apparently denies coverage if the insured is operating a vehicle which he or a member of his household owns (other than the insured vehicle), or one which is furnished for his regular use or the regular use of a member of his household. Does "his household" mean a household of which he is a part, or does it refer to a household of which he is the head? The extent of coverage varies considerably depending upon the meaning which is assigned to the phrase "his household." The trial court concluded that Seymour's insurance did not cover the instant accident for the reason, inter alia, that the Packard was being furnished for the regular use of his mother, a member of his (the son's) household, and for the further reason that it was owned by his father, a member of his (the son's) household. As Seymour was not the head of the household, the trial court must have construed "his household" to mean a household of which he is a part. While this construction is not unreasonable, the phrase is equally susceptible to a more limited construction, viz., that the exclusionary provisions under consideration do not become operative unless the automobile is owned by or furnished to a member of a household of which the insured is the head. This ambiguity, under the authorities to which reference has already been made, must be resolved against the insurer. So considered, the exclusionary provisions under discussion do not apply to the facts of the instant case. The language of the policy was that of the insurance company. It would have been a simple matter for it to have clearly stated the household to which reference was being made.

The judgment is reversed.

ASHBURN, J., concurs.

HERNDON, Justice.

I dissent.

I regard it as a close and debatable question whether the record discloses substantial evidentiary support for the trial court's finding that the Packard automobile was "furnished for regular use to the named insured." I incline to the view that this finding is adequately supported.

However, I base my dissent primarily upon the view that insurance coverage in this case is excluded by clear and unambiguous provisions of the policy. In reaching this conclusion I have accepted as entirely correct the general canons of construction as stated in the majority opinion. As I read the words of the instant contract, giving them meaning as they are generally understood "in their ordinary and popular sense," I find room for only one reasonable interpretation. The added or extended coverage of the policy with respect to vehicles other than that specifically insured does not apply to "any automobile owned by * * * the named insured or a member of his household." To my mind, the only natural and reasonable construction of the words "his household" is that they mean the household of which he is a member. "In normal speech, one's household is the familial or residential group with which one lives; a wife or child, as well as the pater familias, has a household." Farm Bureau Mut. Automobile Ins. Co. v. Violano, 2 Cir., 123 F.2d 692, 695. "One of the definitions of the word 'household' given in Webster's New International Dictionary is, 'Those who dwell under the same roof and compose a family; a domestic establishment.' * * *" Island v. Fireman's Fund Indemnity Co., 30 Cal.2d 541, 547, 184 P.2d 153, 156, 173 A.L.R. 896. "Whether the term 'household' or 'family' is used, the term embraces a collection of persons as a single group, with one head, living together, a unit of permanent and domestic character, under one roof; a 'collective body of persons living together within one curtilage, subsisting in common and directing their attention to a common object, the promotion of their mutual interests and social happiness.'" Lumbermen's Mutual Casualty Co. v. Pulsifer, 41 F.Supp. 249, 251–252; cf. Island v. Fireman's Fund Indemnity Co., supra, 30 Cal.2d 541, 548, 184 P.2d 153, "Persons who dwell together as a family constitute a 'household.' * * *" Arthur v. Morgan, 112 U.S. 495, 500, 5 S.Ct. 241, 243, 28 L.Ed. 825. "We do not doubt that a son living under the parental roof is a member of the household even though he has reached his majority and supports himself * * *." Ocean Accident & Guaranty Co. v. Schmidt, 6 Cir., 46 F.2d 269, 270.

Travelers Indemnity Co. v. Pray, 6 Cir., 204 F.2d 821 is cited as a case in which the majority of a divided court held identical language to be "quite ambiguous". I prefer the reasoning of Judge Miller's dissenting opinion in that case, and also the reasoning of Judge Chesnut in Aler v. Travelers Indemnity Co., D.C., 92 F.Supp. 620, 621 where the identical excepting clause was held *unambiguous* and was given the same interpretation given it by the trial court here.

A later case, dealing with the same policy language is Leteff v. Maryland Casualty Co., La.App., 91 So.2d 123, 136, decided by the Louisiana Court of Appeals. After citing numerous decisions, including Aler v. Travelers Indemnity Co., supra, and Travelers Indemnity Co. v. Pray, supra, the Louisiana Court comments "[p]robably the leading case on the particular narrow problem here involved, and the case most frequently cited, is Aler v. Travelers Indemnity Co., D.C.Md. 1950, 92 F.Supp. 620." "The great weight of authority is in accord with the interpretation of this provision by Judge Chesnut in Aler v. Travelers Indemnity Co., D.C.Md., 92 F.Supp. 620, 623 * * *." Campbell v. Aetna Casualty and Surety Company, 4 Cir., 211 F.2d 732, 736. The Louisiana appellate court appraises the majority opinion in the Pray case as follows: "Bearing in mind the established rules of interpretation and the reason for such exclusion clauses as shown in the cited jurisprudence, we believe that the interpretation placed upon the exclusion clause by the majority in the Pray case not only stands alone but is in error. The great weight of authority is contra." Leteff v. Maryland Casualty Company, supra, 91 So.2d 123, 139–140.

While I fully agree with the rule that any ambiguity or uncertainty in an insurance policy is to be resolved against the insurer, I think it incorrect to find ambiguity by the process of suggesting a strained and quite unnatural interpretation as the basis of possible conflict.

I would affirm the judgment.

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172 Cal.App.2d 549

In re ROBBINS' ESTATE.

In the Matter of the Estate of John Lloyd McCullough Robbins, Deceased.

Mary Emma Robbins Sutton, William C. Robbins, Marie Robbins Hilbert, Irving W. Robbins, Jr., and Martha D. Ireland, Contestants and Appellants,

Beatrice Clayton Robbins, Beatrice Clayton Robbins, as Executrix of the Last Will and Testament of John Lloyd McCullough Robbins, Deceased, Proponent and Respondent.

Civ. 9527.

District Court of Appeal, Third District, California.

July 31, 1959.

Hearing Denied Sept. 22, 1959.

Collateral heirs' proceeding to contest will by which testator left his entire estate to wife whom he had married less than two years before his death at 79 and after he had suffered three strokes, brought on ground of asserted undue influence in procuring execution of will. The Superior Court, Solano County, Lilburn Gibson, J., rendered judgment for proponent, and contestants appealed. The District Court of Appeal, Van Dyke, P. J., held, inter alia, that contestants' evidence was insufficient to show that proponent had actually exerted any undue influence upon testator, though proponent had driven him to attorney's office where will was drawn and was present when it was drawn and executed.

Affirmed.

1. Wills 🔑400

Scope of review as to propriety of court's action, in will contest, in not submitting issue of undue influence to jury was same as if verdict had been directed on such issue, and evidence was to be viewed in light most favorable to appellants.

2. Wills 🔑156

Physical and mental condition of testator are factors to be considered on issue of undue influence.

3. Wills 🔑155(1)

Influence, to be "undue influence" so as to justify voidance of will, must be such as has effect to destroy testator's free agency and to substitute for his own another person's will.

See publication Words and Phrases, for other judicial constructions and definitions of "Undue Influence".

4. Wills 🔑155(1)

Undue influence upon testator which will justify voidance of will must have been directed to procuring will and must have amounted to coercion, destroying free agency on part of testator.

5. Wills 🔑158

General influence alone or opportunity to influence the making of a will, even if coupled with interest or motive to do so, does not constitute "undue influence" which will justify the voidance of a will.

6. Wills 🔑166(12)

Undue influence in procuring execution of will can be proved by circumstantial evidence.

7. Wills 🔑166(1)

In proceeding brought by collateral heirs to contest will by which attorney left his entire estate to his wife whom he had married less than two years before his death at 79 and after he had suffered three strokes, wherein it was shown that wife had driven attorney to another attorney's office where he ordered will drawn in favor of wife in her presence and that she then ordered will drawn leaving her property to him and that testator thereafter again went to attorney's office where will was redrafted because he had erroneously placed signature on wrong line in first will, evidence was insufficient to show that wife had exercised influence which overpowered attorney so as to destroy his free agency.

8. Wills 🔑166(7)

Wife's presence in attorney's office when her husband ordered will drawn in her favor did not show her wrongful participation in drawing will, amounting to undue influence.

9. Trial 🔑261
Wills 🔑329(3)

In proceeding to contest will drawn by testator less than two years before his death at age 79 and after he had suffered three strokes, proponents' proffered instruction that if it was found that testator suffered from some form of mental disorder which would deprive him of testamentary capacity and that such disorder was permanent, there was presumption that incapacity continued down to and including time of making of will would have been warranted had it not further stated that jury might find that testator suffered from disease such as senile dementia, but, as such portion of instruction was not supported by evidence, court committed no error in refusing whole instruction.

10. Trial 🔑261

Where instructions are offered which cannot be properly given without modifications, court may refuse to give them.

11. Trial ⚷260(1)

Where two instructions given covered matters involved in refused instruction, refusal of such instruction could not constitute error.

12. Trial ⚷29(3)

In will contest, wherein it was not requested that jury be excluded during argument on propriety of hypothetical question propounded to expert, court's remarks stating that it had grave doubt as to propriety and legality of question, but, in view of wide discretion vested in court in such matters, it was going to allow question, did not constitute misconduct.

13. Appeal and Error ⚷201(2)

No alleged misconduct of a court in remarking on questions would be available on appeal in absence of objections made to trial court with request for appropriate admonitions to jury.

14. Wills ⚷332

In collateral heirs' contest of will by which testator left entire estate to woman whom he married less than two years before his death at 79 years of age, brought on theory that wife had assertedly exerted undue influence upon testator who had suffered three strokes before their marriage, it was proper for court to give instruction defining natural objects of bounty, and stating, correctly, that such include surviving spouse, descendants, and parents and that collateral heirs are not within classification because of their relationship alone.

◆

Dodge & Evans, Oakland, Dunnell, Herbert & Dunnell, Fairfield (Hildebrand, Bills & McLeod, Robert P. Brorby, Oakland, of counsel), for appellants.

Burt D. Goodman, Fairfield, Kilpatrick & O'Hara, Vallejo, and Kenneth I. Jones, Fairfield, for respondent.

VAN DYKE, Presiding Justice.

This is an appeal from an order admitting to probate the will of John L. M. Robbins, deceased, over the objections of appellants, who contested the probate of the will upon the grounds (1) that it was executed under the undue influence of the proponent, respondent herein, and (2) that the decedent was mentally incompetent to execute the will. At the close of contestants' case the court granted a "nonsuit" as to the undue influence ground of contest and submitted to the jury only the issue of testamentary capacity. The jury's verdict found the decedent to have possessed the requisite testamentary capacity, and thereafter an order was made admitting the will to probate.

[1] Although the procedure of granting a nonsuit may have been technically incorrect (see In re Estate of Jamison, 41 Cal.2d 1, 6, 256 P.2d 984), the variance is immaterial here. The scope of review as to the propriety of the court's action in not submitting the issue of undue influence to the jury is the same as if a verdict had been directed on that issue. The evidence must be viewed in the light most favorable to the appellants. In re Estate of Lounsberry, 149 Cal.App.2d 857, 858, 309 P.2d 554.

We shall first consider the contentions of appellants that the court erred in not submitting the issue of undue influence to the jury, and in doing so will consider only the evidence pertinent to that issue. Testator was an attorney at law, although his practice had been largely confined to the field of probate law. He was a rancher and an investor, and throughout his life had been active in the management of his own affairs, which were extensive. He died June 5, 1955, at the age of 79 years. He left an estate valued at approximately three and one-third million dollars. He had inherited from his parents the foundation of his later fortune. He was survived by his widow, Beatrice Clayton Robbins, proponent herein, whom he had married on November 30, 1953, after the death of his first wife in 1950. He was childless and appellants are his collateral heirs. The will which was admitted to probate was executed by decedent on December 28, 1953, and it left his entire estate to Beatrice. The contestants William C. Robbins, Mary Emma Robbins Sutton, Marie Robbins Hilbert, are brother and sisters of decedent. Contestants Irving W. Robbins, Jr., and Martha D. Ireland are children of decedent's predeceased brother, Irving. They are all people of wealth.

In 1938, the testator hired Beatrice as a secretary and payroll clerk to assist in the handling of his properties. She maintained this position until the time of her marriage to testator. In 1941 testator suffered a stroke, which left him partially paralyzed in his right arm and right leg. He thereafter used a cane when walking, needed assistance in putting on his coat and changed from his right to his left hand for writing purposes. From 1943 on Beatrice acted also as testator's chauffeur. Following the death of testator's first wife he destroyed a will which had theretofore been executed by him, and thereafter remained without a will until after his marriage to Beatrice. On February 7, 1952, when he was about 77 years of age the testator suffered a second stroke which kept him in bed for approximately 3 weeks under the care of a nurse. On October 8, 1953, he suffered a third stroke which affected his speech, and his speech remained somewhat affected until his death in 1955. On November 30, 1953, he married Beatrice, and a little more than a week thereafter executed a will in her favor, which left her all his property, and which, save for minor language differences, was practically identical to the will admitted to probate.

On December 8 or 9, 1953, Beatrice accompanied testator to the office of his attorney. This attorney was an old-time acquaintance of the testator and for a considerable period of time had performed professional work for him. In the presence of Beatrice the testator instructed his attorney to draw a will, leaving everything to her and naming her as executrix. On the following day testator and Beatrice returned to the attorney's office, where he read the will, announced that it was in accordance with his wishes, and signed the same. In affixing his signature he signed in a blank provided for the signature of a witness. The attorney called this to his attention and upon the attorney's suggestion the testator scratched out the misplaced signature and signed again in the correct place. Immediately upon the execution of the testator's will, Beatrice instructed the attorney to draw up a will for her, leaving her entire estate (valued at some $50,000) to the testator. They waited while the will was typed and she executed it in the presence of the testator. The testator took both of the wills, and Beatrice drove him to the bank, which he entered, and it may be inferred that he put the wills into his safe deposit box. On December 28, 1953, Beatrice again drove the testator to the attorney's office, but this time she waited outside in the car and did not go in with him. The testator told the attorney that he wanted to have his will redrafted as he had become concerned over the erroneously-placed signature and its erasure, which at least marred the appearance of the document. Under his instructions and in his presence a new will was typed, practically identical with the executed will. It was executed by the testator while in the attorney's office and was witnessed by the attorney and by an associate. Having executed the last will, the testator, while in the attorney's office, destroyed the prior will by tearing it up and throwing the pieces into a wastebasket. On April 11, 1955, the testator suffered a fourth stroke and was placed under the care of a nurse. On May 23d following he directed Beatrice to close his safe deposit box, which she did. The contents of the box, which included her December 10th will and the testator's December 28th will, were kept in his home. On June 2, 1955, he suffered a fifth stroke and on June 5th following he died.

[2–5] The mental and physical conditions of a testator are factors to be considered on the issue of undue influence. In re Estate of Jamison, supra, 41 Cal.2d at page 8, 256 P.2d at page 985. His several strokes prior to the execution of his wills had resulted in paralytic physical limitations and speech limitations, although he was able to get about and to a considerable degree at least, to attend to his affairs. An expert witness in the medical fields of neurology and psychiatry testified that he suffered permanent brain damage from each of the strokes and that arteriosclerosis, a progressive disease, would have been observable in him from three to six years prior to the first stroke. There was evidence that at the time he executed his will he was, in the opinion of expert witnesses testifying mainly in response to hypothetical questions, suffering from certain delusions described by the expert. And there was expert and lay testimony that he was of unsound mind. There was testimony that he became weakened to the point where he was a person who could be easily influenced. There was proof also that his wife Beatrice sustained toward him a confidential relationship of such nature as to make her a fiduciary in respect to the issue of undue influence. We think it unnecessary to relate further details concerning the evidence on the issue of undue influence, because we think that, assuming that all the factors to be considered in resolving the issue of undue influence were present and proved save one, the failure to prove that one requires an affirmance of the court's action in refusing to submit to the jury the issue of undue influence. Influence to be undue so as to justify the voidance of a will must be such as in effect to destroy the testator's free agency and substitute for his own another person's will. It must be shown that pressure was brought to bear directly on the testamentary act. The influence must be shown to have been directed to procuring the will and must have amounted to coercion, destroying free agency on the part of the testator. Proof of general influence alone is insufficient. Proof of opportunity to influence the making of the will, even coupled with an interest or motive to do so, is insufficient. In re Estate of Arnold, 16 Cal.2d 573, 577, 107 P.2d 25, 27. It was said in that case: "'The unbroken rule in this state is that courts must refuse to set aside the solemnly executed will of a deceased person upon the ground of undue influence unless there be proof of "a pressure which overpowered the mind and bore down the volition of the testator at the very time the will was made."'" See, also, In re Estate of Lingenfelter, 38 Cal.2d 571, 241 P.2d 990, and In re Estate of Goddard, 164 Cal.App.2d 152, 330 P.2d 399. A will cannot be overturned on the mere speculation or suspicion that undue influence may have been used to procure it. In re Estate of Gleason, 164 Cal. 756, 765, 130 P. 872; In re Estate of Welch, 43 Cal.2d 173, 272 P.2d 512. Mere general influence, however strong and controlling, not brought to bear upon the testamentary act, is not enough; it must be influence used directly to procure the will, must amount to coercion destroying free agency. In re Estate of Welch, supra, 43 Cal.2d at page 175, 272 P.2d at page 513. "It is not sufficient for a contestant merely to prove circumstances consistent with the exercise of undue influence; but before the will can be overthrown the circumstances must be *inconsistent* with voluntary action on the part of the testator." In re Estate of Welch, supra, 43 Cal.2d at page 178, 272 P.2d at page 515.

[6-8] Although such procurement can be proved by circumstantial evidence, nevertheless the proof must be made; and disregarding testimony of proponent as to her non-participation does not amount to proof to the contrary. It is in the essential necessity of such proof that contestants failed to make a case warranting submission of the issue to a jury. Notwithstanding confidential relationship, motive, opportunity and perhaps an unnatural quality of the will, there was a complete lack of proof of procurement. All that was shown was that respondent, who for so long had been the testator's chauffeur and, according to the proof made by contestants themselves, had driven him wherever he wanted to go, performed her duty as chauffeur by driving him to the office of the attorney. These facts do not warrant an inference

that she was thereby wrongfully participating in the drawing and execution of his will. It cannot be inferred that she selected the attorney, since there is no direct proof of it and the proof of the contestants was that the attorney had acted for him in various matters for years, besides being an old acquaintance. There was no proof that she took part in discussing the contents of the proposed will. Indeed, the proof was that the testator simply told the attorney he wanted a will drawn leaving everything to his wife and this simple request was complied with. The attorney asked no questions and gave no advice. So far as the record shows, the only discussion that occurred, if it can be called such, was the directive issued by the testator. Respondent's presence in the attorney's office does not show wrongful participation. In re Estate of Morcel, 162 Cal. 188, 197, 121 P. 733; In re Estate of Easton, 140 Cal.App. 367, 376, 35 P.2d 614. See, also, In re Estate of Lingenfelter, supra. Undue influence is not shown by the circumstance that after the testator had executed his will respondent had the attorney draw the will for her, leaving her property to her husband. It is argued by appellants that this was a situation from which it could be inferred that there was some form of mutuality or reciprocity involved connecting the two wills, thus indicating and warranting an inference of participation, but there is nothing from which this can be concluded. There was no proof whatever that the wills had been agreed upon and were reciprocal or mutual wills based upon antecedent contracts to make and keep in force such wills. The argument advanced on this point is mere speculation. In thus discussing the execution of the will of December 10, 1953, we are not losing sight of the fact that it was not this will which was offered for probate, nor do we find it necessary to analyze the appellants' argument that proof of undue influence in the execution of the first will would justify an inference that the undue influence persisted and produced the second will. Assuming that such an argument might be made and passing on to the execution of the last will, we find the same lack of proof of active participation noted in respect of the prior will. The only difference is, if there be a difference, that when the last will was executed the proponent drove the testator to the office of the attorney and remained outside while the last will was being drawn and executed. We hold that neither will was shown to have been the product of the undue influence of respondent.

[9, 10] Contestants contend that it was error for the court to have refused to give their proposed instruction No. 28, which reads: "If you find that the testator, * *, prior to the date of making the will, suffered from some form of mental disorder which would deprive him of testamentary capacity, and this disorder is shown to be of a permanent type, a presumption arises that such incapacity continued down to and including the time of making the will. Thus, if in this action you should find that the testator, * * *, did suffer from a permanent and progressive mental disease *such as senile dementia* prior to the execution of his will, then I instruct you that the law presumes, in the absence of proof to the contrary, that he remained in that condition and was thereafter incapable of making a valid will." (Italics added.) Contestants do not contend, nor does the record disclose, that there was any evidence that testator suffered from senile dementia rendering him incapable of making a will, nor is there testimony which likens or compares testator's mental condition to such senile dementia. There was testimony, as we have said, by lay witnesses that the testator was of unsound mind from a time prior to the execution of the will and expert testimony that the strokes inflicted permanent brain damage and that testator suffered from delusions which were permanent in nature. In the absence of any evidence relative to incapacitating senile dementia, the instruction as propounded by contestants would have confused the jury. Testator was 78 years old when the will was executed, had suffered a number

of strokes and was somewhat crippled physically. There was testimony that he suffered from arteriosclerosis to some degree. In view of such evidence the jury might well have concluded from the reference to senile dementia that the court was telling them he did suffer from that disease to an incapacitating degree. The reference to senile dementia had no proper place in the instruction which was complete without it and, without it, would have been a correct instruction. We hold the court was justified in refusing to give the instruction in the form requested. Where instructions are offered which cannot properly be given without modification the court may refuse to give them. In re Estate of Dopkins, 34 Cal.2d 568, 575, 212 P.2d 886.

[11] Contestants next contend that the court erred in refusing to give their proposed instruction No. 23, which reads: "The proof of the soundness of mind of the testator, * * *, and of the facts upon which his state of mind depends, are not necessarily confined to the exact time of the execution of the will. Evidence of the testator's mental status, together with his appearance, conduct, acts, habits and conversation, both before and after execution of the will, should be considered by you upon the issue of his soundness of mind so long as they have a reasonable tendency to indicate his mental condition at the time of the execution of the will." This would have been a proper instruction, but the court did give instructions upon the same subject matter, which we hold to be sufficient. The court told the jury: "In determining the mental capacity of Lloyd M. Robbins to make a Will it is proper to give consideration to his appearance, conduct, declarations, habits and conversations before and after the alleged execution of the Will, so long as such considerations have a reasonable tendency to establish the mental condition of Lloyd M. Robbins at the time of the alleged execution of the Will" The court further told the jury: "You are further instructed that evidence of the condition of the Testator's mind, both before and after the date of the Will's execution shall only be considered by you for whatever weight you see fit to give the same guided by my instructions only as it bears on the mental condition of the Testator at the very time of the Will's execution." In combination these instructions covered the matters involved in the refused instruction.

[12, 13] It is contended that the court committed prejudicial misconduct by making certain comments before the jury in ruling on the admissibility of a hypothetical question. Contestants had propounded a hypothetical question which covers some seventy pages of transcript. Objection to the form of the question was sustained and contestants agreed to reframe the question. The amended question was asked the following day and objection was again made. It was not requested that the jury be excluded during arguments on the objection. Following argument, the court stated: "Well, frankly, gentlemen, I am not too well satisfied with the propriety or the entire legality of that question, but I have in mind the rules applicable to hypothetical questions, and I am going to overrule the objection. You may answer the question." Before the question was answered, however, the court recessed and upon reconvening said: "As I remember, what the Court said was that—what I said was that I had grave doubt as to the propriety and legality of the propounded question. What I intended to say was—and what I do now say by way of amendment thereto is—that I have grave doubt as to the propriety and legality of the question in part, but I have in mind the wide discretion that the Court is vested with in these matters, and at this time I am going to resolve that doubt in favor of the propounder of the question and in favor of the question. I am going to and I do overrule the objection. Doctor, you may resume the stand and answer the question." No objection was made by contestants at that time to the remarks of the court and the court was not requested to admonish the jury in any manner. Now contestants argue that they were entitled to the jury's unbiased con-

sideration of the testimony of the expert witness, free from judicial remarks against it. Contestants cite In re Estate of Blake, 136 Cal. 306, 68 P. 827. That case, however, was different from this. Here the court commented to counsel upon the propriety of the question rather than on the merits of the answer. We find no misconduct and if there were any the objection would not be available on appeal, in the absence of objections made to the trial court with request for appropriate admonitions to the jury. In re Estate of McGivern, 74 Cal.App.2d 150, 157, 168 P.2d 232.

[14] Finally, contestants contend that the court erred in giving a portion of proponents' instruction No. 26, reading as follows: "The expression 'natural objects of a testator's bounty' has reference to the descendants, surviving spouse, and parents of the Testator who purely by reason of relationship may be presumed to have had claims upon his bounty. Collateral heirs such as brothers and sisters, nieces and nephews are not because of such relationship alone, 'natural objects of bounty' and such next of kin not provided for in the Will, in order to establish that the instrument is unnatural, must show affirmatively, that he had peculiar or superior claims to the decedent's bounty, and if no such claim is established the instrument cannot be held to be unnatural." Contestants were relying upon alleged unnatural aspects of the testator's will as part of their proof of undue influence. They proved the large extent of the testator's fortune, the short space of time that separated the marriage from the execution of the first will, the disparity between the amount carried by the will of respondent when compared with the large fortune disposed of by the testator's will. They introduced a great deal of evidence concerning friendly relations between the testator's collateral heirs and the testator. The contestants themselves requested, and the court gave, instructions defining that unsoundness of mind which will render a testator incompetent to make a will, which instructions contained a requirement that the testator be "capable of understanding the act he is doing and the relation in which he stands to the objects of his bounty."

It was proper for the court to define the term "natural objects of a testator's bounty." The definition is in accord with that contained in Re Estate of Arnold, 16 Cal.2d 573, 588, 107 P.2d 25; In re Estate of Del Fosse, 67 Cal.App.2d 490, 498, 154 P.2d 734; 26 Cal.Jur., sec. 53, pp. 695–696.

The judgment is affirmed.

SCHOTTKY, J., concurs.

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172 Cal.App.2d 658

Thelma E. BAUM, Plaintiff and Appellant,
v.
Ernest M. BAUM, Defendant and Respondent.
Civ. 23076.

District Court of Appeal, Second District, Division 1, California.
Aug. 7, 1959.

Proceedings by former wife to appoint a receiver and/or order a sale of former husband's interest in partnership, and to make a lien on such partnership interest and to foreclose the same. The Superior Court of Los Angeles County, Elmer D. Doyle, J., entered order denying former wife's motion to appoint a receiver and order of sale of former husband's partnership interest and former wife appealed. The District Court of Appeal, Fourt, J., held that under evidence disclosing their respective ages, abilities, and needs and fact that wife in spite of her remarriage for a time sought to collect support and maintenance from former husband and that minor child had been for some time self-supporting, it could not be said that court had abused discretion in failing to order appointment of receiver.

Affirmed.

See also 335 P.2d 481.

1. Divorce ⚷261, 267, 311

In former wife's action against former husband for appointment of receiver and for sale of former husband's partnership interest, and for charging such interest with sums previously ordered paid by former husband to former wife, under evidence showing that despite her remarriage former wife for some time had attempted to compel collection of alimony from former husband and that minor child of party had been self-supporting for some time, there was no disclosure of an abuse of discretion by trial court in refusing to appoint receiver and/or order sale of former husband's partnership interest. West's Ann.Corp.Code, § 15028.

2. Divorce ⚷286

Where former wife moved for order of trial court to appoint a receiver of and/or order sale of former husband's interest in partnership in connection with enforcement of prior orders concerning money that was to be paid to former wife as result of divorce decree, burden was on former wife to show that denial of motion constituted an abuse of discretion by trial court.

3. Divorce ⚷261, 269(1), 311

Where former wife moved trial court for an order appointing a receiver of and/or order sale of former husband's interest in partnership in connection with enforcement of prior alimony and support orders contained in divorce decree, and trial court denied motion for appointment of receiver or sale of former husband's interest in partnership, denial did not foreclose former wife from again applying for various orders to facilitate collection of balance apparently due her, and if former husband persisted in failing to comply with orders of court, assuming his ability to do so, the trial judge would make a charging order provided for by statute or find him guilty of contempt. West's Ann.Corp. Code, § 15028.

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Charles Murstein, Los Angeles, for appellant.

Benjamin P. Riskin, Los Angeles, for respondent.

FOURT, Justice.

This is an appeal from an order denying the "plaintiff's motion to appoint a receiver of, and/or order a sale of defendant's interest in the partnership of J. H. Baum and Sons, charging said interest under section 15028 of the Corporations Code with sums theretofore ordered paid by defendant to plaintiff and made a lien on said partnership interest, and that such lien be foreclosed and a sale of said interest had".

The plaintiff and the defendant were formerly husband and wife. One child was born as the issue of the marriage. Certain orders were made by the trial court wherein the defendant was directed to pay certain amounts to the plaintiff for her support and maintenance and further to pay to the plaintiff certain amounts for the support and maintenance of the child.

There is no Reporter's Transcript before us and the matter is submitted upon a record consisting of a part of the minutes of the court, selected orders and some motions and affidavits.

Apparently the plaintiff made a motion with reference to the moneys which the court had theretofore ordered the defendant to pay to the plaintiff for the support and maintenance of the plaintiff and child. At or about the same time the defendant petitioned the court to modify the order providing for such payments. A motion was heard on November 9, 1956. On December 11, 1956 there was filed "Findings of Fact by Court Commissioner", wherein it was set forth and found that the defendant was a member of a partnership, which partnership was engaged in the contracting business and that the defendant's only asset was his interest in the partnership.

Further, it was found that the plaintiff had remarried on October 25, 1956, that the minor child was self-supporting and that the defendant was delinquent in child support. The Commissioner recommended and the court ordered on December 11, 1956 "* * * partnership interest of defendant in * * * is impressed with the unpaid alimony * * * and is impressed with the unpaid child support * * *" and "So much of the sentence heretofore imposed on April 13, 1956 and unexecuted is further suspended on conditions heretofore imposed."

Apparently, the defendant excepted to the findings of the Commissioner, although such exceptions are not before us. In any event, an order was made on January 18, 1957 "* * * defendant's exceptions to the findings of the commissioner, and order are granted." It was ordered on January 18, 1957 in effect that the portion of the order as to support of the plaintiff was vacated and a hearing de novo was set down for February 18, 1957. The defendant's exceptions as to the child support were continued to February 18, 1957 if he had paid up the arrearages in child support.

On February 18, 1957 a hearing was held and the court ordered: "the child support order heretofore made to remain in full force and effect until the child becomes of age; and prior to that time, on condition defendant has paid the arrearage accruing under the said order, he may come into court for modification, but at this time modification is denied."

In the hearing on February 18, 1957 a copy of a marriage certificate (presumably of the marriage of the plaintiff to her new husband of October 25, 1956) was introduced into evidence. The matter of further consideration of the petition for modification or alimony was continued to February 19, 1957. There is no copy of the minutes of February 19, 1957 in the record before us. On April 25, 1957 the plaintiff filed a notice of motion: "(a) To terminate the suspension of the sentence imposed upon defendant for contempt; (b) * * * to correct minutes of January 18, 1957 and enter minute order of February 19, 1957; and (c) * * * to appoint a receiver of and/or order a sale of defendant's partnership interest etc. and (d) * * * for attorney's fees, etc."

In this latter mentioned document the plaintiff set forth that the minutes of January 18, 1957 should be corrected to read to the effect that the defendant's exceptions to the findings of the Commissioner should be granted as to sums accruing subsequent to October 25, 1956 and that the matter as to such amounts be set down for a new hearing; and further that the minutes of February 19, 1957 should read to the effect: that plaintiff waived payments for support accruing after October 25, 1956 and that plaintiff renewed her motions to charge defendant's partnership interest with the amounts due and owing; that the motions were granted with the deductions and order of December 7, 1956 and the Commissioner's findings are confirmed with such deduction; that the motion to modify the support for the child is denied because defendant was in contempt. Plaintiff went on to set forth in the notice of motion that there was nothing in the Clerk's Minutes or any proceedings had on February 19, 1957, but that the Court Reporter's Transcript (which is not before us) did show what had occurred. The motion was heard on July 8, 1957 and the court denied the motion to terminate the suspension of the sentence of defendant for contempt; the motion for the appointment of a receiver was ordered off calendar "subject to the right to renew the motion within thirty days"; the minutes of January 18, 1957 were amended by adding "and the matter is set down for a hearing de novo as to sums accruing for plaintiff's support subsequent to October 25, 1956"; the minutes of February 19, 1957 were amended by adding, "plaintiff waives payments for her support accruing subsequent to October 25, 1956. The Commissioner's findings are confirmed with that deduction"; the defendant was ordered to pay plaintiff's attorney $150 attorney's fees and the amount was to be a lien against the defendant's partnership interest. That order was entered on July 10, 1957. On August 12, 1957 (more than thirty days from July 10, 1957), the plaintiff filed what is denominated a "notice of renewal of motion to appoint a receiver of and/or order a sale of defendant's partnership interest etc." That motion was heard on September 9, 1957 and the court ruled on the same day that: "the plaintiff's motion to appoint a receiver and/or order a sale of defendant's partnership interest etc. having heretofore been argued and submitted * * * plaintiff's motion is denied".

The sole question submitted by the briefs is whether the trial court abused its discretion in refusing to make the orders which are possible under Section 15028 of the Corporations Code.

Section 15028 of the Corporations Code reads in part as follows:

"(1) Application by judgment creditor; charge on partner's interest; appointment of receiver. On due application to a competent court by any judgment creditor of a partner, the court which entered the judgment, order, or decree, or any other court, may charge the interest of the debtor partner with payment of the unsatisfied amount of such judgment debt with interest thereon; and may then or later appoint a receiver of his share of the profits, and of any other money due or to fall due to him in respect of the partnership, and make all other orders, directions, accounts, and inquiries which the debtor partner might have made, or which the circumstances of the case may require."

In appellant's opening brief she appears to be satisfied to rely upon the following authorities: (1) Sherwood v. Jackson, 121 Cal.App. 354, 8 P.2d 943, which holds to the effect that a separate creditor, that is, a creditor of an individual partner, *may not* levy attachment or execution on a partner's right in specific partnership property, or his interest in the partnership, but may only, after first obtaining judgment, pursue the statutory remedy of seeking a charging order (now under Section 15028 of the Corporations Code); (2) Ribero v. Callaway, 87 Cal.App.2d 135, 196 P.2d 109 to the effect that a receiver *may* be appointed and Civil Code, Section 3523 wherein it is provided that where there is a wrong there should be a remedy.

The Supreme Court said in Baum v. Baum, 51 Cal.2d 610, 335 P.2d 481, 482, with reference to the orders making the amounts a lien against the partnership interest the following:

"The court has general power to make a support allowance a lien on property (see Gaston v. Gaston, 1896, 114 Cal. 542, 546, 46 P. 609; [55 Am.St.Rep. 786]; 16 Cal. Jur.2d 527, § 237, and cases there cited), and no showing has been made that it was not merely in the exercise of such general power that the order was made 'impressing' defendant's partnership interest in this case. Further, it appears that an order making support payments a lien upon property does not constitute either the equivalent of a writ of execution (see Anderson v. Anderson (1899), 123 Cal. 445, 56 P. 61; Wellborn v. Wellborn (1942), 55 Cal. App.2d 516, 523, 131 P.2d 48) or of a charging order. As hereinafter shown charging orders on partnership interests have replaced levies of execution as the remedy for reaching such interests."

[1] Assuming that "charging orders on partnership interests have replaced levies of execution as the remedy for reaching such interests" and keeping in mind the provisions of Sections 139 and 140 of the Civil Code, we are of the belief that appellant has not shown that the trial court abused its discretion. Section 139 of the Civil Code at the time in question read in part as follows:

"In any interlocutory or final decree of divorce or in any final judgment or decree in an action for separate maintenance, the court may compel the party against whom the decree or judgment is granted to make such suitable allowance for support and maintenance of the other party for his or her life, or for such shorter period as the court may deem just, having regard for the circumstances of the respective parties, and also to make suitable allowance for the support, maintenance and education of the children of said marriage during their minority, *and said decree or judgment may be enforced by the court by execution or by such order or orders as in its discretion it may from time to time deem necessary.*" (Italics added.)

Section 140 of the Civil Code reads as follows:

"The court *may* require any person required to make any payments under the provisions of this article to give reasonable security therefor and *may* enforce the same by the appointment of a receiver, or by any other remedy applicable to the case."

In Messenger v. Messenger, 46 Cal.2d 619, 630, 297 P.2d 988, 994, the court said, among other things:

"In 1951, however, section 139 was amended, and in addition to other changes not relevant to this proceeding, a provision was added that orders thereunder 'may be enforced by the court by execution or by such other order or orders as in its discretion [the trial court] may from time to time deem necessary.' Under this provision the trial court now has discretion to determine in each case whether execution is an appropriate remedy for enforcing its order. In the present case the court found on sufficient evidence that to permit the issuance and enforcement of a writ of execution would discredit defendant professionally and impair his ability to make the monthly payments and discharge the arrearages. Accordingly, it did not abuse its discretion in conditioning the issuance of execution on defendant's noncompliance with its order to discharge the arrearages in installments."

Even in the days before section 139 of the Civil Code provided that it was within the discretion of the trial court as to whether certain enforcement orders should issue, courts on occasion saw fit to withhold the issuance of a writ of execution or to recall or quash a writ which had theretofore been issued. (See, 8 Hastings Law Journal, 214.) Defendants on occasions in the past convinced the courts that under special hardship situations the discretion of the court should be exercised to avoid the difficulties which a writ of execution might entail and as said in the Law Review (Note, above mentioned) at page 220:

"Yet, the installment judgment, fair and reasonable at its inception, seemed not always able to contemplate the future misadventures of erstwhile spouses, thus forcing the courts to warily exercise their discretion to prevent obvious injustices."

Now, however, the court has a specific statute to look to (Civil Code section 139) and in our opinion it means what it says, namely, "that the orders of the court may be enforced by the court by execution or by such other order or orders *as in its discretion* may from time to time deem necessary." (Italics added.)

The trial judge in this case had before him the parties, and he was able to and did observe them, he was able to judge of their respective ages, abilities, needs, health conditions, intelligences and adaptabilities. Undoubtedly the judge took into consideration many things such as the fact that the plaintiff, in spite of her remarriage, sought for a time to collect support and maintenance from the defendant and sought to invoke the powers of the court to send the defendant to jail for an earlier contempt and the court further undoubtedly considered the fact that the child had been for some time self-supporting and many other things which do not appear in any record before this court.

[2] The burden is on the appellant to show that there was an abuse of discretion by the trial judge. From the face of the record before us there is no showing of such abuse, to the contrary, there is every indication that the trial court simply selected one of several courses of action which were available to him and that he acted within the dictates of his conscience and without arbitrary or capricious action. 48 C.J.S. Judges § 44, p. 1008; See, Anderson v. Anderson, 123 Cal. 445, 56 P. 61; Wellborn v. Wellborn, supra, 55 Cal.App.2d 516, 131 P.2d 48; Bryant v. Bryant, 161 Cal.App.2d 579, 326 P.2d 898;

Wilkins v. Wilkins, 95 Cal.App.2d 605, 213 P.2d 748; Parker v. Parker, 203 Cal. 787, 266 P. 283; Anderson v. Anderson, 129 Cal.App.2d 403, 276 P.2d 862; Fowler v. Fowler, 126 Cal.App.2d 496, 272 P.2d 546.

[3] The plaintiff is not by this proceeding forever foreclosed from again applying for various orders which would facilitate the collection of the balance which is apparently due to her; and if the defendant persists in failing to comply with the orders of the court (assuming that he is or will be able to comply) the trial judge will undoubtedly make a charging order as provided for in section 15028 of the Corporations Code or find him guilty of contempt and confine him to jail until he does pay. In any event we do not believe that under the circumstances of the case on the record before us that we can say that the trial court abused its discretion.

The order is affirmed.

WHITE, P. J., and LILLIE, J., concu

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173 Cal.App.2d 98

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Ernest CALDERA, Defendant and Appellant.

Cr. 1513.

District Court of Appeal, Fourth District, California.

Aug. 13, 1959.

Defendant was convicted of assault with a deadly weapon with intent to commit murder and burglary in the first degree. The Superior Court, Riverside County, Hilton H. McCabe, J., entered judgment of conviction and an order denying defendant's motion for new trial, and from the judgment and order, defendant appealed. The District Court of Appeal, Shepard, J., held that the evidence was not sufficient to require submission of question of intoxication to jury, but that instructing jury that voluntary intoxication was not of itself a defense to a criminal charge was not prejudicial error.

Judgment and order affirmed.

1. Criminal Law 🔑739(1), 1172(6)
Homicide 🔑270

In prosecution for assault with a deadly weapon with intent to commit murder and burglary in the first degree, testimony of victim that at some unspecified time, apparently some hours before offense allegedly was committed, defendant was to some extent intoxicated was insufficient to require submission of question of intoxication to jury, in view of physical and speech activities of defendant before crime was committed and absence of effort by defendant to raise defense of intoxication, but instructing jury that voluntary intoxication was not of itself a defense to a criminal charge was not prejudicial error, though instruction should not have been given. West's Ann.Pen.Code, §§ 217, 459.

2. Criminal Law 🔑814(2)

In prosecution for assault with a deadly weapon with intent to commit murder and burglary in the first degree, evidence was sufficient to support instruction concerning flight, leaving to jury question of fact as to whether flight was shown. West's Ann.Pen.Code, §§ 217, 459.

3. Burglary 🔑46(2)
Homicide 🔑292(1)

On appeal from convictions for assault with a deadly weapon with intent to commit murder and burglary in the first degree, record disclosed that jury was fully informed on subject of specific intent as an element of each charge. West's Ann.Pen. Code, §§ 217, 459.

4. Criminal Law 🔑806(1)

Repetition of a subject once covered in instructions is not required.

5. Criminal Law ⚿1087

On appeal from convictions for assault with a deadly weapon with intent to commit murder and burglary in the first degree, record disclosed that defendant was accorded a full and fair trial and that jury was fully and fairly instructed on all issues supported by the evidence. West's Ann.Pen.Code, §§ 217, 459.

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Thomas T. Anderson, Indio, for appellant.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., Jack K. Weber, Deputy Atty. Gen., for respondent.

SHEPARD, Justice.

Defendant was charged, tried and convicted of the crimes of assault with a deadly weapon, with intent to commit murder (violation of Penal Code, Section 217), and burglary in the first degree (violation of Penal Code, Section 459). Defendant appeals from the judgment of conviction and from the order denying defendant's motion for a new trial.

In general effect the prosecution evidence showed the following: Defendant was the husband of Angelina Navarro Caldera. They were separated and an interlocutory decree of divorce had theretofore been rendered. Angelina lived with her four small children in an apartment in the rear of her mother's home, near Blythe, California. On April 13, 1958, Angelina went to a dance in Arizona with Mr. and Mrs. Juan Gonzales. Defendant was present at the dance and some unpleasantness occurred, including a threat of personal harm by defendant toward Angelina. Angelina stated that the defendant was intoxicated but not as bad as she had seen him on other occasions. The exact time when she noticed the intoxication and the degree of intoxication were not described by her. Angelina left the dance before midnight and returned to her home near Blythe. Apparently at some time before midnight, after she had gone to bed, defendant broke through a window of her bedroom, threw her to the floor and stabbed her with a knife in seven places, one of which stabs penetrated her chest cavity and lung. During the time she was on the floor defendant uttered threats that he was going to kill her. Mrs. Higuera (Mrs. Caldera's mother) heard the commotion, the scream of her daughter, calls for help, and the cries of the four-year old son of "Grandma, Grandma, Daddy kill Mama." Mrs. Higuera broke the screen, unlocked the door, pulled defendant away from Mrs. Caldera and shouted "Get the shot gun", whereupon defendant ran away. Some two hours or so later, at about 2:00 a. m. on the 14th, defendant borrowed money from a friend without explanation as to why he needed it. At about the same time, he telephoned his mother and asked her to send his valise and money to Mexicali or to Calexico. Later that morning he quit his job and left that neighborhood without attempting to obtain his money and personal effects from his home.

Defendant's defense was alibi and that he did not do any of the acts charged as a part of the crime. He did not offer the defense of intoxication nor did he claim that at any time during the period when the offense was alleged to have been committed he did not have full possession of his mental faculties. He never even mentioned intoxication.

[1] Defendant's first contention is that the trial court committed prejudicial error in giving an instruction that voluntary intoxication was not, of itself, a defense to a criminal charge. In the case at bar not one word of testimony even touching the subject of intoxication was offered by any witness for the defense nor by any other witness, except one lone comment by Angelina that at some unspecified time during the dance he was to some undescribed degree intoxicated. However, he danced three times with her and several times with other ladies and talked with no notable difficulty. Counsel for defendant did not question the witness Angelina at all

on this point. In fact, he asked no questions of any witness on the subject of intoxication. It is perfectly clear from our reading of the entire record that the issue of intoxication was not at any time during the presentation of evidence intended by the defendant to be presented as an issue in the case. Therefore, in the face of consistent abstinence of any questioning on this subject by either counsel (after the one lone reference thereto in the testimony of Angelina Caldera), and considering the time element in that reference (it was some hours before the alleged offense) and the physical and speech activities of defendant thereafter and before the crime was committed, we must hold that the issue of intoxication was never tendered by the defendant, and that under the particular circumstances here present the evidence of intoxication was insufficient to compel the question to be submitted to the jury. People v. Price, 207 Cal. 131, 133 [1], 277 P. 316; People v. Hatfield, 129 Cal.App. 162, 170 [12], 18 P.2d 366; People v. Owens, 79 Cal.App.2d 290, 299 [9], 179 P.2d 401; People v. Turville, 51 Cal.2d 620, 633 [7], 335 P.2d 678. The case of People v. Coyne, 92 Cal.App.2d 413, 206 P.2d 1099, offers no satisfactory analogy because in that case both the testimony and defense offered was clearly one of intoxication. The case of People v. Neetens, 42 Cal.App. 596, 184 P. 27, cited by defendant, is not analogous for two reasons. First, there is no discussion therein of a tender of an issue by defendant nor a forced tender of the issue by the whole evidence presented. We must, therefore, presume that in that case there was, in fact, a tender of the issue. Second, as pointed out therein that case, unlike the case at bar, involved a crime in which there were no other included degrees or offenses to which the provisions of the instruction complained of could have applied. We are satisfied that in the case at bar the instructions on intoxication were surplusage and should not have been given, but we are unable to discern how they could have affected the result and we find no prejudicial error.

[2] The instruction concerning flight was correctly given. As hereinbefore pointed out, the defendant borrowed money from a friend in the middle of the night, telephoned his mother to forward his money and valise to a distant address, quit his job the following morning, and left the community without going back to his home to pick up his personal effects. This evidence was amply sufficient to support the giving of the instruction on flight, leaving to the jury the question of fact as to whether or not the factor of flight was shown. The case of People v. Fremont, 22 Cal.App.2d 292, 70 P.2d 1005, presents no analogy for, in that case, there was no factual evidence which could have reasonably justified an inference that defendant was in flight.

[3, 4] It is also clear from an examination of the record that the court fully informed the jury on the subject of specific intent as an element of each charge. The repetition of a subject once covered in the instructions is not required. People v. Geibel, 93 Cal.App.2d 147, 176 [21], 208 P.2d 743; People v. Steccone, 36 Cal.2d 234, 240(7), 223 P.2d 17.

[5] An examination of the whole record convinces us that the defendant was accorded a full and fair trial and that the jury was fully and fairly instructed on all issues supported by the evidence.

The judgment and order denying the motion for a new trial are affirmed.

GRIFFIN, P. J., and MUSSELL, J., concur.

PEOPLE of State of California, Plaintiff and Respondent,

v.

Manuel TOLEDO-CORRO, Jose Angel Plata-Silva and Pedro Garcia de Leon Arechiga, Defendants,
Juan Soria-Flores, Defendant and Appellant.*

Cr. 1415.

District Court of Appeal, Fourth District, California.

Aug. 21, 1959.

Rehearing Granted Sept. 18, 1959.

Defendant was convicted of conspiring to violate and of violating Health and Safety Code provision prohibiting the selling, furnishing, or giving away of narcotics (heroin). The Superior Court, San Diego County, William A. Glen, J., entered judgment of conviction and order denying motion for new trial, and defendant appealed. The District Court of Appeal, Shepard, J., held that evidence, which did not reveal anything other than suspicion which arises in the surmise of guilt by association, and which did not show culpable knowledge or participation in the criminal conspiracy, was not sufficient to sustain the conviction.

Judgment and order reversed.

1. Conspiracy 🔑47
Poisons 🔑9

Evidence, which did not reveal anything other than suspicion which arises in the surmise of guilt by association, and which did not show culpable knowledge or participation in the criminal conspiracy, was not sufficient to sustain conviction for conspiring to violate and for violating statute forbidding the selling, furnishing, or giving away of narcotics. West's Ann. Health & Safety Code, § 11500.

2. Criminal Law 🔑1160

Jury's decision which has been approved by trial judge in denial of motion for new trial will not be set aside on appeal unless there is no substantial evidence, upon any hypothesis whatsoever, to support jury's verdict and trial court's conclusion.

3. Conspiracy 🔑47

Fact of conspiracy may be proved circumstantially by evidence of other facts and circumstances if they are inconsistent with any other rational conclusion, and if, when such inconsistency exists, it may be fairly inferred that a conspiracy does in fact exist.

4. Conspiracy 🔑47

Conspiracy cannot be established by suspicion or mere association; there must be evidence of some participation or interest in the commission of the offense.

Harrison Tellyer, Fresno, for appellant.

Stanley Mosk, Atty. Gen., S. Clark Moore, Deputy Atty. Gen., for respondent.

SHEPARD, Justice.

Defendant was charged, tried and convicted along with three other defendants of the crime of conspiracy to violate section 11500 of the Health and Safety Code of the State of California, and a second count of a violation of said section 11500 in selling, furnishing or giving away narcotics (heroin) as forbidden by said section. This defendant is the sole appellant. He appeals from the judgment and from the order denying a motion for new trial.

The scene of the crime was at "Sparky's Cafe" in Chula Vista, California, near the intersection of Broadway and G Streets. On June 26, 1958, H. E. Springett, a narcotics inspector of the State of California, made contact with defendant Manuel Toledo-Corro (hereinafter called Corro) and partly arranged for the purchase from Corro of a quantity of heroin. Appellant was not present but Corro had borrowed and was driving a 1954 Mercury automobile (hereinafter called Mercury) which belonged to this appellant, Juan Soria-Flores. Springett arranged to meet Corro later at 6:00 p. m. to take delivery but the 6:00 p. m. appointment was not kept by Corro. However, Corro was seen to drive in the Mercury slowly by the meeting place (Sparky's Cafe). On the same night or the next day (the evidence is conflicting), appellant, Corro and another defendant called Jose Angel Plata-Silva (hereinafter called Silva) drove in the Mercury to Los Angeles and returned. On July 2, 1958, Officer Springett again made contact at about 9:00 p. m. at Sparky's Cafe, with Corro and another defendant named Pedro Garcia de Leon Arechiga (hereinafter called Arechiga). Again appellant was not present. However, appellant and defendant Silva had come from Mexico to Chula Vista with Corro and Arechiga. The appellant was seen to drive north on Broadway and to return south on Broadway past Sparky's Cafe during the time Corro and Arechiga were in the cafe talking to Springett about the delivery of heroin. Another officer observer outside the cafe testified that the Mercury at that time had no license plates. (It likewise had no license plates on June 26 and on June 27.) At about 10 o'clock on the evening of July 2, the Mercury crossed the Mexican border going south with all four defendants in the car, and another officer observer testified the license plates were then on the car.

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* Opinion vacated 345 P.2d 529.

On July 8, 1958, the final contact was made by Springett with Corro and Arechiga at Sparky's Cafe. Again appellant was not present. Corro and Arechiga came from Mexico in a Plymouth automobile and according to Corro brought with them in that car the heroin which was later delivered to Springett. The Plymouth was parked somewhere on or near Broadway not far from Sparky's Cafe. Scattered around the immediate vicinity but unknown to any of the defendants were six other officers who acted as observers, and assisted in the final arrest. Appellant and Silva came in the Mercury to Chula Vista the same evening and parked the Mercury near a grocery store called Angels Market some distance from Sparky's Cafe. There is no evidence that the two cars came together or at the same time. During the negotiations between Corro and Springett in Sparky's Cafe Corro told Springett to wait while he went to "pick it up" from another fellow. He left the cafe and was observed by another officer to walk to the vicinity of the Mercury. Whether he also went to the Plymouth is not disclosed. There is no testimony that he either got into or reached into the Mercury or took anything from it. The testimony shows that appellant and Silva were not then in the car. Corro then returned to the cafe and Springett says that upon entering, Corro had a bulge in his left front pants pocket which he, Springett, had not theretofore been able to detect. The evidence before us does not show the exact spot where the Plymouth was parked. Corro says that he went out of the cafe merely to see if there was anything suspicious. The left front pants pocket of Corro was the one from which the heroin was later produced by Corro, when the delivery was made at the near-by Monterey Motel. Shortly after delivery Springett, Corro and Arechiga went to Springett's car and Corro and Arechiga were then arrested. Appellant and Silva were arrested by other officers on the sidewalk near the market. Appellant says he was walking toward the Mercury and the officer says he was walking away from it at the time of the arrest. However, there is no hint or indication in any of the testimony that appellant was running, attempting to escape, or that he otherwise exhibited guilt or inculpatory knowledge at the time of his arrest. Appellant had had twelve years of service with the Federal Security Police of Mexico. It was established without contradiction that there then existed an unwritten custom to allow accredited police officers on both sides of the border to carry their weapons when temporarily crossing either side of the border. Appellant had his pistol in the glove compartment of the Mercury. Appellant says he gave the keys of the car to a police officer to open the glove compartment. That officer denies this, and says the glove compartment was already unlocked. The evidence also shows, without contradiction, that it was the custom of the Mexico registration department at that time to take up the license plates of a motor vehicle upon a change of ownership and to issue a permit in lieu thereof until new license plates could be secured.

The central figure of guilt was Corro, who was a fellow officer in the Federal Security Police Force of Mexico. Appellant, with twelve years of service in the same force had known Corro only about a year and a half as a fellow officer, was on friendly terms with him, and occasionally loaned Corro his car. Appellant bought the Mercury second-hand in June, 1958. On transfer, the vehicle registration department took up the old license plates and issued a temporary permit. Exactly when the new plates were received is not clear.

There are three points of discrepancy between the testimony of the officers and this appellant. One relates to the question of whether or not the license plates were on the car in Chula Vista on July 2nd and later on the same evening at the Mexican border crossing. Appellant says he does not remember if the plates were on at that time or not, but that he made no change between Chula Vista and the Mexican border. There is no testimony that the plates were missing on July 8, the date when the actual delivery of the narcotic was made by Corro. July 8th then was the very time when, if appellant had any knowledge of the existence of the conspiracy or of the narcotic being delivered, he would have removed the license plates. In view of this, we are unable to ascribe to the apparent discrepancy in the testimony of the plates, regarding July 2nd, an inference necessary to tie knowledge of existence of the conspiracy or of the heroin, to this appellant. The second discrepancy cited is that regarding which way appellant was walking on the sidewalk when arrested. Appellant's statement that he had been to the market and bought eggs and other domestic articles is partly corroborated by the finding of these articles in the Mercury. There being no hint from any witness that appellant was attempting to escape or that he did not freely and promptly acknowledge ownership of the Mercury, this discrepancy carries no inference of guilty knowledge. The third discrepancy relates to the difference in testimony as to whether or not the police officer who searched the car did or did not unlock the glove compartment. The presence of the weapon in the glove compartment is fully explained by the uncontradicted testimony regarding the custom of accredited police officers temporarily crossing the border. We are unable to ascribe any inference of guilty knowledge from the slight discrepancy regarding the locked or unlocked glove compartment.

[1] It is apparent from the testimony that the package of heroin was of such size as could be carried on the person without exciting inquiry even from a friend or companion. The town of Chula Vista is but a short distance from the Mexican border crossing. Under the border crossing conditions herein shown there could not reasonably be anything suspicious in frequent visits thereto, either by friends together or at the same time in separate cars. Appellant is not placed in Sparky's Cafe nor at any other place where he could have overheard any inculpatory talk referred to in the testimony. Nowhere in the evidence does there appear any conversation or act in the presence of appellant that could reasonably be expected to cause appellant to be suspicious or put on inquiry, nor was there any act or statement of appellant himself showing that he was possessed of knowledge of the unlawful conspiracy. In substance then, we are unable to find in the evidence anything other than that suspicion which so frequently arises in the surmise of "guilt by association."

[2–4] It is well recognized that "The decision of the jury, which has been approved by the trial judge in the denial of a motion for a new trial, will not be set aside on appeal unless there is no substantial evidence upon any hypothesis whatsoever to support the verdict of the jury and the conclusion of the trial court." People v. Robinson, 43 Cal.2d 132, 136 [3], 271 P.2d 865, 868. Respondent cites authorities in support of another well recognized rule, that conspiracy can be and often is established by circumstantial evidence. People v. Wayne, 41 Cal.2d 814, 822 [3], 264 P.2d 547; People v. Curtis, 106 Cal.App.2d 321, 325 [4], 235 P.2d 51; People v. Schmitt, 155 Cal.App.2d 87, 106 [9], 317 P.2d 673. However, in these and numerous other authorities cited, and in all the other many authorities our independent research has revealed, each conviction which has been sustained is founded on inculpatory acts or statements which are explainable under no other reasonable hypothesis than that the defendant had guilty knowledge of the criminal conspiracy complained of, and with such knowledge participated in some way. This basic rule is referred to in People v. Weber, 7 Cal.App.2d 620, 622 [1], 46 P.2d 222, 223, where the court says:

> "While mere association does not make a conspiracy, it is settled that the fact of conspiracy may be proved circumstantially by evidence of other facts and circumstances, *when they are inconsistent with any other rational conclusion* and when thus being inconsistent, it may be fairly inferred that a conspiracy does in fact exist." (Italics ours.)

Furthermore, as was said in People v. Long, 7 Cal.App. 27, 33, 93 P. 387, 390: "Conspiracies cannot be established by suspicions. There must be some evidence. Mere association does not make a conspiracy. There must be evidence of some participation or interest in the commission of the offense." In People v. Bucchierre, 57 Cal.App.2d 153, 163 [5], 134 P.2d 505, 510, the court says:

> "The association of persons with an honest intent is not conspiracy, and one of the tests on a conspiracy trial is, did the accused act in ignorance without criminal intent?"

In Dong Haw v. Superior Court, 81 Cal.App.2d 153, 158, 183 P.2d 724, and in numerous other cases, these same principles have been discussed and confirmed. As was said in People v. Zoffel, 35 Cal.App.2d 215, 226, 95 P.2d 160, 166: "It is true that appellant may be guilty, but at best the evidence does no more than raise a mere suspicion."

Try as we will, in repeatedly reviewing the evidence in this case we cannot find any act or testimony which even to the slightest degree shows culpable knowledge or participation in the criminal conspiracy by appellant.

The judgment and order appealed from are reversed.

GRIFFIN, P. J., and MUSSELL, J., concur.

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172 Cal.App.2d 560

Ernest M. McKEE, Sr., Petitioner and Appellant,

v.

STATE of California; Department of Finance, State Lands Division; et al., Respondents.

Civ. 9556.

District Court of Appeal, Third District, California.

July 31, 1959.

Mandamus proceeding involving transactions taken by petitioner for purpose of acquisition as lieu land, under the School Land Grant, a tract belonging to the federal government. The Superior Court, Lake County, Benjamin C. Jones, J., entered judgment denying petition for writ of mandate, and the petitioner appealed. The District Court of Appeal, Van Dyke, P. J., held that evidence sustained findings that petitioner applied for purchase of lieu land direct and did not purchase scrip and apply it upon the lieu land.

Affirmed.

1. Mandamus ⚷168(4)

In mandamus proceeding involving transaction taken by petitioner for purpose of acquiring as lieu land, under the School Land Grant, a tract belonging to the federal government, evidence sustained findings that petitioner applied for purchase of lieu land direct and did not purchase scrip and apply it upon the lieu land. West's Ann. Public Resources Code, §§ 7301, 7403, 7405.1, 7406, 7412, 7413, 7416, 7417.

2. Mandamus ⚷168(3), 187(9)

In mandamus proceeding involving transactions taken by petitioner for purpose of acquiring as lieu land, under School Land Grant, a tract belonging to federal government, wherein the question was whether the petitioner had purchased scrip and had applied it upon the lieu land or had applied for the purchase of land direct, testimony as to the departmental practice of the state with respect to the sale of lieu land or scrip to be used for the purchase of lieu land after statutory law had been enacted permitting cash sale of the land on an appraisal basis should not have been received into evidence; however, it could not be said that a different result would probably have been reached by the trial court had this evidence not been offered and received, and therefore the error was not prejudicial. West's Ann.Public Resources Code, §§ 7301, 7403, 7405.1, 7406, 7412, 7413, 7416, 7417.

Spurr & Brunner and G. Neil Tocher, Ukiah, for appellant.

Atty. Gen., by Paul M. Joseph, Deputy Atty. Gen., for respondents.

VAN DYKE, Presiding Justice.

This is an appeal from a judgment denying appellant's petition for a writ of mandate directed against the State of California, the Department of Finance and the members of the State Lands Division. All of the respondents will be referred to as the State.

[1] The transactions involved here have to do with proceedings taken by appellant with the purpose of acquiring as lieu land, under the School Land Grant, 440 acres of land in Lake County belonging to the federal government. Appellant's contentions are that he purchased from the State an indemnity certificate, commonly called scrip; that he paid therefor; that the scrip was issued to him and that he then proceeded to have it applied to lieu lands on an acre-for-acre basis, thereby becoming entitled to a certificate of purchase. The contentions of the State are that the transactions were not "scrip" transactions, but instead that appellant made application to purchase the lieu lands for cash on an appraisal basis under which method of acquisition a preliminary deposit is first made and later, and after the lands have been clear-listed to the State and have been appraised, the purchaser pays any sum by which the appraisal exceeds the preliminary deposit.

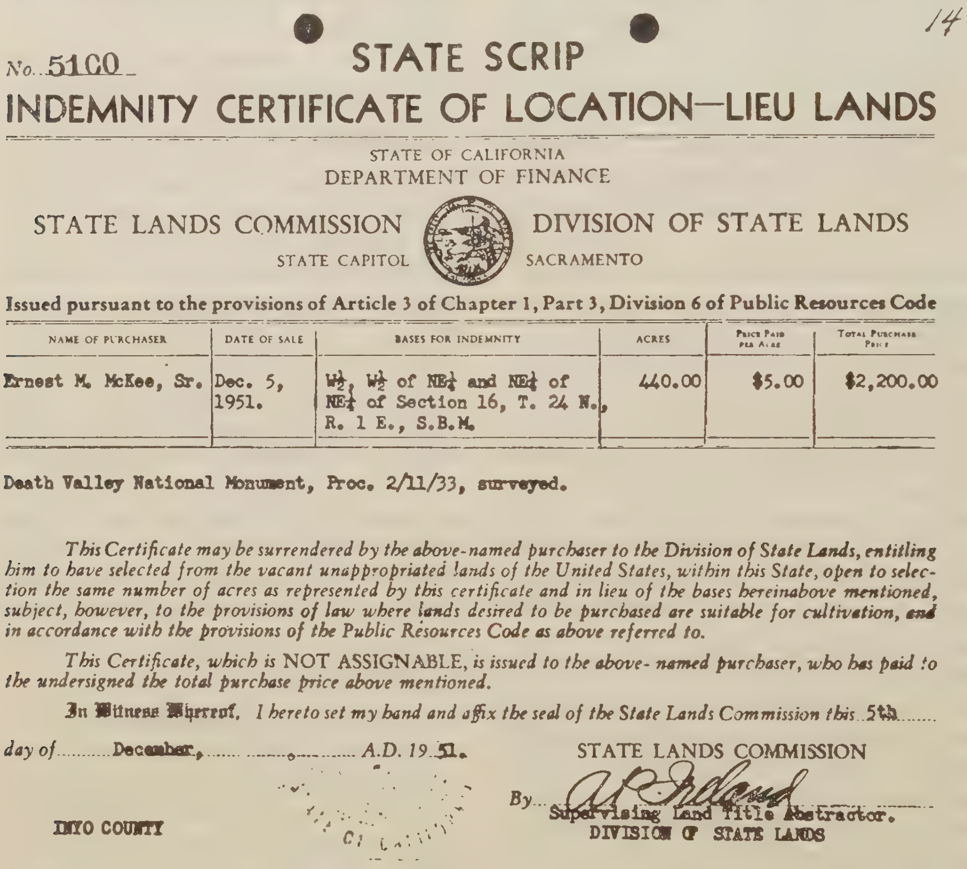
Petitioner in mandate, appellant here, alleged that on December 5, 1951, he purchased from the State Lands Commission a scrip certificate covering 440 acres of land in the Death Valley National Monument in Inyo County, California, and paid the price thereof, to-wit, the sum of $2,200; that on the same day he surrendered the scrip to the State and made his application to have selected for him by the State, in lieu of the land covered by the certificate, 440 acres of federally-owned land in Lake County; that he acted pursuant to Sections 7412 and 7413 of the Public Resources Code and paid all fees required; that his application was forwarded to the federal government, but was rejected; that through the State, but in his own interest, he appealed from the rejection order and by decision on appeal the order was vacated and the application was allowed; that the land applied for was then clear-listed to the State; that pursuant to the Public Resources Code applicable to lieu lands, and in particular pursuant to Section 7417 thereof, petitioner thus became entitled to have issued to him a certificate of purchase showing full payment for the lieu lands; that notwithstanding he demanded such certificate of purchase the State demanded that he pay an additional sum of $97,900, the sum by which the appraisal exceeded his payment of $2,200, failing which his application for the purchase of said lieu lands would be cancelled and the lands would be offered for public sale. The petition further alleged that the proceedings for appraisal of the lands and the demand for the additional payment were proceedings in excess of the jurisdiction of the State agencies involved; that the law cast upon the State the ministerial duty through its proper agencies of issuing the purchase certificate.

The superior court issued its alternative writ. The return and answer of the State denied that there had occurred any transaction by which scrip was purchased under the Public Resources Code, but that instead appellant had simply made application to purchase lieu lands for cash, had paid $2,200 as a preliminary deposit, together with expense deposits, and that the proceedings had were pursuant to Rules 2400 through 2402 of the Rules and Regulations of the State Lands Commission adopted pursuant to Public Resources Code provisions in Sections 7301, 7405.1 and 7406; that the parties contemplated throughout that the lieu lands were to be sold for a price determined by an appraisal after being clear-listed to the State; that when the land had been clear-listed it was appraised at $100,100; that in accordance with the application of appellant and in accordance with commission rules a demand was then made upon the appellant to pay the balance of $97,000 as the price of the land; that appellant had failed to pay the same and the commission ordered that his rights would be terminated unless he did so; that he failed to pay the additional amount and by so failing had failed to comply with the conditions upon his part to be performed under the law.

As stated by appellant the question presented is, Did appellant purchase scrip and apply it upon the lieu lands or did he apply for the purchase of the land direct?

The trial court found that on December 5, 1951, appellant applied in writing to the commission to buy from the State for cash at a price to be fixed by an appraisal by the State the 440-acre parcel of Lake County lands; that the land was then vacant land owned by the United States; that at the time of appellant's application the land was subject to location and selection by the State through the State Lands Commission in lieu of the 16th and 36th sections granted to the State for the use of the public schools and in lieu of losses sustained by the State to its school land grant; that appellant's application was made by him and filed by the commission pursuant to the provisions of Sections 7301, 7405.1 and 7406 of the Public Resources Code and other provisions of said code relating to the sale by the State of indemnity lands of the United States pursuant to Rules 2400 through 2402 of the State Lands Commission (Title 2, Division 3, Article VI, secs. 2400–2402, California Administrative Code); that appellant when he filed his application paid to the commission as an initial offer $5.00 per acre for the said land so applied for, aggregating the sum of $2,200 and agreed to pay the balance of the purchase price, if any, within 20 days after demand by the commission. It is not disputed on this appeal that if the evidence before the court was sufficient to support the foregoing findings the judgment appealed from must stand.

A careful reading of the transcript and consideration of the documentary evidence convinces us that the trial court's findings are substantially supported and that the judgment must be affirmed. We find much conflict on the essential points, but under the familiar rule that will not aid appellant. Appellant did testify that he was familiar with the longstanding provisions whereunder indemnity certificates, "scrip", could be purchased from the State and thereafter "located" upon lieu lands for which the State, responsive to its obligations under scrip purchases, and upon clear-listing of the federal lieu lands to it would issue its fully-paid certificate of purchase. Appellant said that he informed the State's agents with whom he dealt that such was his intention; that upon being informed the Lake County lands were available as lieu lands which the State could obtain he returned to Willits, where the witnesses were who had gone over the Lake County lands with him, filled out the necessary forms and mailed them to the commission along with the required funds. In support of his contention that he was buying scrip under provisions of the Public Resources Code authorizing sale of scrip and its later "location" he points to a certificate of indemnity in the usual form where such purchases are being made which, when his application was received, was in fact made out by the commission's employees and, in form at least, executed by the proper officers of the State and thereafter retained in the State's file covering his application. This certificate, which was introduced in evidence and which had been produced from the State's file, reads as follows:



14

No. 5100

STATE SCRIP

INDEMNITY CERTIFICATE OF LOCATION—LIEU LANDS

STATE OF CALIFORNIA
DEPARTMENT OF FINANCE

STATE LANDS COMMISSION
STATE CAPITOL

DIVISION OF STATE LANDS
SACRAMENTO

Issued pursuant to the provisions of Article 3 of Chapter 1, Part 3, Division 6 of Public Resources Code

NAME OF PURCHASER	DATE OF SALE	BASES FOR INDEMNITY	ACRES	PRICE PAID PER ACRE	TOTAL PURCHASE PRICE
Ernest M. McKee, Sr.	Dec. 5, 1951.	W½, W½ of NE¼ and NE¼ of NE¼ of Section 16, T. 24 N., R. 1 E., S.B.M.	440.00	$5.00	$2,200.00

Death Valley National Monument, Proc. 2/11/33, surveyed.

This Certificate may be surrendered by the above-named purchaser to the Division of State Lands, entitling him to have selected from the vacant unappropriated lands of the United States, within this State, open to selection the same number of acres as represented by this certificate and in lieu of the bases hereinabove mentioned, subject, however, to the provisions of law where lands desired to be purchased are suitable for cultivation, and in accordance with the provisions of the Public Resources Code as above referred to.

This Certificate, which is NOT ASSIGNABLE, *is issued to the above-named purchaser, who has paid to the undersigned the total purchase price above mentioned.*

In Witness Whereof, *I hereto set my hand and affix the seal of the State Lands Commission this* 5th *day of* December, *A.D. 19*51.

INYO COUNTY

STATE LANDS COMMISSION
By A. L. Ireland
Supervising Land Title Abstractor.
DIVISION OF STATE LANDS

◆

It is not disputed that this indemnity certificate is in the form of scrip ordinarily issued to purchasers of scrip and if regularly issued and delivered to appellant would have entitled him at any future time to have surrendered it on an acre-for-acre basis for lieu lands available. There is nothing on the face of this instrument to indicate that it was other than what it purports to be. There is nothing concerning an appraisal of lands or the possibility that further compensation would have to be paid.

But there is much evidence opposed to appellant's testimony and to his claim that he had in fact purchased scrip, that it had been delivered to him for the price paid, and that, simultaneously with its issue and because he was applying at the same time to purchase lieu lands by use of the scrip, he left the scrip in the possession of the State as a surrender thereof pursuant to his application for purchase of lieu lands. We will state that evidence as briefly as we can. Mr. Ireland, who, on behalf of the State, signed the purported certificate of indemnity and who had worked for the State Lands Commission from 1911 to 1953 and was in charge of the Sacramento office of the Division of State Lands in 1951, and until his retirement in 1953, testified as follows: Pursuant to an act passed in 1909, the Surveyor General sold scrip at public auction in his office on the first Monday in January, March, July and September which gave the purchaser the right to make selections of vacant unappropriated nonmineral open land upon surrendering certificates in payment therefor. This system for the sale of scrip at public auction was discontinued somewhere about 1920, at which time the price of scrip was fixed by the State Board of Control and anyone could secure scrip certificates either by writing in by mail or personally at the fixed price. When the money was sent in the scrip was issued and delivered to the purchaser. In the late 1940's another plan was begun which was described in a bulletin issued, reading in part as follows: "The price of indemnity certificates is fixed by the State Lands Commission, but in no event to be less than $5.00 per acre. Before the price is fixed, however, it will be necessary for an appraisal to be made of the government land desired and, in the event the value thereof is fixed at a price in excess of $5.00 per acre, the price so fixed would be the price the applicant would have to pay the State for the scrip in order to purchase the government land." Ireland testified that under this practice a prospective purchaser on getting in touch with the State office would be required to deposit money to cover the cost of an appraisal by the State of the federal land sought; that the appraisal would then be made by the State and after the appraisal the prospective purchaser would be advised of the cost of the scrip (the appraised value of the lieu lands) and he would then file an application with the State office, paying for the scrip, together with necessary fees of the United States and the State of California. In 1949 provisions were made in the Public Resources Code which authorized cash sales of lieu lands in accordance with commission rules. Rules 2400 through 2402 of the State Lands Commission were adopted and published in the Administrative Code under an entitlement: "Sale of Vacant United States Land." Under these rules, in addition to the various filing fees and expense deposit of $100, there was required a minimum initial offer of $5 per acre for the land applied for. Upon receiving the application and the necessary deposits the rules provided that the State, through the State Lands Commission, would make the selection by forwarding to the federal land office the necessary papers filed by the applicant and the selection papers necessary to be made out by the State. Then upon allowance of the State's selection by the federal land office the land would be appraised by the State and thereafter the price would be fixed at $5 per acre or at the appraised value, whichever was greater. The price so fixed would be the price the prospective purchaser of the lands would be required to pay. Ireland testified in effect that it was this later procedure which was followed by appellant and by the State land office and that there was no purchase of scrip made or intended. The State, in support of Ireland's testimony as to the nature of the transactions between the State and appellant, points to the application form filled out by appellant. In substance, this form, entitled, "Application to Purchase Lieu Lands", recites that appellant applies to purchase certain land; that he asserts the land is not occupied; that he has personally examined each and every legal subdivision thereof and wants to purchase the same for his own use and benefit and has made no contract or agreement to sell the same. The following then appears in the form: "In accordance with Sections 7403, 7413 and 7416 of the Public Resources Code, I hereby surrender the following Certificates of Indemnity or Scrip in payment for said land: ————————." At the bottom of the application form in large letters the following appears: "Each Application must be accompanied with a filing fee of $5.00, expense deposit of $100.00, and a minimum deposit of $5.00 per acre for the scrip pending appraisal of the land." The reference in the application form to Sections 7403, 7413 and 7416 of the Public Resources Code and to the surrender of scrip is relied on by appellant as showing that the parties were dealing with a purchase of lieu land to be paid for with scrip. On the other hand, respondent points to the fact that there was no description of the scrip purported to be surrendered and explains the presence of the language referring to a scrip purchase as something that happened because a form ill-adapted to the actual transaction was used. The State points to the statement at the end of the application form hereinbefore quoted, which refers to "a minimum deposit of $5.00 per acre for the scrip pending appraisal of the land" as substantiating its contention that no sale of scrip was involved and that the transaction was one to bring about a purchase of the lieu lands for cash on an appraisal basis. Concerning the presence in the commission's file of the document entitled "Indemnity Certificate of Location", which we have hereinbefore quoted in full, there was testimony that it was never delivered nor intended to be delivered as scrip purchased by appellant, was a mere office memorandum to indicate the Inyo County lands lost to the State from the original federal grant of school lands constituting the bases for lieu land selections. According to the witness Ireland the scrip certificate was made out and placed in the file covering appellant's application for purchase of land merely as an office memorandum so that there would be a record of the base land in Inyo County being surrendered by the State to the United States for the lieu lands selected; that it was a convenient way of keeping track of such base lands by having such memorandum in each application file, instead of having to go to some record book in the office; that the certificate was not meant to indicate full payment for the lieu lands to be received by appellant. Another witness testified that in 1951 such memorandum was placed in all application files. As she put it, "At that time every application had an indemnity certificate of location, using old forms which were in the office, which showed the down payment." Ireland said that the certificates were "written up and put into the application [file] for reference purposes when we wanted to determine what piece of land was outstanding, without having to go through what we call an indemnity list." It was further testified, and this testimony was not controverted, that the certificate was fully made out and placed in appellant's file by a commission employee on the day that the application to purchase was received; that it remained in the file, its presence being unknown to appellant; that the knowledge of its existence was not obtained by appellant until years after it was placed in the file when appellant was in the office of the commission looking through the file for purposes of his own; that at that time he made no claim that it constituted his property and that it remained in the file where he had seen it. There was further evidence concerning the validity, as a title document, of the certificate, but enough has been recited to show that the trial court was justified in finding as it did that the certificate had never been delivered to McKee and never had become a muniment of title. Specifically, the court's findings, which we hold to be supported, were: "that upon the date the petitioner applied to the State Lands Commission for said land and upon which the said Commission filed said application, but after said application had been filed, the State Lands Commission filled out a form that had been previously used by said Commission as the form for indemnity certificates of location; that said form was signed by an agent of the said Commission authorized to sign the same and was sealed with the seal of said Commission; said form was never delivered to petitioner or any person other than petitioner, but, instead, was placed in the file of said Commission relating to petitioner's said application and was at all times retained in the possession of said Commission; that said form was not intended by the said Commission or any of its employees or representatives as or for an indemnity certificate of location or scrip certificate under the provisions of the Public Resources Code or any other laws or any rules or regulations pertaining to the application, selection or sale of indemnity lands; that the said form contained a description of certain land in the Death Valley National Monument in the County of Inyo, State of California, intended by the said Commission to be used as base land and to be relinquished by the State of California to the United States upon the listing (or conveyance) to the State of California of the land in the County of Lake applied for by petitioner and about to be selected by the State of California from the United States; that said form, as so filled out, was intended by the State Lands Commission to be, and at all times was, an office memorandum of the State Lands Commission."

In support of its position that appellant bought land, not scrip, the State points to a letter written to appellant acknowledging receipt of appellant's application, reading as follows: "Receipt is acknowledged of your application to purchase, through this office with State scrip, the S½, W½ of NE¼ and SE¼ of NE¼ of Section 15, T. 11 N., R. 8 W., M.D.M., containing 440.00 acres in Lake County. Said application was accompanied with the required State filing fee of $5.00, expense deposit of $100.00 and $2,200.00 to cover the minimum scrip deposit of $5.00 per acre, pending appraisal."

As further support for the State's contentions it appears that after appraisal of the land demand was made upon appellant for the payment of the large sum of money constituting the difference between the amount he had already paid in and the appraisal figure and he did not protest that the State was obligated to issue him a certificate of sale without further money, but, on the contrary, entered into negotiations with the State concerning the appraisal figures. There is a good deal in support of the contentions of both sides which we have not related. Undoubtedly, the forms used were not apt to truly reflect the transactions between the parties, but we think it unnecessary to discuss further the sufficiency of the evidence to support the trial court's related findings. The issue under the evidence was one of fact for resolution by the trial court. That court's resolution of the issue is supported by substantial evidence and is binding on appeal.

[2] Appellant contends that the court committed prejudicial error in receiving into evidence over objection testimony as to the departmental practice of the State with respect to the sale of lieu lands or of scrip to be used for the purchase of lieu lands after statutory law had been enacted permitting cash sale of the land on an appraisal basis. There was introduced records of sales on such basis dating from 1949 through 1951, thus bracketing the proceedings between appellant and the State and showing that the sales were made on an appraisal basis. Other testimony was admitted concerning the same subject-matter, the avowed intent of the State being to prove that after cash sales on an appraisal basis were authorized under rules to be adopted by the commission scrip sales were discontinued. The State seeks to justify the admission of this material upon the theory that since the nature of the transaction in litigation was in issue the State could show its custom and practice concerning other proceedings of like nature had with others. The cases cited do not support the State's theory as to the admissibility of the evidence objected to. The issue here was as to the contract between appellant and the State. What the State may have contracted for with others would

not prove the nature of its contract with appellant. It was still lawful to sell scrip with the right to apply it upon lieu land. The only question was as to which of these alternate roads had been traveled. Cited cases holding that evidence of transactions of like kind with others can be introduced against the party having such transactions upon the theory that the course of conduct so evidenced constitutes admissions against interest have no application here where just the reverse is attempted, that is, where the person having such other transactions is attempting to prove that the transaction with the adverse party was the same as those with others. Lande v. Southern Cal. Freight Lines, 85 Cal.App.2d 416, 193 P.2d 144. We think that it was error to receive this evidence.

Under the constitutional mandate this judgment cannot be reversed unless there has been a miscarriage of justice because of the error in the receipt of evidence. We are satisfied that from the whole record it cannot be said a different result would probably have been reached by the trial court had this evidence not been offered and received. When McKee mailed in his application for purchase of lieu lands the form he used plainly stated in capital letters that he was making a minimum deposit of $5 an acre pending appraisal of the land. On the day that application was received its receipt was acknowledged by a letter from Ireland heretofore quoted ascribing the same character to the transaction, and appellant made no protest.

Appellant did not advance his claim that he was attempting to acquire the lands by buying scrip and that he had bought and paid for scrip which he was entitled to surrender in full payment of the selected lieu lands until long after he had received notice direct by letter that the appraisal was about to be made, had been asked to participate in the appraisal proceedings, had done so, had protested against the appraisal figures as being excessive and had negotiated for a reduction. In view of all this we believe that the same judgment would have been entered had the evidence objected to been excluded.

For the reasons given the judgment is affirmed.

SCHOTTKY, J., concurs.

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172 Cal.App.2d 739

UNIVERSAL LAND COMPANY, a corporation, Plaintiff and Respondent,

v.

ALL PERSONS CLAIMING ANY INTEREST IN, OR LIEN UPON, REAL PROPERTY HEREIN DESCRIBED, OR ANY PART THEREOF, Defendants,

Estelle Latta, et al., Defendants and Appellants.

Civ. 18579.

District Court of Appeal, First District, Division 1, California.

Aug. 10, 1959.

Action under Destroyed Land Records Relief Law to establish plaintiff's title to real property. A defendant filed an answer seeking to have title adjudged in her and others, predicating her right to relief upon asserted fraud of administrator of decedent's estate in concealing names and addresses of heirs from court in estate proceeding. The Superior Court, City and County of San Francisco, Thomas Coakley, J., rendered judgment upon sustaining demurrer of plaintiff to such defendant's answer, and that defendant appealed. The District Court of Appeal, Bray, P. J., held that, under circumstances, defendant's claim was barred both by laches and by limitations.

Affirmed.

1. Records 🔑18(8)

In action, under Destroyed Land Records Relief Law, to establish title to real property, answer of a defendant, praying that title be adjudged in her and others, contending that fraud had been practiced in administration of their ancestor's estate, was insufficient where it did not allege that plaintiff took title with knowledge of fraud or of any circumstances to put plaintiff on notice of fraud. West's Ann.Code Civ. Proc. §§ 319, 751.01 et seq.

2. Vendor and Purchaser 🔑239(9)

Rights of persons who have been defrauded out of their interests in property cannot prevail over those of innocent purchasers of such property in good faith and for value.

3. Executors and Administrators 🔑315(6)

Decree of distribution which had become final could be attacked only for extrinsic fraud. West's Ann.Prob.Code, §§ 440, 441, 1041.

4. Executors and Administrators 🔑315(6)

Failure to list all heirs in petition for administration or to notify heirs of death and of estate proceeding and even misrepresentation of administrator as to who were heirs of decedent could not constitute such extrinsic fraud as would entitle court to declare final decree of distribution void. West's Ann.Prob.Code, §§ 440, 441, 1041.

5. Limitation of Actions 🔑177(2)
Records 🔑18(5)

Right of defendant, in action under Destroyed Land Records Relief Law, to attack decree of distribution entered in 1883, for asserted fraud of administrator, was barred both by laches and by bar of statute requiring seizin within five years where defendant making attack had had knowledge of asserted fraud for many years, relevant records had been destroyed in fire of 1906, estate had passed into many hands, and pleading contained no assertion that defendant or his ancestor was seized or possessed of property within statutory period. West's Ann.Code Civ. Proc. §§ 319, 338, subd. 4, 751.01 et seq.; West's Ann.Prob.Code, §§ 440, 441, 1041.

6. Records 🔑18(8)

For defendant, in action under Destroyed Land Records Relief Law, seeking to have title adjudged in herself and others, to prevail on ground of asserted fraud of administrator of decedent's estate, where decree of distribution had been final for many years, defendant was required to allege when she discovered fraud and that she acted promptly and with diligence to protect any rights she might have had. West's Ann.Code Civ.Proc. §§ 319, 338, subd. 4, 751.01 et seq.; West's Ann.Prob.Code, §§ 440, 441, 1041.

7. Records 🔑18(8)

In action under Destroyed Land Records Relief Law for establishment of title to real property, wherein a defendant filed answer praying title be adjudged in her and others on ground of asserted fraud of administrator of decedent's estate in concealing names of heirs from court, in view of facts that many years had passed since entry of decree of distribution, that all original participants were dead, that records had been destroyed in 1906 fire, that such defendant had maintained prior unsuccessful action asserting similar claim and fact that properties of estate were in hands of many bona fide purchasers, and other facts, trial court properly sustained plaintiff's demurrer to such answer. West's Ann.Code Civ.Proc. §§ 319, 338, subd. 4, 751.01 et seq.; West's Ann.Prob. Code, §§ 440, 441, 1041.

8. Limitation of Actions 🔑40(1)
Records 🔑18(5)

Fact that one asserting rights in realty did so by way of answer in action under Destroyed Land Records Relief Law, rather than in action to quiet title could have no effect to lift bars of laches and limitations from her claim. West's Ann. Code Civ.Proc. §§ 319, 338, subd. 4, 751.01 et seq.; West's Ann.Prob.Code, §§ 440, 441, 1041.

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Busick & Busick, Sacramento, for appellants.

Royal E. Handlos, San Francisco, for respondent.

BRAY, Presiding Justice.

Defendant Estelle Latta, purporting to act for herself and others, appeals from a judgment entered after an order sustaining demurrer by plaintiff to defendant's answer without leave to amend.

Question Presented.

Propriety of the sustaining of demurrer to answer without leave to amend.

Record.

Under the Destroyed Land Records Relief Law (Pt. 2, Tit. 10, Ch. 3.5, Code Civ. Proc., Stats.1953, ch. 52, § 6) plaintiff filed an action against all persons to establish title to real property. Defendant Estelle Latta filed an answer stating that she is one of the persons claiming "an interest in, or lien upon" the real property described in the complaint; that she is a direct descendant of a brother of Mark Hopkins; that she appears for herself and "all other heirs of Mark Hopkins similarly situated," whose names are set forth in her answer; that the other heirs are so numerous it is impractical to bring them all before the court; that the questions involved are of a common interest to all said heirs. The gravamen of her answer is that there were two Mark Hopkins, not related to each other. One came from North Carolina to Placerville in 1851. The other came from New York to Sacramento in 1849. The New York Mark Hopkins married Mary Frances Sherwood. In 1876 the New York Mark Hopkins died, leaving as his survivors his wife and their son Timothy. Thereafter Mary obtained a position as the housekeeper of the North Carolina Mark Hopkins. He died March 29, 1878, a resident of San Francisco, leaving surviving no wife, father, mother, or issue; but he left surviving as his heirs at law his eight brothers and sisters, one of whose descendants is defendant Estelle Latta. Their names are set forth. Mary is charged with fraud in obtaining letters of administration of his estate, in claiming to be his wife and failing to notify the county clerk of the names and addresses of said heirs which she well knew. Later the North Carolina Mark Hopkins' brother Moses succeeded Mary as administrator of the estate. He likewise is charged with fraud in failing to reveal the names and addresses of his brothers and sisters and in instances in the 80's writing one of them to the effect that Mark was survived by a wife and children, and in another instance stating that Mark had left Moses all of his estate. It is charged that the decree of distribution in the Mark Hopkins estate is void because of the alleged fraud of Mary and Moses and the failure to notify the heirs of the probate proceedings including the obtaining of the two sets of letters of administration and the decree of final distribution in 1883 distributing the entire estate, three-quarters to Mary and one-quarter to Moses.

Defendant Estelle Latta prayed that she and the heirs of Mark listed in her answer be adjudged to be the owners of the described real property.

Plaintiff filed a general and special demurrer and among other grounds set forth laches and certain statutes of limitation. It further alleged that the questions raised by the answer had been determined adversely to defendant and the persons on whose behalf the answer was filed by the final judgments in Freeman v. Hopkins, 9 Cir., 32 F.2d 756, and in Latta v. Western Inv. Co., 9 Cir., 173 F.2d 99. The court sustained the demurrer to defendant's answer without leave to amend.

Demurrer Was Properly Sustained.

[1, 2] In the first place, there is no allegation that the plaintiff took title with knowledge of the alleged fraud or of any circumstances to put plaintiff on notice. This is a requisite in a fraud action. As said in Newport v. Hatton, 1924, 195 Cal. 132, 149, 231 P. 987, 993, dealing with a judgment obtained through extrinsic fraud: "Appellants concede that any person acquiring title to any part of the property in good faith, and without knowledge of the fraud, is fully protected, notwithstanding the interests of the plaintiffs. Their rights cannot prevail over those of innocent purchasers in good faith and for value. That much is not disputed." See also Newport v. Hatton, 1929, 207 Cal. 515, 520, 279 P. 134; Ferguson v. Ferguson, 1943, 58 Cal. App.2d 811, 814, 137 P.2d 735; Wool v. Scott, 1956, 140 Cal.App.2d 835, 843, 296

P.2d 17; Marlenee v. Brown, 1943, 21 Cal. 2d 668, 678, 134 P.2d 770. As said in the Ferguson case, supra, 58 Cal.App.2d at page 814, 137 P.2d at page 736: "It is clear that if respondents were purchasers for value and without notice, taking their title through the decree of distribution which constitutes a muniment of title immune to collateral attack, they cannot be charged as trustees and they hold the property free from any equity in plaintiffs. [Citations.]"

[3] Secondly, the answer shows that the alleged defense is barred by section 319, Code of Civil Procedure, and by laches on its face. The extrinsic fraud (and only by extrinsic fraud could the decree of distribution which long since became final be attacked) consists in the failure of Mary and Moses in their then respective petitions for letters of administration to list the names and addresses of Mark Hopkins' brothers and sisters, the failure to send out notices of the application for the decree of distribution, the failure of Mary and Moses to disclose the pendency of the estate to Mark's sisters and other brothers (it appears in the answer that one of the brothers, Samuel, was aware of the proceedings), plus the alleged misrepresentations of Moses in the early 80's (whether during or after the probate proceedings were concluded does not appear).

[4, 5] Assuming that extrinsic fraud was thereby alleged * the answer is barred by section 319, Code of Civil Procedure, and by laches. In Latta v. Western Inv. Co., supra, 173 F.2d 99, 107, defendant Estelle Latta brought an action to declare the decree of distribution in the Mark Hopkins estate void on the identical grounds urged here. In holding that her complaint was barred by the provisions of section 338, Code of Civil Procedure, the court said (at page 107): "The alleged fraud was completed upon the granting of the decree of distribution in 1883, and as heretofore pointed out, the appellants have had actual knowledge of the alleged fraud herein complained for over twenty years. Time, death and destruction by fire have blotted out the events of that period beyond the restoration of the living. It is not only a closed chapter but a sealed chapter in the lives of those involved.

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* While section 1371, Code of Civil Procedure (now Probate Code, § 440), at the time of the probate proceedings, provided that the petition for letters of administration should state "the facts essential to give the Court jurisdiction of the case" and the names and addresses of the heirs of the decedent known to the petitioner, it also provided "If the jurisdictional facts existed, but are not fully set forth in the petition, and are afterwards proved in the course of administration, the decree or order of administration and subsequent proceedings are not void on account of such want of jurisdictional averments." At that time the only notice of the petition required to be given by the clerk was a notice by posting. Code Civ.Proc. § 1373 (now Probate Code, § 441), and Nicholson v. Leatham, 1915, 28 Cal.App. 597, 601, 153 P. 965, 155 P. 98. Notice of the petition for distribution was to be given either by posting or publication as the court might direct (§ 1668, now Probate Code, § 1041). There is no allegation that the notices required by these sections were not given. In Latta v. Western Inv. Co., supra, 173 F.2d 99, the court seemed to consider the allegations as to withholding the names and addresses of the heirs and the failure by Mary and Moses to notify them of the proceedings, as sufficiently alleging extrinsic fraud. However, in Monk v. Morgan, 1920, 49 Cal.App. 154, 162, 192 P. 1042, the court held that an administrator of an estate, either in his capacity as coheir or as administrator, is under no duty to inform his coheirs of the death of the decedent, his appointment as administrator or of any of the proceedings in the estate, other than through the giving of the notices required by law to be given during such administration and which having been duly given constitute constructive notice to the decedent's heirs as to all proceedings had in the course of the administration of the estate. Therefore, the failure to list the heirs in the petition for administration, or to notify the heirs of the death and the estate proceedings, and even misrepresentations by the administrator as to who were the sole heirs of the decedent, did not constitute such extrinsic fraud as would entitle a court to declare the decree of distribution in that estate void. See also Mulcahey v. Dow, 1900, 131 Cal. 73, 63 P. 158.

The burned records cannot be restored. The dead cannot be resurrected. The fortune accumulated by Mark Hopkins long ago passed through and into many hands, far removed from the generation in which he lived. To attempt to disentangle this estate would be unjust and inequitable. Equity frowns upon stale demands. Equity declines to aid those who have slept on their rights. The appellants' alleged claims long ago were lost by reason of gross laches." We adopt that language in applying the bar of section 319 to defendant's answer here. (Defendant contends that she is not seeking to have the decree of distribution declared void as she was trying to do in the above mentioned case, but to have her title and that of the others to the real property adjudged.) But the answer contains no allegations that defendant or the ancestor or predecessor defendant was seised or possessed of the property within five years as required by section 319, Code of Civil Procedure. As said in Fugl v. Witts, 97 Cal.App.2d 495, 496, 218 P.2d 102: "Since defendant was not seised or possessed of the premises in question within five years before the commencement of the action, he neither had (1) a cause of action entitling him to have title quieted in him to the property, nor (2) a defense to plaintiff's cause of action to have the title to the property quieted in plaintiff. (Code Civ.Proc. § 319.)" It should be noted that section 319 provides: "No cause of action, *or defense to an action*, arising out of the title to real property * * * can be effectual, unless it appear that the person prosecuting the action, *or making the defense*, * * * or the ancestor, predecessor, or grantor of such person was seised or possessed of the premises in question within five years * * *" (Emphasis added.)

[6, 7] The answer contains no allegation of when the alleged fraud was discovered by defendant nor that she acted promptly and with diligence to protect any rights she might have had. For the necessity of such allegations in this type of case see Del Campo v. Camarillo, 154 Cal. 647, 98 P. 1049; 18 Cal.Jur.2d p. 228, § 53; 23 Cal.L.Rev. 79. In view of the fact that almost 75 years had passed since the entry of the decree of distribution, all the original participants are dead, the records were destroyed in the 1906 fire, the fact that in 1929 one Freeman, in Freeman v. Hopkins, supra, 32 F.2d 756, claiming to be an heir of Mark Hopkins and purporting to act on behalf of about 450 other alleged heirs, brought suit claiming that certain securities belonging to Mark Hopkins had been falsely concealed and not included in the assets of the estate on distribution, and pointing out that none of the brothers and sisters of Mark, except Moses, had been named in the decree of distribution, and that defendant herself in 1948 (approximately 10 years before filing this suit) had brought suit (Latta v. Western Inv. Co., supra, 173 F.2d 99) setting up the very grounds of fraud alleged here and alleging, according to the opinion in that case, that the alleged fraud was discovered in 1945, and that defendant in nowise attempts to excuse the laches in not bringing this action sooner, the fact that the properties of the Mark Hopkins estate have been in the hands of many purchasers, none of whom are claimed not to be bona fide purchasers for value without notice,—all of these show that in sustaining the demurrer without leave to amend the court not only did not abuse its discretion but would have abused its discretion had it not done so.

[8] Defendant's main contention is that even though if she were bringing an action to quiet title on the grounds of fraud alleged in her answer the cause of action might be barred by laches and section 319, Code of Civil Procedure, these bars cannot be applied to the matters set forth in her answer in which she merely asks that she and the other alleged heirs be adjudged to own the real property originally belonging to Mark Hopkins. The cases she cites in support of this contention are not in point for two reasons: (1) they only apply to answers which do not seek affirmative relief, and here defendant asks that she and

the others be adjudged owners of the real property, and (2) they do not apply to cases where the plaintiff is not a party to the alleged fraud nor has knowledge of it.

1. In Islais & Salinas Water Co. v. Allen, 1901, 132 Cal. 432, 64 P. 713, an action to quiet title in which the defendant prayed that he be adjudged the owner of the property described in the complaint, the court held that he was seeking affirmative relief, saying concerning the answer "there were affirmative allegations, which, if sustained by the evidence, entitled the defendant to affirmative relief, *and such relief was demanded.*" 132 Cal. at page 437, 64 P. at page 715; emphasis added. And as pointed out hereinbefore, section 319, Code of Civil Procedure (as well as section 338, subdivision 4, if defendant were seeking to set aside the decree of distribution) bars defendant's alleged cause of affirmative defense. Sullivan v. Compton, 1943, 61 Cal. App.2d 500, 143 P.2d 357, where the answer alleged a claim of lien in the property described in the plaintiff's action to quiet title and the court held that the answer did not seek affirmative relief, is not in point as the prayer only asked that the plaintiff take nothing by his complaint. The court distinguished that case from Islais & Salinas Water Co. v. Allen, supra, 132 Cal. 432, 64 P. 713, by pointing out that the answer there, as does the answer in our case, specifically prayed for a decree determining that the defendant was the owner of the property. In Hungarian Hill Gravel Min. Co. v. Moses, 58 Cal. 168, likewise, the answer prayed merely that the plaintiff take nothing by its complaint.

2. The cases relied upon by defendant were all cases in which not only were the defendants not seeking affirmative relief, but also the plaintiffs were either charged with the fraud or having obtained their title with knowledge of it. Thus, in McColgan v. Muirland, 1905, 2 Cal.App. 6, 82 P. 1113, an action to recover on a judgment, the action was brought by the very person (and his assignee of an interest) whom the defendant charged with procuring the judgment by fraud, and the defendant merely asked that the plaintiffs take nothing by their complaint. In Re Estate of Cover, 188 Cal. 133, 204 P. 583, the son of the decedent petitioned to have the widow removed as administratrix of the decedent's estate, based upon an agreement executed some 10 years prior by her and the decedent in which she waived all her rights to inherit. She answered claiming that the agreement had been obtained by fraud of the decedent, the son and another. In holding that laches and the statutes of limitation did not apply to her defense, the court pointed out that she was not seeking affirmative relief. Again here there was no question of the plaintiff being free from the taint of fraud. In J. B. Colt Co. v. Freitas, 1926, 76 Cal. App. 278, 244 P. 916, the action was brought by the company that the defendant charged with fraud in obtaining the promissory note sued upon. The court said (76 Cal.App. at page 287, 244 P. at page 919): "Where fraud is relied upon as a defense merely 'neither the limitation of the statute nor the doctrine of laches will operate to bar the defense of the invalidity of the agreement upon the ground of fraud, for so long as the plaintiff is permitted to come into court seeking to enforce the agreement, the defendant may allege and prove fraud as a defense. In short, it is not incumbent upon one who has thus been defrauded to go into court and ask relief, but he may abide his time, and when enforcement is sought against him excuse himself from performance by proof of the fraud.' In re Estate of Cover, 188 Cal. 133, 140, 204 P. 583, 587." In Hart v. Church, 126 Cal. 471, 58 P. 910, 59 P. 296, the court states that a person defending against the enforcement of a fraudulent contract is not barred by the statutes of limitation in excusing himself from performance by proof of the fraud, but, the court points out, "in such a case he incurs the risk of defeat by the intervention of the rights of innocent parties." 126 Cal. at page 479, 58 P. at page 913. Cox v. Schnerr, 1916, 172 Cal. 371,

156 P. 509, was an action by a person relying upon a deed which the defendant charged he had procured by fraud. Evans v. Duke, 1903, 140 Cal. 22, 73 P. 732, 734, likewise was an action upon a contract which the defendant alleged was obtained through the plaintiff's fraud. The court held that the defendant was barred by laches from asserting affirmative relief but not from merely defending the action on the ground of the fraud. It then quoted from Hart v. Church, supra, 126 Cal. 471, 479, 58 P. 910, 59 P. 296, to the effect that in his defense of fraud a defendant "'* * incurs the risk of defeat by the intervention of the rights of innocent parties.'" Thus it clearly appears that both the statutes of limitation and laches will apply to an answer which either asks for affirmative relief or seeks to defend against the claims of innocent persons.

Raisch v. Myers, 1946, 27 Cal.2d 773, 167 P.2d 198, deals with the situation where the court held that the pleading of the statutes of limitation "should not avail a property owner to the prejudice of a subordinate lien claimant in the extinguishment of a valid lien where the *status quo* is disturbed by foreclosure of a superior lien." 27 Cal. 2d at page 781, 167 P.2d at page 202. The court said: "In the state of the record as analyzed, equally applicable here are the equitable principles governing cases where the property owner seeks affirmative relief in a quiet title action against an outstanding lien that cannot be foreclosed by reason of the bar of the statute of limitations. In the one as in the other situation, the property is still subject to the lien and the lien claimant will be protected as against a property owner seeking an affirmative advantage without doing equity as the circumstances require." 27 Cal.2d at page 781, 167 P.2d at page 202. But there the property owner knows or should know of the existence of the liens as they are of record, and hence he is not an innocent person who in the other situations disclosed by the cases may set up the bars of the statute and laches.

In view of our decision, we deem it unnecessary to discuss the other points urged by plaintiff for affirming the action of the trial court.

The judgment is affirmed.

FRED B. WOOD and TOBRINER, JJ., concur.

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172 Cal.App.2d 794

STATE of California, Plaintiff and Respondent,

v.

ALL PERSONS CLAIMING ANY INTEREST IN, OR LIEN UPON, REAL PROPERTY HEREIN DESCRIBED, OR ANY PART THEREOF, Defendants,

Estelle Latta et al., Defendants and Appellants.

Civ. 18580.

District Court of Appeal, First District, Division 1, California.

Aug. 10, 1959.

Action under Destroyed Land Records Relief Law to establish plaintiff's title to realty. A defendant filed an answer praying that such defendant and others be adjudged owners of the realty, contending that a decree of distribution was result of extrinsic fraud of administrator in concealing names and addresses of heirs from court. The Superior Court, City and County of San Francisco, Milton D. Sapiro, J., rendered judgment for plaintiff, on the pleadings, and appeal was taken. The District Court of Appeal, Bray, P. J., held that a defendant's failure to take prior action to attack final decree of distribution, because of belief that claim could be presented only after action to clear title had been filed by plaintiff was not a sufficient excuse for laches in attacking decree and afforded no defense to action.

Affirmed.

Records 🔑18(5)

A person's failure to take action to attack, for asserted extrinsic fraud of administrator in concealing names and addresses of heirs, a final decree of distribution, because of belief that her claim could be filed only after action to clear title had been filed by another was not a sufficient excuse for laches in attacking decree and afforded no defense to such other person's action under Destroyed Land Records Relief Law brought to establish title to realty.

Busick & Busick, Sacramento, for appellants.

Stanley Mosk, Atty. Gen., Miriam E. Wolff, Deputy Atty. Gen., for respondent.

BRAY, Presiding Justice.

Defendant Estelle Latta, purporting to act for herself and others, appeals from a judgment on the pleadings in favor of plaintiff.

The original complaint, except as to the name of the plaintiff, is identical with that in Universal Land Co. v. All Persons, No. 18579, Cal.App., 342 P.2d 958. The questions presented are likewise identical with those in that case. The only difference between the cases is that in this case plaintiff's demurrer to defendant's original answer was sustained with leave to amend. Defendant amended her answer. The only difference between the amended answer and the original one was an allegation that defendant after discovering the alleged fraud (it does not state when) took no action because she and her attorneys felt that her claim could only be filed after an action to clear title was filed by plaintiff. Plaintiff moved for judgment on the pleadings on the grounds that the amended answer did not set up a ground of defense, and showed laches. The court granted judgment on the pleadings.

As defendant's amended answer is identical with that in case No. 18579 (except in the particular above mentioned, which is not a sufficient excuse for the laches shown in the amended answer) and does not state a cause of defense and affirmatively shows laches, for the reasons there set forth, the judgment is affirmed.

FRED B. WOOD and TOBRINER, JJ., concur.

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172 Cal.App.2d 795

WESTERN TITLE INSURANCE AND GUARANTY COMPANY, a corporation, Plaintiff and Respondent,

v.

ALL PERSONS CLAIMING ANY INTEREST IN, OR LIEN UPON, REAL PROPERTY HEREIN DESCRIBED, OR ANY PART THEREOF, Defendants,

Estelle Latta et al., Defendants and Appellants.

Civ. 18581.

District Court of Appeal, First District, Division 1, California.

Aug. 10, 1959.

Appeal from Superior Court, City and County of San Francisco; Thomas Coakley, Judge.

Busick & Busick, Sacramento, for appellants.

Royal E. Handlos, San Francisco, for respondent.

BRAY, Presiding Justice.

As in Universal Land Co. v. All Persons, No. 18579, Cal.App., 342 P.2d 958, defendant Estelle Latta, purporting to act for herself and others, appeals from a judgment entered after an order sustaining demurrer by plaintiff to her answer without leave to amend.

Except as to the name of the plaintiff, the complaint and answer are identical with those in No. 18579. As there, the trial court here sustained plaintiff's demurrer without leave to amend and thereafter entered judgment.

As the questions presented are identical with those in case No. 18579, it is unnecessary to discuss them here. Upon the authority of that case, the judgment is affirmed.

FRED B. WOOD and TOBRINER, JJ., concur.

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172 Cal.App.2d 796

HOUSING AUTHORITY OF CITY AND COUNTY OF SAN FRANCISCO, a public body, corporate and politic, Plaintiff and Respondent,

v.

ALL PERSONS CLAIMING ANY INTEREST IN, OR LIEN UPON, REAL PROPERTY HEREIN DESCRIBED, OR ANY PART THEREOF, Defendants,

Estelle Latta et al., Defendants and Appellants.

Civ. 18608.

District Court of Appeal, First District, Division 1, California.

Aug. 10, 1959.

Appeal from Superior Court, City and County of San Francisco; Theresa Meikle, Judge.

Busick & Busick, Sacramento, for appellants.

Gerald J. O'Gara, San Francisco, for respondent.

BRAY, Presiding Justice.

Defendant Estelle Latta, purporting to act for herself and others, appeals from a judgment on the pleadings in favor of plaintiff.

Except as to the name of the plaintiff, the complaint and answer are identical with those in Universal Land Co. v. All Persons, No. 18579, Cal.App., 342 P.2d 958. Plaintiff moved for judgment on the pleadings on the grounds that said answer did not set up a ground of defense and showed laches.

As the questions presented are identical with those in case No. 18579, it is unnecessary to discuss them here. Upon the authority of that case, the judgment is affirmed.

FRED B. WOOD and TOBRINER, JJ., concur.

In the Matter of the ESTATE of Jessie Lee TOLER, Deceased.

Edward J. GUIRADO, Executor of the Estate of Minnie Carter, Deceased, Appellant and Respondent,

Bank of America N. T. & S. A., Executor of the Estate of Jessie Lee Toler, Appellant and Respondent,

Susan E. Ponder, as Guardian of the Person and Estate of Benjamin Edward Toler, an Incompetent Person, and Susan E. Ponder, Individually, Appellants and Respondents,

v.

Eddie F. PONDER and William L. Morris, Respondents.*

Civ. 5925.

District Court of Appeal, Fourth District, California.

July 30, 1959.

Hearing Granted Aug. 28, 1959.

Proceedings in the matter of a decedent's estate, wherein the Superior Court of Orange County, Robert Gardner, J., entered the orders challenged on appeal. The District Court of Appeal, Shepard, J., held that where word "final" did not appear in original notice of hearing, but all parties proceeded on basis of hearing being on final account and for distribution, objectors could not be heard to complain on appeal that court had not acquired jurisdiction to proceed with final distribution because no notice of hearing as to final account had been given.

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* Opinion vacated 345 P.2d 152.

Modified and affirmed.

1. Executors and Administrators 🔑507(2)

A finding of due notice is ordinarily essential to show jurisdiction of record of proceeding on final account and for distribution. West's Ann.Prob.Code, § 926.

2. Executors and Administrators 🔑510(4)

Where word "final" did not appear in original notice of hearing, but all parties proceeded on basis of hearing being on final account and for distribution, objectors could not be heard to complain on appeal that court had not acquired jurisdiction to proceed with final distribution because no notice of hearing as to final account had been given. West's Ann.Prob.Code, § 926.

3. Executors and Administrators 🔑505

Task of presenting facts to court in such way that court can readily understand case and make such allocations as law requires devolves on executor; but if executor's accounts are such that court cannot reasonably and readily understand them, it is right and power of court to order such final accounting information to be furnished as may be necessary for court to conveniently and adequately make its order allocating various sums as law in particular case may require. West's Ann.Prob.Code, § 926.

4. Executors and Administrators 🔑502

Where will was silent on subject of accounting periods, court acted correctly in choosing annual accounting period.

5. Executors and Administrators 🔑109(3)

Certain expenses may be allowed to beneficiary who is conducting objections which may redound to benefit of other heirs who have not appeared by counsel, but such allowance is addressed to sound discretion of court in its application of equitable principles; and where it appeared that primary purpose of objector's employment of accountant was to enhance only estate of life tenant and was not addressed to any degree to preserving common fund for remaindermen, it was not an abuse of discretion to refuse to allow to her expense of accountant hired by her to analyze accounts of executor.

6. Life Estates 🔑17, 18

Ordinarily, where will is silent on subject of expenses, owner of life estate will be held responsible for upkeep of improvements against ordinary waste, for taxes, and for just proportion of extraordinary assessments benefiting whole inheritance.

7. Wills 🔑728

In absence of any specification or explanatory material in will giving life beneficiary "rents, issues and profits", quoted words would be construed as substantially synonymous with "income" and as having reference to difference between gross operative income and gross operative expense, and thus operational expense was chargeable to income.

See publication Words and Phrases, for other judicial constructions and definitions of "Income" and "Rents, Issues and Profits".

8. Executors and Administrators 🔑313

Where accounting period was properly determined to run on annual basis, court properly allowed to life tenant 4% interest on annual amounts of income payable to him but remaining unpaid; and such interest would run in favor of life tenant until distribution.

9. Life Estates 🔑15(1)

Where no oil or gas was withdrawn from property, income from oil and gas leases was properly allocated to life tenant rather than to remaindermen. West's Ann. Civ.Code, § 730.11; West's Ann.Prob. Code, § 162.

10. Executors and Administrators 🔑475

Imposition of surcharges, in matters involving delay in settlement of an estate and payment of legacies and support, lies within sound discretion of court. West's Ann.Prob.Code, § 1232.

11. Executors and Administrators ⚷109(1), 510(10)

Trial court is vested with broad discretion as to reasonableness and necessity of expenditures during administration, and its exercise of that discretion will not be disturbed on appeal except when abused.

12. Executors and Administrators ⚷497

Award of fees for extraordinary services lies within sound discretion of trial court.

13. Executors and Administrators ⚷375

Where no appeal was ever taken from order confirming sale of estate ranch under authority of will, such order became final, and was not open to question on final account. West's Ann.Prob.Code, §§ 581, 757, 1240.

14. Executors and Administrators ⚷131

Where there was some evidence that life tenant had desired one-half interest remainderman to remain in residence with him, and that she had acted as his housekeeper and had partially cared for him, executor was not chargeable with rental value of residence.

15. Executors and Administrators ⚷496(1)

The whole matter of adjustment of fees is within sound discretion of trial court, and weighing of basis of fee calculation against extraordinary fees is part of that process.

16. Executors and Administrators ⚷507(2)

Findings are not generally required on settlement of accounts of administrators.

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Harold B. Newrock, Whittier, for appellant and respondent Edward J. Guirado.

Turpit, Drennen & Thompson, Whittier, for appellant and respondent Bank of America N. T. & S. A.

Clyde C. Shoemaker, Los Angeles, for appellants and respondents Susan E. Ponder and Susan E. Ponder, as guardian of the person and estate of Benjamin Edward Toler, an incompetent.

SHEPARD, Justice.

Jessie Toler died testate on September 26, 1946. The Bank of America National Trust & Savings Association was appointed executor of her estate. The estate was appraised at $186,657.11, the chief asset being a citrus ranch valued at $130,000. Notice to creditors was published and claims totaling $2,566.20 were ultimately paid. On May 23, 1947, an order was made by the court pursuant to petition authorizing the executor to carry on the farm business of deceased until the further order of the court. In 1953, oil and gas leases were entered into by order of court. In 1954, the ranch properties were sold with a net return of $290,000.

On December 19, 1955, Benjamin Edward Toler, life tenant legatee of all of the residue of the estate, filed through his guardian his petition for preliminary distribution of $200,000 on account. Substantially, the only other legacies were two $5,000 specific bequests and the remainder interest after the termination of the life estate. Objections were filed by certain remaindermen, and after a full hearing on the petition and objections the trial court found that the allegations of the petition were true; that all claims and taxes had been paid; that the two bequests of $5,000 had been paid; that as of December 15, 1955, the executor had on hand $308.934.69 of which $307,013.37 was cash, and ordered $200,000 distributed to the guardian of said life tenant with trust deposit restrictions for bond reduction purposes. The distribution was for the natural life of said legatee. The trial court in that order refrained from making any allocation of principal and income, and likewise refrained from making any statement on the rights of the remaindermen *in futuro* after the death of said life tenant. That order has become final (In re Estate of Toler, 49 Cal. 2d 460, 319 P.2d 337).

The first account current was filed on February 10, 1949 covering the period from the commencement of the administration to January 6, 1949, and was approved February 28, 1949. That order likewise appears to have become final.

The second account current was filed December 9, 1955 covering the period from January 6, 1949 to April 27, 1955. On the same day there was filed a "Petition for Final Distribution and for Instructions" which referred to and by reference made the second account current a part thereof. On December 22, 1955, the executor filed its supplement to the second account current and report. On March 9, 1956, the executor filed its "Final Account Current and Report and Amendment to Second Account Current and Report". Timely objections and exceptions were filed as to all these last mentioned accounts, reports and petitions. On March 7, 1957, the court entered its "Order Settling Final Account, Fixing Attorney Fees and Executor Commissions, Determining Income and Principal Accounts and Instructions for Distribution." By its order the trial court disposed of the accounts, petitions for fees, commissions objections, exceptions and final distribution.

It found, among other things, that the accounts are true and correct; that the executor was not under the duty to sell the real property prior to the time the actual sale was made; that all capital gain is a part of the residue and not income; that expense of operations should be charged against income; that receipts from oil and gas leases are income; that in any year where there was no net income property taxes should be charged against the residue; that all expenses of administration, estate and inheritance taxes and income taxes due from decedent at death, and capital gain taxes should be charged to residue; that payments to the life tenant for services should be charged to ranch operations but all other advancements to him should be charged to income.

The court ordered, among other things, that all income be determined on an annual basis and that it bear interest at 4% after the year during which it was received and up to date set for hearing the petition for final distribution. It was further ordered that all cash in the hands of the executor after July 1, 1956, bear interest at 2% per annum as provided by section 920.5 of the Probate Code. It ordered statutory commissions, it allowed $9,000 extraordinary fees for the executor, $8,000 extraordinary fees for the executor's regular attorney, and $4,000 special fees to a separate attorney engaged to try the contests, subject of this appeal. It ordered that one-half of said $4,000 is to be paid by the executor from its extraordinary fees and one-half thereof to be borne by the residue of the estate. It found the executor in possession of $250,604.92. plus $786.84 accounts receivable. It ordered certain physical property originally inventoried at $450 to be charged off on the ground that it had no substantial value. Oil and gas leases were listed at a nominal $3. It fixed the total income distributable to the life tenant at $41,994.44 and recited that $16,754.19 of this had already been paid. (The record shows that of this amount already paid, $15,000 was paid on April 5, 1956 pursuant to a stipulation without prejudice to the rights of any party.) It ordered a total of $3,891.92 interest payable to the life tenant at 4% on delayed annual income payments and surcharged the same against the executor by ordering it deducted from commissions payable to the executor. It found that after the payment of expenses, commissions, fees, special bequests with interest thereon, and advances to the life tenant, there remained on hand the sum of $216,615.64. It found that the total income payable to the life tenant is the sum of $41.994.44 of which $16,754.19 had already been paid, leaving a balance of $25,240.25 income payable to the life tenant, and $191,375.39 corpus. It then defines the fractional interest of the remaindermen and orders distribution subject to individual adjustments for closing expenses and tax possibilities accruing in the interim.

Appeals from certain portions of this order are taken by Susan E. Ponder individually, as one of the remaindermen, and as guardian of said life tenant; by the executor, and by Edward J. Guirado as executor of the estate of Minnie Carter, another of the remaindermen. It will be necessary to deal with most points of appeal raised by the briefs separately.

[1, 2] The first contention by appellant Ponder is that the court did not acquire jurisdiction to proceed with final distribution because there was no final account filed, there was not filed with the final account a petition for final distribution, and no notice of hearing of a final account nor a petition for distribution given, as required by Probate Code, Section 926. A finding of due notice is ordinarily essential to show jurisdiction of record (In re Estate of Kauffman, 63 Cal.App.2d 655, 659 [3], 147 P.2d 11).

First it should be noted that at the time of the trial of the objections to the account the objectors devoted a goodly portion of their opening discussions to assuring the trial court that the objectors were there to present a hearing on the final account, that they wanted a final distribution and were prepared to proceed on the basis of a hearing, being one on final account and on a petition for distribution. Objector Guirado was present during all of this discussion and voiced no dissent to the matter, proceeding as so suggested. All parties did thereafter proceed on the basis of the hearing being on final account and for distribution. It would appear, therefore, that the grounds of adequate notice were waived by all appellants herein. In re Estate of Pailhe, 114 Cal.App.2d 658, 661 [3], 251 P.2d 76. Furthermore, from the record, it appears that notice of the hearing of the accounts was duly given as required by Probate Code Section 926, although the word "final" did not appear in the original notice. We are of the opinion that appellants, in view of their announced attitude to the trial court on this matter at the time of the hearing may not now be heard to complain.

[3, 4] The second contention of appellant Ponder is that the executor's accounts made no segregation of principal and income, and failed to properly compute or show probate income on the basis of annual accounting periods. It is true that the original accounting in both the first and second current accounts was lacking in a considerable degree in annual accounting computations, as well as the identification by date of some items, and that the task of presenting the facts to the court in such a way that the court can readily understand it and make such allocations as the law requires is a duty that devolves on the executor. But if the executor's accounts are such that the court cannot reasonably and readily understand them in order to perform its duty in making the allocations required by law, it is the right and power of the trial court to order such final accounting information to be furnished as may be necessary for the court to conveniently and adequately make its order allocating various sums as the law in a particular case may require. Hirschfeld v. Cross, 67 Cal. 661, 8 P. 507. Otherwise, the whole purpose of accounting might be defeated. As was said in Re Estate of Dow, 91 Cal.App.2d 420, 431, 205 P.2d 698, 704: "The court has a broad discretion in passing on accounts of administrators." In order to perform the function of allocation the trial court did require and did receive additional supplemental accounts, information and exhibits which support the allocation of receipts and expenditure to corpus and income, as was ordered by the court.

Since the will was silent on the subject of accounting periods, it appears that the court acted correctly in choosing an annual accounting period and the executor, under the direction of the court, did perform its function of furnishing the additional factual information to enable the court to readily and conveniently make the necessary orders. In re Estate of Platt, 21 Cal.2d 343, 351, 131 P.2d 825; In re Estate of Roberts, 27 Cal.2d 70, 78, 79 [12, 10b], 162 P.2d 461. If the trial court had been dissatisfied, it could have ordered further clarification.

[5] The third contention of appellant Ponder appears to be that the trial court should have allowed to her the expense of

an accountant hired to analyze the accounts of the executor. She cites no authorities. It is true that certain expenses may be allowed to a beneficiary who is conducting objections which may redound to the benefit of other heirs who have not appeared by counsel. In re Estate of Bullock, 133 Cal.App.2d 542, 547 [2], 284 P.2d 960. However, such an allowance is addressed to the sound discretion of the court in its application of equitable principles. In re Estate of Plumer, 147 Cal.App.2d 760, 763 [4], 306 P.2d 110. It appears from the record that the primary purpose of appellant Ponder's employment of an accountant was to enhance only the estate of the life tenant. It was not addressed to any degree to preserving a common fund for the remaindermen. This, as well as the other facts in the case at bar, convinces us that the trial court did not abuse its discretion.

[6, 7] Appellant Ponder next contends that the court improperly determined income allocable to the life tenant, and that it should not have charged operational expense to income. Paragraph Fifth of the will, as to the portion with which we are here concerned, reads as follows:

> "All of the rest and residue of my estate, real, personal, and/or mixed, wherever situated, I give, devise and bequeath to my brother, Benjamin Edward Toler, for and during his natural life, with the right to the full use and benefit of all of the rents, issues and profits therefrom with the remainder over in fee to the following persons * * *."

Ordinarily, where the will is silent on the subject of expenses the owner of the life estate will be held responsible for the upkeep of the improvements, against ordinary waste and for taxes, and a just proportion of extraordinary assessments benefiting the whole inheritance (In re Estate of Dare, 196 Cal. 29, 41, 235 P. 725). In our opinion, the "rents, issues and profits", in the absence of any other specification or explanatory material in the will, is substantially synonymous with the word "income" in a matter of the kind here at bar. The word "income" has been construed to mean the difference between gross operative income and gross operative expense (People v. Gustafson, 53 Cal.App.2d 230, 239 [6], 127 P.2d 627). The common sense of this view has been put into statutory expression in a statute relating to principal and income as between tenants and remaindermen. Civil Code, sec. 730.03. It is there stated that "'Income' as used in this chapter means the return derived from principal." In our view, the court's action in the charge of operational expense to income was proper. Likewise, the charging of taxes to corpus in any year in which a loss occurred is amply supported by precedent. In re Estate of Bothwell, 65 Cal.App.2d 598, 607 [6], 151 P.2d 298.

[8, 9] Since the accounting period was properly determined to run on an annual basis, the court correctly allowed to the life tenant 4% interest on the annual amounts of income payable to him but remaining unpaid. However, such interest should run in favor of the life tenant until distribution. In re Estate of Platt, 21 Cal.2d 343, 350 [2], 131 P.2d 825. Appellant Guirado contends the income from oil and gas leases should be credited 95% to principal and 5% to income. Contrary to the contention of appellant the will does authorize the executor "to lease, encumber and sell" the property of the estate.

The primary asset of the estate was the ranch property. The amounts received from oil leases, as far as the record shows, did not result in the finding of oil or gas or the withdrawal of any from the property. Its real effect was mere ground rent as distinguished from natural resource taking. Thus, there could have been no depletion of the corpus and there appears to us no reasonable cause to distinguish between the allocation of net income from the farm operations and the income from the oil leases. In re Estate of Smith, 16 Cal.App.2d 239, 60 P.2d 574 and In re Estate of Allen, 42 Cal.App.2d 346, 108 P.2d 973, cited by appellant, relate to the position of a third party advancing money or credit to the estate, and are not persuasive as to the point here in question. We see nothing in Civil Code, Section 730.11 requiring a different construction.

[10, 11] We are unable to find any merit in the contention that the court should not have allowed a credit of $15,000 for that amount theretofore advanced to the life tenant. By its settlement of the accounts the court implicitly found that there was no unreasonable delay in the final settlement of the estate. It did find, under Probate Code, Section 162, that the life tenant was entitled to interest at 4% on the deferred annual income payments. Thus there accrued a total of $3,891.92 interest on the successive annual income for the years 1948 to 1955, inclusive, which income had the cumulative total of $41,994.44. By its order charging this interest against the executor individually, it is also implicit that the court found substantially with the life tenant's contentions, to wit, that there had been an unreasonable delay in the payment of the income. The life tenant now apparently contends that because of delay in the payment of the $15,000 he was prevented from earning 3% for a certain period, but as is above shown he will actually receive 4% from the executor when the court's order is carried out.

The imposition of surcharges in matters involving delay in the settlement of an estate and the payment of legacies and support lies within the sound discretion of the court. This is exemplified by the policies expressed by the legislature, as well as by the courts, such as the matter of costs as set forth in Probate Code, Section 1232. In re Estate of Hart, 119 Cal.App.2d 310, 316 [8–9], 259 P.2d 703; In re Estate of Wallace, 12 Cal.2d 476, 480 [2–3], 86 P.2d 95. This same policy is to be found in connection with the whole subject of the reasonableness and necessity of expenditures during administration, where the trial court is vested with a broad discretion which will not be disturbed on appeal except when abused. In re Estate of Fraysher, 47 Cal.2d 131, 136 [9], 301 P.2d 848. The evidence shows that at least some of the heirs advised with the executors that the best interests of the estate required the holding of the ranch and property as a home for the life tenant. The evidence further shows that it was at least doubtful if there was available sufficient free cash to pay legacies, taxes, costs of administration and annual income to the life legatee prior to the completion of the 1954 sale proceedings. (Death, income and ad valorem taxes, alone, amounted to nearly $115,000.) Thus the exercise of the court's discretion respecting the delay in estate closure should not be disturbed on appeal.

[12] Appellant Ponder also contends that fees for extraordinary services are exorbitant and unwarranted. Again the award of such fees lies within the sound discretion of the trial court. Under all of the facts of the case at bar we are unable to find as a matter of law that the court abused its discretion in the award of extraordinary fees. In re Estate of Hardenberg, 18 Cal.App.2d 307, 310, 63 P.2d 1200; In re Estate of Lampman, 15 Cal.2d 212, 219 [4], 100 P.2d 488.

[13] Appellant Ponder next contends that the trial court erroneously rejected their offer of proof that other parcels of property in the vicinity of the ranch belonging to this estate were sold at sums largely in excess of the price secured for this property. The estate ranch was sold under authority of the will, due return to the court was made, and an order of confirmation was had under Probate Code, Section 757. This was an appealable order. Probate Code, Section 1240. The record shows that no appeal was ever taken. The order became final and is not ordinarily open to question on final account. In re Estate of Gump, 16 Cal.2d 535, 549 [6], 107 P.2d 17. The case of County of Los Angeles v. Faus, 48 Cal.2d 672, 312 P.2d 680, cited by appellant, related to eminent domain and the use of other sales in proving value on trial. It has no analogy to the case at bar.

[14] Next appellant Ponder contends that the executor should be charged with the rental value of the residence portion

of the premises. The evidence shows that the life tenant lived there until the property was sold, and that Minnie Carter, a one-half interest remainderman, also lived in the same residence, acted as his housekeeper and partially cared for him. There is some evidence that the life tenant desired to remain in the residence. This was the place where he had lived for many years with his sister, the testatrix. The case of In re Estate of Welch, 83 Cal.App.2d 391, 399 [7], 188 P.2d 797 was one in which the executrix herself occupied the property involved. Here the legatee of the property involved was the occupant along with the person whose occupancy, according to some of the evidence, was for the benefit of the legatee. We think the court's ruling was correct. Probate Code, Section 581; In re Estate of Dow, 82 Cal.App.2d 675, 681 [5], 186 P.2d 977.

The same reasoning applied to the items of repair and upkeep of the automobile. Furthermore, there is some evidence that the automobile was used in the farm operations and therefore these items were properly chargeable thereto.

Next appellant Ponder contends that certain items inventoried at a total value of $450 were improperly charged off. Some of these items of small value had been appropriated by relatives, some had been worn out in farm use. The trial court was evidently of the view that the small items appropriated by relatives of the deceased were taken without fault on the part of the executor, and that attempts to recover them would be more expense to the estate than they were worth. The farm tool showing of complete depreciation in service was sufficient. The point has not merit.

[15] Respecting fee calculations it must be observed that the whole matter of adjustment of fees is within the sound discretion of the trial court, and the weighing of the basis of fee calculation against extraordinary fees is a part of that process. In re Estate of Lampman, supra. The trial court cut down the objector's claim for $18,000 for extraordinary services and allowed only $9,000. It reduced the claim for extraordinary attorney's fees from $15,000 to the sum of $8,000, plus $4,000 for a special attorney in the trial of the account objections, but it adjusted even these last named special attorney fees by what amounted to a surcharge of $2,000 out of that fee against the fees allowed to the executor.

[16] Both appellant Ponder and the executor question the sufficiency of the findings respecting various orders of the court in connection with its settlement of the account and adjustment fees and surcharges. Findings are not generally required on the settlement of accounts of administrators. In re Estate of Dow, 91 Cal.App.2d 420, 432, 205 P.2d 698; In re Estate of Machado, 186 Cal. 246, 251 [2], 199 P. 505; In re Estate of Bell, 58 Cal. App.2d 333, 339 [6], 136 P.2d 804; In re Estate of Tretheway, 32 Cal.App.2d 287, 293 [8], 89 P.2d 679; Douglas v. Westfall, 113 Cal.App.2d 107, 114 [5], 248 P.2d 68.

The estate here in question has been already delayed settlement far beyond normal limits. Full enjoyment by the one who was the primary object of decedent's bounty has likewise been delayed. A full and fair hearing was had before the trial court. That court to the best of its human ability resolved the maze of claims, counterclaims and objections. No charge of dishonesty in accounts nor of fraud nor of misappropriation of funds are either made or proved. It is time this matter was closed finally.

That portion of the order providing for interest at 4% per annum on deferred payments of annual income to the life beneficiary is hereby modified, adding thereto the following: "Interest at a like 4% per annum payable from the corpus of the estate, shall continue in favor of said life beneficiary after December 23, 1955, until date of distribution."

The order is affirmed as modified. All other orders appealed from are affirmed. Each party shall bear his own costs.

MUSSELL, Acting P. J., concurs.

173 Cal.App.2d 58

Frank W. BABCOCK, Plaintiff and Appellant,

v.

CRAFTS 20 BIG SHOWS, INC., a California Corporation, West Coast Shows, Inc., a California Corporation, Robert Folz and L. G. Chapman, individually and as partners and joint venturers, doing business as Foley and Burk, Foley and Burk, a joint venture, Defendants and Respondents.

Civ. 9553.

District Court of Appeal, Third District, California.

Aug. 12, 1959.

Hearing Denied Oct. 7, 1959.

Action by buyer against other buyers of exclusive privileges of supplying carnival attractions to fairs and community celebrations in California for damages sustained due to other buyers' alleged monopolistic combination by which other buyers intended to make it financially impossible for buyer to compete with them. The Superior Court, Sacramento County, Albert H. Mundt, J., entered judgment based upon an order sustaining a demurrer to buyer's amended complaint without leave to amend, and buyer appealed. The District Court of Appeal, Van Dyke, P. J., held that complaint was sufficient to allege violation of statute banning combinations of capital, skill, or acts in restraint of trade or commerce, and that complaint contained a sufficient pleading of injury by reason of defendants' acts to meet test of a general demurrer.

Judgment reversed.

1. Monopolies ⚷28(6.3)

Complaint, which alleged that plaintiff and defendants were all engaged in business of buying exclusive privileges for supplying carnival attractions to fairs and community celebrations in California, and that defendants conspired to make an unreasonably low joint bid if plaintiff did not bid, but, if he did bid, to make a high joint bid at little or no profit to them, was sufficient to allege violation of statutes banning combinations of capital, skill, or acts in restraint of trade or commerce. West's Ann. Bus. & Prof.Code, § 16720.

2. Monopolies ⚷28(1.6)

Enforcement of legislation banning monopolistic combinations is committed, in the main, to Attorney General and district attorneys, but persons who have been injured in business or property by reason of anything forbidden or declared unlawful by such statutes may sue to recover twofold the damages sustained by them. West's Ann.Bus. & Prof.Code, § 16750.

3. Monopolies ⚷28(6.7)

Complaint, which alleged that parties were engaged in buying exclusive privileges to supply carnival attractions to fairs and community celebrations in California, that defendants would have submitted a bid of $106,500 for such privilege in regard to state fair had plaintiff made no bid but, when plaintiff bid $117,500, defendants, pursuant to combination in restraint of trade, submitted bid of $132,500 to plaintiff's damage in sum of $50,000, contained a pleading of injury by reason of defendants' acts sufficient to meet test of a general demurrer. West's Ann.Bus. & Prof.Code, § 16750.

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Austin Clapp, Woodside, for appellant.

Charles Bagby, San Francisco, for respondents.

VAN DYKE, Presiding Justice.

This is an appeal from a judgment based upon an order sustaining a demurrer to plaintiff's amended complaint without leave to amend.

In substance the complaint alleges the following: Plaintiff and the defendants are all engaged in the business of buying exclusive privileges for supplying carnival attractions to various fairs and community celebrations in California. Prior to December 1956 they were all in competition with each other and their position in the business was such that among them they did about 80 percent of the total business in the state. Competition was keen. During the year prior to the commencement of this action the defendants conspired and agreed to combine their capital and skill, with the purpose of creating and carrying out competitive restrictions in the business. To accomplish this they intended, by combining, to drive plaintiff out by making it financially impossible for him to compete with them, and then having thus come into a position of dominance and control they intended to fix and maintain unreasonably low prices for the privilege of supplying carnival attractions. Accordingly, they conspired and agreed that they would not bid for the privilege of furnishing carnival attractions in competition with each other, but would bid jointly, making unreasonably low bids if plaintiff did not bid, but if he did bid then they would jointly bid higher even though their joint bid would be at such a price as to permit little or no profit to them. Having so conspired, and plaintiff having bid for the privilege of supplying carnival attractions for the State Fair in 1957, the defendants submitted their joint bid substantially higher than plaintiff's bid, which they would not have done save for such plan and thereby obtained the privilege to plaintiff's damage in the sum of $50,000 through his loss of the privilege.

Section 16720 and following of the Business and Professions Code (the Cartwright Act) contain California's legislation banning combinations of capital, skill or acts in restraint of trade or commerce. Section 16720 provides that:

> "A trust is a combination of capital, skill or acts by two or more persons for any of the following purposes:
>
> "(a) To create or carry out restrictions in trade or commerce.
>
> * * * * * *
>
> "(c) To prevent competition in * * * sale or purchase of * * * any commodity."

[1] The allegations are sufficient to state a violation of the statutes. They show a combination formed with the intent to arbitrarily use its combined power to force weaker competitors out of business. If the combination is successful it will stifle, or at least lessen materially, competition in the business. Clearly had the four parties combined they would be in the position of dominance in the field. The same effect will be reached if the purposes of the combination of three former competitors succeed in eliminating the fourth.

> "* * * [I]f it [the combination] arbitrarily used its power to force weaker competitors out of business, * * * it puts a restraint upon * * * commerce." United States v. E. I. DuPont De Nemours & Co., C. C., 188 F. 127, 151.
>
> "* * * [P]laintiff does have the right to have its business protected if there is concert of action directed at plaintiff, which results in its removal from competition.
>
> "* * * A suppression of competition necessarily restrains commerce * * *. The purpose of the anti-trust laws * * * is thwarted if group-power is utilized to eliminate a competitor who is equipped to compete." William Goldman Theatres, Inc. v. Loew's, Inc., 3 Cir., 150 F.2d 738, 742, 743.

The purpose of the combination was to restrict competition by (1) combining three of the dominant competitors in the field and (2) eliminating the fourth. The combination made and maintained with those ends in view was unlawful.

[2, 3] A serious question is presented concerning the right of plaintiff to maintain the action. The enforcement of the legislation banning monopolistic combinations is committed in the main to the Attorney General and to the district attorneys. Section 16750 sets up the conditions under which private actions can be maintained and limits such actions to persons who have been injured in business or property "by reason of anything forbidden or declared unlawful" by the statutes. Such persons may sue to recover two-fold the damages sustained by them. Although the

difficulties of proof may prove insurmountable we are not here concerned with that feature. Plaintiff has alleged that pursuant to the purposes of the combination respondents would have submitted a bid of $106,500 had plaintiff made no bid. But when plaintiff bid $117,500 then respondents submitted a bid of $132,500. He alleges that, but for the combination and the unlawful intent to drive him out of business, he would have been the high bidder and would have obtained the privilege; that by being unlawfully deprived of it he suffered damages in the sum of $50,000. We think there was here a sufficient pleading of injury by reason of the acts of the respondents to meet the test of a general demurrer.

Accordingly, the judgment appealed from is reversed.

PEEK and SCHOTTKY, JJ., concur.

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172 Cal.App.2d 731

Julia Virginia NOE, Plaintiff and Appellant,

v.

TRAVELERS INSURANCE COMPANY, a corporation, First Doe, Second Doe, Third Doe and Fourth Doe, Defendants and Respondents.

Civ. 18264.

District Court of Appeal, First District, Division 1, California.

Aug. 10, 1959.

Hearing Denied Oct. 7, 1959.

Action by employee against her employer's insurance carrier. The Superior Court, City and County of San Francisco, Milton D. Sapiro, J., sustained demurrer, without leave to amend, to the two-count complaint, and the plaintiff appealed. The District Court of Appeal, Tobriner, J., held that in the event of the employer's insurance carrier's negligent delay in providing, and wanton misconduct in refusing to provide, medical care to injured employee, with the consequence that the temporary injury becomes permanent, the employee's exclusive remedy is under the Workmen's Compensation Law by way of petition to the Industrial Accident Commission, and employee has no remedy by way of action to recover damages from employer and insurer.

Affirmed.

1. Workmen's Compensation 🔑2087

In the event of the employer's insurance carrier's negligent delay in providing, and wanton misconduct in refusing to provide, medical care to injured employee, with the consequence that the temporary injury becomes permanent, the employee's exclusive remedy is under the Workmen's Compensation Law by way of petition to the Industrial Accident Commission, and employee has no remedy by way of action to recover damages from employer and insurer. West's Ann.Labor Code, §§ 3201 et seq., 3850, 3852, 4600, 4604, 5300(a, b), 5301, 5304; West's Ann.Const. art. 20, § 21.

2. Appeal and Error 🔑917(1)

Where the case came to the District Court of Appeal upon the sustaining of a demurrer, without leave to amend, to a two-count complaint, the District Court of Appeal accepted as true the pleaded facts.

J. Adrian Palmquist, David M. McGahey, Oakland, Francis T. Cornish, Berkeley, for appellant.

O'Connor, Moran, Cohn & Hall, San Francisco, for respondents.

TOBRINER, Justice.

[1] Appellant's suit against her employer's insurance carrier for negligent delay in providing, and wanton misconduct in refusing, medical care raises the question whether such a liability can withstand the exclusive sweep of the Workmen's Compen-

sation Act, Labor Code, § 3201 et seq. As we explain in this opinion, we do not think it can.

[2] The case comes to us upon the sustaining of a demurrer, without leave to amend, to a two-count complaint; we therefore accept as true the pleaded facts. Count One alleges that appellant on July 19, 1955, in the course of her employment with National Automotive Fibers, Inc., injured her back. Respondent served as the insurance carrier for this concern, and one of the benefits under that contract consisted of furnishing proper medical treatment to an injured employee.

Respondent did undertake to provide the promised medical care. In January of 1956 the doctor chosen by respondent for such purpose recommended and requested authorization for surgery. Despite repeated requests for such authorization, respondent only approved of the surgery 14 months later, on March 6, 1957. The complaint alleges that due to respondent's negligent failure to follow its own doctor's recommendations, appellant has been injured to the extent of $150,000.

Count Two contains all the allegations of Count One, but in addition states that defendant willfully and wantonly both failed to perform its duty to provide medical care and also ignored its own doctor's recommendations. Appellant therefore seeks punitive damages in Count Two.

We first direct our attention to Count One.

Appellant's contention that the carrier's arrogation to itself of the authority to delay the operation gave it a third party status, subjecting it to liability additional to the Code, and that the resultant development of the temporary into a permanent disability constituted a new and further injury, calls for an analysis of the function and scope of the act. For the purpose of this discussion, since Labor Code, section 3850, provides "employer" includes "insurer" and since the insurer is subrogated to the rights and duties of the employer (Fitzpatrick v. Fidelity & Casualty Co., 1936, 7 Cal.2d 230, 233, 60 P.2d 276), we shall treat the terms "employer" and "insurer" interchangeably.

Workmen's compensation contemplates a substitution of the contractual rights and obligations which normally flow between worker and employer with a complete and exclusive statutory scheme based not upon contract but upon status. The relationship of employer and employee itself generates the rights and obligations; the legislation describes the content and extent of those rights and obligations.

The obligation to provide medical treatment to the injured employee stems from the constitutional and statutory provisions. Article XX, section 21, of the California Constitution provides that the Legislature is "vested with plenary power * * * to create and enforce a complete system of workmen's compensation * * *. A complete system of workmen's compensation includes adequate provisions for the comfort, health and safety and general welfare of any and all workmen * * * to the extent of *relieving from the consequences of any injury* * * * sustained by workmen in the course of their employment * * * also * * * full provision for such medical, surgical, hospital and other remedial treatment as is requisite to cure and *relieve from the effects of such injury*; * * *." (Italics added.) Pursuant thereto the Legislature enacted a "complete system of workmen's compensation" (Labor Code, § 3201) which specifies in section 4600 the employer's obligation to provide "[m]edical, surgical, and hospital treatment, including nursing, medicines, medical and surgical supplies * * * which is reasonably required to cure or relieve from the effects of the injury * * *." In case of the employer's "neglect or refusal reasonably to do so," the section provides, "the employer is liable for the reasonable expense incurred by or on behalf of the employee in providing treatment." "Controversies * * * arising under this chapter shall be determined by the commission * * *." § 4604.

The Legislature placed the exclusive power of enforcement of these obligations in the Industrial Accident Commission. Labor Code, section 5300, provides,

> "All the following proceedings shall be instituted before the commission and not elsewhere, except as provided in Division 4.
>
> "(a) For the recovery of compensation, or concerning any right or liability arising out of or incidental thereto.
>
> "(b) For the enforcement against the employer or an insurer of any liability for compensation imposed upon him by this division in favor of the injured employee * * *."

Section 5301 again explicitly states the commission commands "full power, authority and jurisdiction to try and determine finally all the matters specified in Section 5300 * * *." Relating back to the above-quoted sections 4600 and 4604, pertaining to the obligation to provide medical care, section 5304 gives the commission "jurisdiction over any controversy relating to or arising out of sections 4600 to 4605 inclusive * * *."

This correlation of rights and exclusive remedies of enforcement through the commission has, of course, found articulation in the cases. We initially consider four decisions which hold that the employer who fails to provide medical treatment must pay the costs of such care procured by the employee. Although we recognize that these cases do not reach our specific problem, that is, the liability of the employer for the consequences of such failure in the form of a temporary injury becoming permanent, the cases do define the nature of the obligation and the means of its enforcement.

Pacific Indem. Co. v. Industrial Accident Commission, 1948, 85 Cal.App.2d 490, 193 P.2d 117, declares medical treatment is a "benefit" under the act, covered as compensation under Labor Code, section 3202, and therefore exclusively within the jurisdiction of the commission. Union Iron Works v. Industrial Accident Commission, 1922, 190 Cal. 33, 210 P. 410, upheld the commission's award of the costs of an operation to an injured employee, who upon refusal of surgery by the employer's physicians, underwent successful surgery by a doctor of his own choice. The court held that such failure of "petitioners' physicians to operate * * * was tantamount to a refusal to furnish the treatment seasonably required by the statute." 190 Cal. at page 40, 210 P. at page 413. Draney v. Industrial Accident Commission, 1949, 95 Cal. App.2d 64, 212 P.2d 49, likewise upholds the commission's award of costs of medical care upon failure of the employer to provide it. Finally Pacific Electric R. Co. v. Industrial Accident Commission, 1950, 96 Cal.App.2d 651, 216 P.2d 135, sustains the commission in granting a petition for surgery at the employer's expense, after adequate notice of such request to the employer and his refusal to furnish such treatment.

The statutory provisions, as interpreted by these decisions, make it clear that the Legislature did contemplate a situation in which the employer or the compensation carrier refused reasonable medical and surgical care; the statutory scheme provides a remedy by petition to the commission. Our question narrows, then, to the right of such an employee to forsake the remedy and to obtain damages from the errant employer or carrier for the injurious consequences of its deficient or delayed performance of such service. In the words of appellant, "[I]s an insurance carrier which steps beyond the position of carrier and directs the manner in which the injuries shall be treated * * * a 'third person'" within the meaning of Labor Code, section 3852, which preserves the employee's actions for damages against "any person other than the employer?"

Neither the cases nor the underlying legislation really support appellant's affirmative answer to this question. We initially discuss two cases which reject that position; then the decision upon which she relies; finally, the legislative considerations.

The first decision in substantial opposition to appellant, Hazelwerdt v. Industrial Indemnity Exchange, 1958, 157 Cal.App.2d 759, 321 P.2d 831, denies the liability of a carrier in a suit against an insurance company and a doctor employed by it premised upon the ground that the company conspired with the doctor to refuse "to furnish plaintiff with any medical, hospital, surgical and psychiatric treatment, thereby compelling plaintiff to employ the services of private physicians." 157 Cal.App.2d at page 761, 321 P.2d at page 832. The Second District Court of Appeal held the complaint did not state a cause of action, saying: "In effect plaintiff's complaint asserts that defendant failed to provide him with certain medical and surgical treatment which he reasonably needed and which defendant was required to furnish pursuant to the mandate of the Industrial Accident Commission. The allegations of conspiracy do not alter the nature of defendant's alleged acts and omissions. * * * Defendant's obligation to furnish such care was established by the Industrial Accident Commission pursuant to workmen's compensation law, and defendant's responsibility for failing to meet that obligation should also be determined before that tribunal." 157 Cal.App.2d at page 763, 321 P.2d at page 833.

If the intervention of a third party in the form of a coconspirator does not transmute the employer's liability into that of a person other than the employer, the splitting of the employer's own identity into two parts cannot do so.

The second opposing case, Penn v. Standard Accident Insurance Co., 1957, 4 A.D.2d 796, 164 N.Y.S.2d 618, holds "the charge" that a carrier delayed medical treatment for 21 days was "solely one of nonfeasance" and fell under the "exclusive remedy" of the Workmen's Compensation Law. 164 N.Y.S.2d at page 620.

Appellant, however, places her main reliance upon Duprey v. Shane, 1952, 39 Cal. 2d 781, 249 P.2d 8. There plaintiff, a practical nurse, employed by the Shane Diagnostic Foundation, a partnership owned by Dr. Shane and his wife, sustained an injury in the course of her employment. Dr. Shane and Dr. Harrison, a coemployee, treated the injury. Plaintiff received a workmen's compensation award but then sued both doctors for malpractice. Defendants demurred to the jurisdiction of the court; the demurrers were overruled, and a verdict for plaintiff ensued. On appeal the California Supreme Court affirmed, adopting Justice Peters' appellate opinion as its own, stating: "[W]here, as here, it is perfectly apparent that the person involved—Dr. Shane—bore towards his employee two relationships—that of employer and that of a doctor—there should be no hesitancy in recognizing this fact as a fact." 39 Cal.2d at page 793, 249 P.2d at page 15.

The Shane case, in substance, is the antithesis of the instant one: there, the doctor who *was* the employer treated the employee negligently; the employer assumed no new role but exercised his pre-existing one. Shane does not transform the employer *into* the doctor to fashion a new personality by some Svengali projection; it merely recognizes that the doctor who did treat the employee happened also to be her employer. In brief Shane *was* a doctor, and a living "third party" physician who affirmatively and medically treated the employee and did so negligently; here, we have no treatment, and no doctor, except the fictionalized one of an insurance company transformed into the spirit, the ghost, of one.

But, beyond the legalistic objection to appellant's position, we must point out that if delay in medical service attributable to a carrier could give rise to independent third party court actions, the system of workmen's compensation could be subjected to a process of partial disintegration. In the practical operation of the plan, minor delays in getting medical service, such as for a few days or even a few hours, caused by a carrier, could become the bases of independent suits, and these could be many and manifold indeed. The uniform and exclusive application of the law would become honeycombed with independent and conflicting rulings of the courts. The objective of the Legislature and the whole pattern of workmen's compensation could thereby be partially nullified.

It is true, however, that, as appellant argues, insurance adjusters should obtain no sanction in overruling or "directing competent physicians and surgeons." Flagrant interference by a carrier with rendition of medical care, such as described in this complaint, should generate swift relief in the commission. The courts support the commission in affording it. Pacific Electric R. Co. v. Industrial Accident Commission, 1950, 96 Cal.App.2d 651, 216 P.2d 135; Simonton v. Industrial Accident Commission, 1931, 119 Cal.App. 15, 5 P.2d 959.

Appellant's further contention under Count One is that the carrier's disregard of "the advice of the physician constitutes a new injury, or breaks the chain of causation from the original injury" and hence supports an independent suit for damages. The theoretical rules of proximate causation do not hold that an omission to perform an act breaks "the chain of causation" (Flies v. Fox Bros. Buick Co., 1928, 196 Wis. 196, 218 N.W. 855, 60 A.L.R. 357), and this is particularly pertinent when the "omission" consists of the breach of a duty imposed by a statute which affords its own remedy for that very breach.

Appellant frankly admits no California cases establish her position. Those she cites disclose a factual situation in which the employer or carrier committed an affirmative intervening act upon which liability fastened. Thus in Aetna Life Ins. Co. v. Watts, 1931, 148 Okl. 28, 296 P. 977, the carrier directed the removal of the patient to a different hospital and in the course of transportation his broken leg suffered a further injury. Pacific Coast Casualty Co. v. Pillsbury, 1915, 171 Cal. 319, 153 P. 24, involves "an additional injury to the employee from an accident * * * occurring after the employment had ceased * * *." 171 Cal. at page 323, 153 P. at page 26. The cryptic opinion in Ellamar Mining Co. of Alaska v. Possus, 9 Cir., 1918, 247 F. 420, apparently rests upon a different rule than that of California as to an aggravation of the industrial injury by the treating doctor.

We are unable to inject into California law the thin distinction urged by appellant in the face of antithetical general rules and the untoward effect it may impose upon the statutory scheme which we have described above.

Count II, which rests upon a "wilful" failure to furnish medical care which "did not occur in the performance of * * * [appellant's] duty as an employee" and therefore "is not limited by the provisions of the Labor Code," falls into the void of a failure to show an intervening personal assault of the employer or carrier.

The count relies upon Conway v. Globin, 1951, 105 Cal.App.2d 495, 233 P.2d 612, in which the Third District Court of Appeal held that "allegations that the plaintiff's injuries resulted from the defendant employer's wilful attack upon plaintiff" describe an injury "which is not a risk or condition of the employment" (105 Cal.App.2d at page 498, 233 P.2d at page 614) and hence an independent suit is not barred by the act. The case and any liability conceivably arising from it involves the rare situation "where the employer, an individual, personally committed a wilful, malicious and intentional personal assault upon the employee * * *." 18 Univ.Pitt.L.R. (1956–1957) 81, 90; 42 Calif.L.R. (1954) 852. We have no counterpart to such facts here.

We affirm the judgment.

BRAY, P. J., and FRED B. WOOD, J., concur.

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Gilbert Leho KIIHOA, Defendant and Appellant.*

Cr. 6610.

District Court of Appeal, Second District, Division 2, California.

Aug. 13, 1959.

Hearing Granted Oct. 7, 1959.

Defendant was convicted in Superior Court of Los Angeles County, H. Burton Noble, J., of sale of narcotics, and he appealed. The District Court of Appeal, Herndon, J., held that prior arrest and release constituted no bar to subsequent prosecution of defendant for offense.

Affirmed.

1. Criminal Law 🔑175

Legality or illegality of first arrest, after which defendant, who allegedly had sold heroin, was held for 51 hours and then released without any charges being filed, was immaterial and such prior arrest and release constituted no bar to subsequent prosecution of defendant on same charge.

2. Criminal Law 🔑173

Jeopardy does not attach until defendant has been placed on trial before an impaneled jury or until first witness has been sworn or defendant has pleaded guilty.

3. Criminal Law 🔑204

Where defendant, who was being tried for selling heroin, did not affirmatively plead defense of former jeopardy, he waived it. West's Ann.Pen.Code, § 1017.

4. Criminal Law 🔑37

Where defendant had ready access to heroin and was willing to make sale to deputy sheriff, failure of deputy sheriff to identify himself as deputy sheriff or to wear a uniform was not entrapment.

5. Criminal Law 🔑661

In prosecution for sale of heroin, failure of prosecution to call as witness the informant, who would have been material witness because of his knowledge of sale, did not deprive defendant of fair trial or amount to a suppression of evidence.

6. Criminal Law 🔑662(1)

Right of accused to be confronted with witnesses is right to have witnesses testify in his presence and right of accused to cross-examine them, and it is not required that all witnesses or persons who may have knowledge of crime be produced in court or called to testify.

7. Poisons 🔑9

Evidence supported conviction for sale of narcotics.

◆

Gilbert Leho Kiihoa, in pro. per.

Stanley Mosk, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., Jack K. Weber, Deputy Atty. Gen., for respondent.

HERNDON, Justice.

A jury found appellant guilty of a charge of selling heroin and he was sentenced to State Prison. He appeals from the judgment of conviction.

On the evening of April 23, 1958, Deputy Sheriff Trujillo, who was then assigned to a narcotics detail, drove to the Spanish Kitchen, a restaurant and bar located in Duarte. The officer was accompanied by one Robert Stough, who was identified as a confidential informant. About 15 minutes after Trujillo and Stough had entered the cafe appellant entered and sat at the bar with one Frank Leyva. Stough walked over to appellant and conversed with him briefly. Stough then returned to Officer Trujillo and spoke to him. The court sustained appellant's objections to questions designed to elicit the substance of these conversations. After Stough had reported to the officer, they proceeded to a restroom at the rear of the cafe and were momentarily joined by appellant. Appellant told the two men that Leyva did not want to deal with them as he didn't know Officer Trujillo and had seen two "Narcos" (meaning narcotics officers) nearby, but that he would "deal" with Trujillo and

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* Opinion vacated 3 Cal.Rptr. 1, 349 P.2d 673.

Stough through appellant. The officer asked how much a gram of "junk" would cost. Appellant answered that it would be $17, that Trujillo should give him the money and he would give it to Leyva, that Leyva would give him the "junk" and that he would deliver it. Trujillo then gave appellant $17 and appellant then inquired if they "wanted to fix there". The officer testified that in the jargon of the narcotics trade "a fix" refers to an intravenous injection of heroin. The officer replied that they did not have their "fit" or "outfit" and that they would wait for him in the car in front of the cafe. It was explained by the officer that the "fit" includes such apparatus as a needle, spoon, eyedropper, and a piece of cotton.

Trujillo and Stough went to their car which was parked in front of a vacant lot east of the cafe some 15 or 20 feet away. They waited for 5 or 10 minutes and observed Leyva leave his car and later return. Shortly thereafter appellant approached, entered the officer's vehicle and handed over a package or bindle. Two days later Trujillo again saw appellant in front of the Spanish Kitchen. At that time, after first explaining that another pusher had taken money but failed to return with either heroin or money, appellant stated: "* * * I should never have trusted this person * * * because he would always 'burn' people * * *." Appellant said to the officer that "whenever I wanted to score I should wait for him * * * and that he could score all he wanted." It was explained that "to score" is to purchase narcotics.

A forensic chemist analyzed the powder inside the bindle delivered at the first meeting and found that it was heroin.

On July 16, 1958, appellant was arrested by Officer Renteria, another deputy sheriff, on telephonic instructions and information received from Sergeant Sewards, a superior officer. Neither Renteria nor Sewards had participated in the transactions heretofore detailed. The arrest, however, was based on information relating to those transactions.

Appellant called Sergeant Sewards as a defense witness and developed the fact that following his arrest on July 16th appellant was held in custody for some 51 hours and then released without any charges being filed. Appellant also developed the fact that he had thereafter filed an action for false arrest against Officer Renteria. Sometime later, on September 29, 1958, the information was filed instituting the present proceedings and appellant was again arrested on the same charge, that is to say, on the charge of making the sale of heroin on April 23, 1958, as above recounted.

To counter the apparent suggestion that appellant's second arrest was motivated by the false arrest action, the prosecution introduced rebuttal evidence to explain why appellant had been released after the first arrest and why at a later time he was again arrested and prosecuted on the same charge. Sergeant Sewards testified that no complaint was filed following appellant's first arrest because the confidential informant had subsequently advised the sheriff's office that he could not be named and could not testify because he had been threatened with physical harm should he become involved as a result of the arrest and conviction of said Leyva. It was the policy of the sheriff's office not to divulge the name of informants when it appeared that their safety would be jeopardized, even if it meant the release of a suspect. Sergeant Sewards further testified that they decided to proceed at the later date because he had been advised by the father of Robert Stough that the latter had left California and was living somewhere in Arizona.

Appellant was represented by counsel at the trial, but, appearing in this court in propria persona, he advances the following contentions: (1) that his first arrest was illegal; (2) that the prior arrest amounted to former jeopardy; (3) that he was entrapped; (4) that the case of the prosecution was inherently improbable as shown by his release after his first arrest and by the fact that his second arrest on the same charge followed his commencement of a civil action against one of the officers; and

(5) that he was denied a fair trial because the prosecution failed to produce the informant as a witness and thereby suppressed material evidence.

[1, 2] We find no merit in any of these contentions. The legality or illegality of appellant's first arrest is wholly immaterial. The present record does not contain any evidence to prove the illegality of that arrest, and it is quite apparent from the record that the contention here made was not advanced as a theory of defense in the trial court. In any event, the prior arrest and release constituted no bar to the subsequent prosecution for the same offense. People v. Vacca, 132 Cal.App.2d 8, 9, 281 P.2d 315. It is well settled that jeopardy does not attach until a defendant has been placed on trial before an impaneled jury or until the first witness has been sworn or until he has pleaded guilty. People v. Ayala, 138 Cal.App.2d 243, 248, 291 P.2d 517; People v. Blau, 140 Cal.App.2d 193, 214, 294 P.2d 1047.

[3] In the instant case no criminal proceedings were instituted against appellant until shortly before his second arrest. Furthermore, the defense of former jeopardy must be affirmatively pleaded and, in the absence of such plea, is deemed waived. Penal Code, § 1017; In re Lozoya, 146 Cal.App.2d 702, 703–704, 304 P.2d 156; People v. Mims, 136 Cal.App.2d 828, 833, 289 P.2d 539.

[4] In support of his contention that he was entrapped, appellant points to the fact that the officer's car bore no police markings; that the officer did not wear a uniform and did not identify himself as a deputy sheriff. It is manifest from our recital of the facts that appellant was not a victim of entrapment. People v. Braddock, 41 Cal.2d 794, 802, 264 P.2d 521; People v. Lindsey, 91 Cal.App.2d 914, 917, 205 P.2d 1114. The following language from People v. Neal, 120 Cal.App.2d 329, 333, 261 P.2d 13, 15, is fully applicable to the facts of the instant case: "There was evidence that appellant had ready access to the contraband heroin; that not only was he willing to make the sale for which he was convicted but he also volunteered to make a second sale to the officer. Appellant's obvious familiarity with the narcotics trade, coupled with his ability to produce a substantial quantity of heroin on short notice, all indicate beyond a reasonable doubt that he was not an innocent person who was induced to commit the crime charged by the trickery, persuasion or fraud of the officer."

[5, 6] We find no merit in defendant's contention that the failure of the prosecution to call as a witness the informant Stough deprived him of a fair trial or amounted to a suppression of evidence. Granted that Stough would have been a material witness, it was not the mandatory obligation of the State to call him. "The right of the accused to be confronted with witnesses is the right to have the witnesses testify in his presence and the right of the accused to cross-examine them; it is not required that all witnesses or persons who may have knowledge of the crime be produced in court or called to testify." People v. Taylor, 159 Cal.App.2d 752, 756, 324 P.2d 715, 718; People v. Parry, 105 Cal.App.2d 319, 323, 232 P.2d 899; People v. Tuthill, 31 Cal.2d 92, 98, 187 P.2d 16. The failure to call the informant, moreover, is explained by his absence from the jurisdiction. There is no evidence whatsoever that anyone connected with the prosecution procured or was in any way responsible for his absence. Although the name of the informant was voluntarily disclosed by the prosecution, appellant at no time during the course of the trial indicated any desire or intention to call him as a defense witness. See People v. Alexander, 168 Cal.App.2d 753, 336 P.2d 565; People v. Taylor, supra, 159 Cal.App.2d 752, 756, 324 P.2d 715.

[7] Appellant's contentions that the evidence is insufficient and that the case of the prosecution is inherently improbable require no discussion. They are clearly untenable. We have considered all of defendant's other arguments, and find noth-

ing in them to raise the slightest doubt concerning the fairness of appellant's trial or the justice of the conviction.

Affirmed.

FOX, P. J., and ASHBURN, J., concur.

PEOPLE of the State of California, Plaintiff and Appellant,

v.

William Gerald MOORE, Jr., Defendant and Respondent.*

Cr. 1528.

District Court of Appeal, Fourth District, California.

Aug. 13, 1959.

Hearing Granted Oct. 7, 1959.

Defendant was convicted of murder in first degree and verdict was without recommendation that defendant suffer life imprisonment. The Superior Court, San Bernardino County, Carl B. Hilliard, J., reduced punishment from death to life imprisonment, and the people appealed. The District Court of Appeal, Mussell, J., held that where Supreme Court, on remand, directed Superior Court to again hear and determine motion for new trial or reduction of degree of offense and to enter appropriate judgment or order, trial court's order reducing punishment for offense was not authorized.

Judgment and order reversed.

1. Criminal Law ⚷993

A trial court may grant a new trial or reduce degree or class of a crime. West's Ann.Pen.Code, § 1181, subd. 6.

2. Criminal Law ⚷1192

Where superior court was directed, on remand of case in which death penalty had been imposed, to again hear and determine motion for new trial or reduction of degree of offense and to enter appropriate judgment or order, trial court's order reducing punishment for offense was not authorized. West's Ann.Pen.Code, §§ 187, 1181, 1239 (b).

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., and Lowell E. Lathrop, Dist. Atty., San Bernardino, for appellant.

John C. McCarthy, Pomona, for respondent.

MUSSELL, Justice.

On April 4, 1956, defendant William Gerald Moore, Jr., was accused in an indictment of the crime of murder (Pen.Code, sec. 187) and it was alleged therein that on March 16, 1956, he did wilfully, unlawfully, feloniously and with malice aforethought, kill and murder one Hulda Hoag, a human being. A jury trial resulted in a verdict finding defendant guilty of the crime of murder in the first degree, a felony, as charged in the indictment, and the verdict was without recommendation that defendant suffer life imprisonment. On September 5, 1956, defendant's motion for a new trial was denied and the court pronounced judgment that the defendant "be committed to the state prison at San Quentin, California, and there be put to death by administration of lethal gas for the crime of murder in the first degree."

Following the automatic appeal to the Supreme Court pursuant to the provisions of Penal Code, section 1239(b), the judgment and the order denying the motion for a new trial were affirmed by that court on May 10, 1957 (People v. Moore, 48 Cal.2d 541, 310 P.2d 969). A dissenting opinion was filed therein by Mr. Justice Carter in which he stated that he did not agree that the evidence was sufficient to support the judgment of conviction of first degree murder. Mr. Justice Traynor concurred in this dissent and Mr. Justice Schauer also filed a dissenting opinion in which he stated in his opinion the conviction should be reduced to murder in the second degree. A petition for rehearing was denied on June 4, 1957. Carter, J., Traynor, J., and Schauer, J., were of the opinion that the petition should be granted. Remittitur issued on or about June 10, 1957, and was filed with the clerk of the Superior Court in the county of San Bernardino on June 12, 1957.

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* Opinion vacated 2 Cal.Rptr. 6, 348 P.2d 584.

In September, 1957, defendant filed in the Supreme Court a petition for a writ of habeas corpus and stay of execution, in which he alleged, among other matters, that the trial court abused its discretion in refusing to modify the verdict of the jury by reducing the offense to murder in the second degree. On December 12, 1958, the Supreme Court issued the following order:

> "The petition for a writ of habeas corpus is denied. The remittitur issued on June 10, 1957, in People v. Moore, Crim. 5992, is recalled and the judgment of this court filed May 10, 1957, in that case (48 Cal.2d 541 [310 P.2d 969]) is vacated; the judgment of the trial court and its order denying a motion for new trial are vacated; the cause is remanded to the Superior Court of the State of California in and for the County of San Bernardino with directions to again hear and determine the motion for a new trial or reduction of the degree of the offense and to enter the appropriate judgment or order in accordance with the views set forth in People v. Sheran, 49 Cal.2d 101 [315 P.2d 5]; People v. Borchers, 50 [Cal.2d 321, 325 P.2d 97]; and People v. Robarge, 41 Cal.2d 628 [262 P.2d 14]."

Following this action by the Supreme Court the People filed in that court a petition for order to vacate the order recalling the remittitur and vacating the judgment. In this petition it was contended by the Attorney General that there was no legal basis for the recall of the remittitur and a hearing was requested by the People.

On January 7, 1959, there was filed in the Supreme Court its order, as follows: "The petition to vacate the order filed December 12, 1958, is denied." On January 28, 1959, there was filed in the office of the County Clerk of the county of San Bernardino the following order of the Supreme Court, dated January 27, 1959:

> "Title of the court and case—The above entitled cause having been heretofore taken under advisement, and all and singular the law and premises having been fully considered,
>
> "It is ordered, adjudged and decreed by the Court that the judgment and order of the Superior Court in and for the County of San Bernardino denying motion for new trial in the above entitled cause, be and the same are hereby vacated; the cause is remanded to the Superior Court of the State of California in and for the County of San Bernardino with directions to again hear and determine the motion for a new trial or reduction of the degree of the offense and to enter the appropriate judgment or order in accordance with the views set forth in People v. Sheran, 49 Cal.2d 101, 315 P.2d 5; People v. Borchers, 50 [Cal.2d 321, 325 P.2d 97]; and People v. Robarge, 41 Cal.2d 628, 262 P.2d 14."

On March 18, 1959, the time set for hearing after the remand by the Supreme Court, the matter came before the Superior Court of San Bernardino county for hearing and counsel for defendant moved the court for a new trial or reduction of the degree of the offense charged. The trial court then made the following order:

> "Under the provisions of Section 1181 Penal Code the Court Orders the Verdict, heretofore finding the defendant guilty of the offense of Murder In The First Degree, a felony, without recommendation dated September 5, 1956, modified to impose upon the defendant, life imprisonment in lieu of death by administration of lethal gas for the crime of Murder In The First Degree, a felony.
>
> "Motion by counsel for the defendant for reduction of the degree of the offense is denied."

Defendant then waived time for pronouncing of judgment and the court ordered that he be punished by imprisonment in the state prison of the State of California for the rest of his natural life. The People appeal from this order, contending that the exclusive discretion to determine the penalty in first degree murder cases is fixed in the jury when the matter is tried by a jury and that a trial judge may not modify or reduce the punishment to sentence the defendant to life imprisonment in lieu of the death penalty decreed by the finding of the jury. The Attorney General in support of this contention cites Penal Code, section 190, as it read at the time the case was tried and as amended in 1957; Penal Code, section 190.1, added to the code in 1957, and cases such as People v. Green, 47 Cal.2d 209, 235, 302 P.2d 307; People v. Brust, 47 Cal.2d 776, 791–792, 306 P.2d 480; People v. Odle, 37 Cal.2d 52, 57–58, 230 P.2d 345; and People v. Thomas, 37 Cal.2d 74, 77–78, 230 P.2d 351. These cases hold generally that it is the exclusive province of the trier of fact to determine the penalty to be imposed in murder cases. This general rule is subject to possible exceptions, such as where there is error relating to the punishment imposed (People v. Thomas, supra, 37 Cal.2d at page 78, 230 P.2d at page 353). No such error appears in the record herein.

[1, 2] The Attorney General seems to concede that a trial court may under the provisions of Penal Code, section 1181, subdivision 6, grant a new trial or reduce the degree or class of the crime. In the instant case an examination of the judgment and order of the Supreme Court, dated December 12, 1958, clearly shows that the trial court was directed on remand to again hear and determine the motion for a new trial or reduction of the degree of the offense and to enter the appropriate judgment or order in accordance with the views set forth in People v. Sheran, 49 Cal.2d 101, 315 P.2d 5; People v. Borchers, 50 Cal.2d 321, 325 P.2d 97; and People v. Robarge, 41 Cal.2d 628, 262 P.2d 14.

The intention and purpose of the Supreme Court is clearly expressed in its order by the reference therein to the cases last above cited. The Sheran case deals with the reduction by the trial judge of a verdict of second degree murder to manslaughter. The court, in discussing Penal Code, section 1181, subdivision 6, there said (49 Cal.2d at page 109, 315 P.2d at page 10):

> "The power given by the statute (Pen.Code § 1181, subd. (6)) to the trial court is to be exercised as that court typically functions. (People v. Thomas, 25 Cal.2d 880, 904, 905, 156 P.2d 7). The section in effect provides that in lieu of granting a new trial, the trial court may reduce the degree or class of the crime if the evidence shows that the defendant is guilty of a lesser degree or of a lesser crime. Inasmuch as the trial court is given both the power to grant a new trial or reduce the degree or class of the crime in the same section, it would appear that the trial court's exercise of the power is the same in both cases."

In the Borchers case, supra, the court said (50 Cal.2d at page 328, 325 P.2d at page 101):

> "In passing on a motion for new trial it is not only the power but also the duty of the trial court to consider the weight of the evidence. (People v. Robarge, 1953, 41 Cal.2d 628, 633 [4], [5], 262 P.2d 14; People v. Sarazzawski, 1945, 27 Cal.2d 7, 15 [7], 161 P.2d 934.) The power and duty of the trial court in considering the question of the reduction of the class or degree of the crime are the same. (People v. Sheran, 1957, 49 Cal.2d 101, 109 [6], 315 P.2d 5.)"

And on page 330 of 50 Cal.2d, at page 102 of 325 P.2d:

> "The trial judge here is to be commended for his diligent alertness to the power and duty, reposed *only in trial courts*, to reappraise the weight of the evidence on motion for new trial. He very properly showed no hesitance in reducing the class of the homicide in

> the light of his determination, supported by a reasonable view of the evidence, that there was no sufficient showing of malice aforethought."

In the Robarge case, supra, it is said that (41 Cal.2d at page 633, 262 P.2d at page 17):

> "While it is the exclusive province of the jury to find the facts, it is the duty of the trial court to see that this function is intelligently and justly performed, and in the exercise of its supervisory power over the verdict, the court, on motion for a new trial, should consider the probative force of the evidence and satisfy itself that the evidence as a whole is sufficient to sustain the verdict. [Citations.] It has been stated that a defendant is entitled to two decisions on the evidence, one by the jury and the other by the court on motion for a new trial. [Citations.] This does not mean, however, that the court should disregard the verdict or that it should decide what result it would have reached if the case had been tried without a jury, but instead that it should consider the proper weight to be accorded to the evidence and then decide whether or not, in its opinion, there is sufficient credible evidence to support the verdict. [Citations.]"

The order and judgment of the trial court herein was limited to the determination of the motion for a new trial or a reduction of the degree of the offense, and the order reducing the punishment for the offense was not in accordance with or authorized by the order of the Supreme Court. The order is clearly a direction to grant or deny the motion for a new trial and if a new trial be denied, to determine by weighing the evidence whether or not a reduction of the degree of the offense should be ordered.

There was an automatic appeal to the Supreme Court herein and there the judgment of the trial court was first affirmed and later set aside. A petition for a writ of habeas corpus was denied, the remittitur was recalled and the judgment of the Supreme Court vacated. The petition of the Attorney General for an order vacating the order recalling the remittitur and vacating the judgment was considered by the Supreme Court and denied. Under these circumstances it is not our function or within our power to question the proceeding before the Supreme Court and, since the reduction of the punishment herein was not in accord with the directions of the Supreme Court, the judgment and order appealed from are reversed. The request to augment the record and the motion to dismiss the appeal herein are denied.

GRIFFIN, P. J., and SHEPARD, J., concur.

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172 Cal.App.2d 697

Loucylle Adams BEHR et al., Plaintiffs and Appellants,

v.

COUNTY OF SANTA CRUZ, Defendant and Respondent.

William R. JUNK et al., Plaintiffs and Appellants,

v.

COUNTY OF SANTA CRUZ, Defendant and Respondent.

No. 17747.

District Court of Appeal, First District, Division 1, California.

Aug. 10, 1959.

Hearing Denied Oct. 7, 1959.

Actions by property owners for damages from spread of fire originating in refuse dump owned and operated by county. The Superior Court, County of Santa Cruz, Curtiss E. Wetter, J., rendered judgment for county, and plaintiffs appealed. The District Court of Appeal, Bray, P. J., held that where all eye-witnesses placed location of origin of fire between 75 and 150 feet east of scoopmobile which was being used by county employee and testimony of fire ranger that fire started from action of scoopmobile was not based on any evidence and in fact was contrary to evidence, county was entitled to nonsuit with respect to count alleging that negligent operation by employee of scoopmobile ignited fire in dump.

Affirmed.

Opinion, 335 P.2d 144, vacated.

1. Appeal and Error ⚷345(1)

By filing motion for new trial plaintiffs extended time for appeal.

2. Appeal and Error ⚷23

Question of jurisdiction of District Court of Appeal to consider an appeal may be raised at any time.

3. Judgment ⚷203

There can be only one judgment in any case between the same parties.

4. Appeal and Error ⚷66

Where formal judgments entered showed on their faces that they applied only to verdicts with respect to the first of four counts in complaints, and not to granting of nonsuits with respect to other counts, while reviewing court could order trial court to make necessary amendments disposing of other counts, in view of fact that such method would require rebriefing of all points that were fully briefed and that all pertinent documents were before reviewing court, reviewing court would order that judgments be amended by adding thereto paragraphs dismissing causes of action with respect to which nonsuits were granted and notices of appeal would be treated as notices of appeal from judgments thus amended.

5. Counties ⚷223

In actions by property owners for damage to real and personal property from spread of fire originating in refuse dump owned and operated by county, contract between county and State Division of Forestry providing that State Forest Ranger should have charge of work of fire prevention and suppression in certain areas of county including dump site was properly admitted for sole purpose of showing what county did, not that that was sufficient nor that that was what it should have done, but as only a circumstance indicating the actual situation from which jury might draw proper conclusions from evidence and law.

6. Counties ⚷223

In action by property owners for damages to property resulting from fire that spread from county refuse dump, contract between county and State Division of Forestry providing that State Forest Ranger should have charge of work of fire prevention and suppression in areas of county including dump site was admissible on cross-examination to bring out all circumstances bearing on fire-fighting equipment available to dump.

7. Witnesses ⚷268(3, 6)

A cross-examiner may bring out all facts within knowledge of a witness involving things testified to on direct and which are material to a thorough understanding of the testimony, or to elicit any matter which may tend to overcome, qualify or explain the direct testimony.

8. Evidence ⚷333(1)

In action by property owners against county for damages resulting from spread of fire from county dump, refusal to admit official report made by fire ranger of his investigation of fire was not improper where admittedly he was not present at fire and report was based primarily upon statements made to him by other persons, and report was not admissible under either statute with respect to public or official books or records made in performance of duty by public officer or under Uniform Business Records as Evidence Act. West's Ann.Code Civ.Proc. §§ 1920, 1953e–1953h.

9. Evidence ⚷333(1)

Statute with respect to entries in public or other official books or records made in performance of duty by public officer and Uniform Business Records as Evidence Act were not intended to apply to reports based entirely upon hearsay. West's Ann.Code Civ.Proc. §§ 1920, 1953e–1953h.

10. Evidence ⚷555

Ordinarily, an expert witness must base his opinion either on facts personally observed or on hypotheses that find support in the evidence.

11. Counties ⚷224

In action against county for damage to property resulting from fire spreading from county refuse dump, wherein all eyewitnesses placed location of origin of fire between 75 and 150 feet east of scoopmobile which was being used by county employee and testimony of fire ranger that fire started from action of scoopmobile was not based on any evidence and in fact was contrary to evidence, county was entitled to nonsuit with respect to count alleging negligent operation by employee of scoopmobile igniting fire in dump. West's Ann. Vehicle Code, § 400.

12. Nuisance ⚷76

Where counts purportedly based on nuisance alleged that fire was caused by negligence in maintenance of dump and in operation of vehicle by county, nonsuit on ground that counts did not allege nuisance was propertly granted. West's Ann.Vehicle Code, § 400.

13. Nuisance ⚷76

Allegations in count of complaint against county brought by owners whose property was damaged by fire spreading from county dump, that county maintained dump in such manner as to be injurious to and to cause an obstruction to free use of plaintiffs' property and so as to interfere with comfortable enjoyment of life and property properly alleged nuisance. West's Ann.Civ.Code, § 3482; West's Ann.Gov. Code, § 25820.

14. Municipal Corporations ⚷736

A public agency or municipality may be liable for maintenance of a nuisance even though it is exercising a governmental function in activity at issue, and any person whose property is affected or whose personal enjoyment is lessened by a nuisance may maintain an action for damages.

15. Trial ⚷343

A general verdict imports a finding in favor of winning party on all averments of his pleading material to his recovery.

16. Counties ⚷143

Grant of power to county to maintain and operate a refuse dump including burning of refuse thereon protects county from liability for ordinary operation of dump and county has right to operate dump in usual and customary manner in which similar dumps are operated, however dump may not be operated in negligent manner or in such manner as to constitute a nuisance. West's Ann.Gov.Code, § 25820.

17. Trial ⚷343

Where jury found that dump was not operated in a negligent manner with respect to count based upon Public Liability Act alleging dangerous and defective conditions, and only basis for subsequent count alleging nuisance was that dump was operated in a negligent manner, finding of jury on first count was determinative of same issues under subsequent count and charge in subsequent count became moot. West's Ann.Gov.Code, § 53051 et seq.

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Lucas, Wyckoff & Miller, Santa Cruz, for appellants.

Wyckoff, Parker, Boyle & Pope, John L. McCarthy, Grunsky & Pybrum, Watsonville, for respondents.

BRAY, Presiding Justice.

Two actions by a number of property owners seeking damages to real and personal property from spread of a fire originating in a refuse dump owned and operated by defendant county were consolidated for trial. The two complaints are identical in their allegations except for parties plaintiff, and for the particular properties damaged, and are based upon three theories of recovery. The first count in each complaint is based on the Public Liability Act (Gov. Code § 53051 et seq.) and alleges dangerous and defective conditions. The second count alleges negligent operation by a county employee of a motor vehicle (self-propelled loader) which ignited a fire in the dump. The third count alleges maintenance of a nuisance. At the close of plaintiffs' evidence on the court's suggestion that the third count did not properly allege nuisance, plaintiffs amended their complaints to set up fourth counts alleging nuisance. The court granted nonsuits as to the last three counts. The jury rendered verdicts in favor of defendant on the first counts. Plaintiffs appeal from the judgments thereon and claim to appeal from the orders granting nonsuits.

Questions Presented.

[1] 1. Did plaintiffs effectively appeal from the orders granting nonsuits? Corollary to this question is—Is there a final judgment in the action?

2. Alleged error in admission and exclusion of evidence.

3. Was the granting of the nonsuits erroneous? Is the question moot?

1. Appeal.

July 24, 1956, the minute orders granting the nonsuits were entered.

July 27, the jury verdicts were rendered.

August 3, judgments on the jury verdicts were entered.

September 20, notice of appeal was filed.[1]

[2–4] The only formal judgments entered show on their faces that they apply only to the verdicts, and not to the granting of nonsuits. The notice of appeal refers only to the judgments entered August 3 and does not refer to the minute order of July 24. Thus, on the face of the record there is no appeal attempted from the orders granting nonsuits.[2] However, that fact under the circumstances here is not conclusive of the question of this court's jurisdiction to consider an appeal from the nonsuit orders. We first have to determine whether there has been a final judgment entered in the case. We are satisfied that there has not. There can be only one judgment in any case between the same parties. Gombos v. Ashe, 158 Cal.App.2d 517, 520, 322 P.2d 933. The situation here is somewhat similar to that in the Gombos case. There the trial court sustained a demurrer to the third cause of action and entered a judgment of dismissal thereon. The case proceeded to trial on the first and second causes of action and the plaintiffs recovered judgment thereon. That judgment was satisfied of record. The defendant then moved for a dismissal of the appeal filed from the judgment of dismissal on the ground that such judgment was not a final one.[3] After pointing out that, as here, the action was attempted to be disposed of piecemeal, "that a single object, although stated in several counts, was sought to be attained by the action, and that this single and unseverable object was arbitrarily attempted to be split up as the basis for two distinct judgments" (158 Cal.App.2d at page 521, 322 P.2d at page 935), the court held that the judgment on the first two causes of action was not a final judgment and therefore not appealable. So here, the judgments on the verdicts did not purport to embrace a final disposition of the entire cause. By express terms they were confined to only the first counts, and erroneously failed to include a recital with reference to the disposition of the second, third and fourth counts. In the Gombos case this court held that the appeal from the judgment on the third cause of action was premature, said judgment not being a final one, and that the judgment of dismissal on the first two counts was not a complete judgment because it did not, as it should have done, dispose of the third count. We then pointed out that the appellants were entitled to a determination by the appellate court of the validity of the judgment on the third count and that this could be accomplished by dismissing the appeal with instructions to the trial court to amend the interlocutory judgment on the first two causes of action by including a disposition of the third cause of action. Then the appellants could appeal from the portion of the amended judgment disposing of the third cause of action. That would have required rebriefing of the very points that had already been briefed. Therefore, in the interests of justice, we ordered the judgment to be amended by adding a dismissal of the third cause of action. We then treated the notice of appeal from the premature judgment of dismissal as a notice of appeal from the judgment as amended. So here, while we could order the trial court to make the necessary amendment to the last judgments as entered, such a method would require rebriefing of all the points now fully briefed. As all the pertinent documents are before this court, and in the interests of justice and to prevent unnecessary delay, we order that the judgments of August 3, 1956, be and they are amended by adding thereto a paragraph dismissing the second, third and fourth causes of action based upon the orders granting nonsuits thereto.

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[1] Plaintiffs moved for a new trial, thereby extending the time for appeal. The notice of appeal was timely, whether from the entry of the orders granting nonsuit or from the judgments on the verdicts.

[2] It is interesting to note that both parties assumed in their briefs that there was such an appeal and that this question was not raised until oral argument. Of course, the question of jurisdiction of this court to consider an appeal may be raised at any time.

[3] In Costa v. Regents of University of Cal., 103 Cal.App.2d 491, 229 P.2d 867, it was held that a minute order granting a nonsuit is in itself a judgment of dismissal and ordinarily as such is an appealable order.

This having been accomplished, the notice of appeal filed September 20 may be properly treated as a notice of appeal from the judgments as thus amended, and we do so treat it. This brings us to the appeal on the merits.

2. Admission and Exclusion of Evidence.

Plaintiffs make no claim that the evidence does not support the verdicts against them. Their only contention for reversal on the first cause of action is that the court erred in the admission and exclusion of certain evidence.

The Fire Control Agreement.

[5] The court over objection admitted a contract between defendant county and the State Division of Forestry, which provided that the State Forest Ranger should have charge of the work of fire prevention and suppression in certain areas of the county, which included the dump site. It also provided for fire stations, lookouts, personnel, facilities and equipment. The court informed the jury at some length that the contract was not admitted for the purpose of relieving the county from any obligation but merely for the purpose of showing what the county did in regard to the dump to suppress fire and to prevent the creation of fire, and "If * * * it be contended," as it was, "that nothing was done to meet that obligation, then it becomes material to see what the county did * * * Whether that is sufficient or not is for you to determine * * *"

Certainly the contract could not have been admissible to show that the defendant had either delegated its responsibility or was not the one primarily responsible for fire hazards in the dump. Assuming a duty, the foregoing would follow from the rule that a municipality is liable for the negligence or wrongful act of an employed independent contractor where the particular property or operation remains under the control of the municipality, where there is a positive duty imposed by law upon the municipality of such character that it cannot be delegated, or where the operations or work being performed are inherently dangerous. See 18 McQuillin, Municipal Corporations (3rd ed.) § 53.76, pp. 343–352; Mulder v. City of Los Angeles, 1930, 110 Cal.App. 663, 668, 294 P. 485, 487: "The city was not authorized to abdicate its powers or surrender to a private person its duty to exercise proper supervision of the work which it permitted to be done." But the contract was not admitted for that purpose and the jury was admonished in that regard.

The contract was admitted "only and solely for the purpose of showing what it did, not that that was sufficient nor that that is what it should have done, but it is only a circumstance indicating the actual situation from which you may draw the proper conclusion from the evidence and the law." This seems proper. For example, it showed that fire-fighting equipment and personnel were made available for the dump, in contrast to the evidence that the dump had no real fire-fighting equipment except an ax and a shovel.

[6, 7] The contract was admissible on cross-examination to bring out all the circumstances bearing on fire-fighting equipment available to the dump. A cross-examiner may bring out all the facts within the knowledge of a witness involving things testified to on direct and which are material to a thorough understanding of the testimony, or to elicit any matter which may tend to overcome, qualify or explain the direct testimony. People v. Dotson, 1956, 46 Cal.2d 891, 898, 299 P.2d 875; People v. Whitehead, 1952, 113 Cal.App.2d 43, 50, 247 P.2d 717.

The court properly admitted the agreement for the limited purpose expressed by it.

The Official Fire Report.

[8] One of the duties of the Fire Ranger following a fire was to investigate and make an official report concerning its cause. The court refused to admit the official report made by the ranger of his investigation of the fire in question. Admittedly he was not present at the fire. The report was based primarily upon statements made to him by other persons. Plaintiffs contend that the report was admissible under section 1920, Code of Civil Procedure, "Entries in public or other official books or records, made in the performance of his duty by a public officer of this State, or by another person in the performance of a duty specially enjoined by law, are prima facie evidence of the facts stated therein," or under the Uniform Business Records as Evidence Act, sections 1953e–1953h, Code of Civil Procedure. The report is of a similar type to an accident report made by police officers, concerning which the court in Hoel v. City of Los Angeles, 1955, 136 Cal.App.2d 295, 309–310, 288 P.2d 989, 997, said: "Not all official reports and not all business records are made competent by the cited sections of the code. Essentially accident reports, especially those compiled by police at the scene of an accident,—based on statements of participants, bystanders, measurements, deductions and conclusions of their own,—fail to qualify as admissible official records or business records. See Needle v. New York Rys. Corp., 227 App. Div. 276, 237 N.Y.S. 547, 549; Johnson v. Lutz, 253 N.Y. 124, 170 N.E. 517, 518. That accident reports are not admissible under statutes such as our Uniform Business Records as Evidence Act, Code Civ. Proc. §§ 1953e–1953h, was held in Palmer v. Hoffman, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645 [144 A.L.R. 719]. In McGowan v. City of Los Angeles, 100 Cal.App.2d 386, 392, 223 P.2d 862, 866, 21 A.L.R.2d 1206, this court said: 'The statute does not change the rules of competency or relevancy with respect to recorded facts. It does not make that proof which is not proof. It merely provides a method of proof of an *admissible* "act, condition or event". It does not make the record admissible when oral testimony of the same facts would be inadmissible.' This language was repeated in Reisman v. Los Angeles City Sch. Dist., 123 Cal.App.2d 493, 506, 267 P.2d 36, 45, in holding that certain reports prepared by public officials were inadmissible under section 1953f; and this was followed by application of the same principle to so-called public records."

In Harrigan v. Chaperon, 118 Cal.App.2d 167, 168, 257 P.2d 716, a report of a city fire inspector who was not present at the fire stating the cause of the fire was admitted in evidence without objection. It was the only purported evidence of the cause of the fire. The reviewing court held that as it was based entirely upon hearsay and therefore that section 1920, Code of Civil Procedure, was not applicable, it could not be considered evidence to support the court's finding of the cause of the fire.

[9] Here, had the fire ranger been testifying orally, his testimony, being based entirely upon hearsay, would not have been admissible.[4] Merely placing the same material in a written report could not replace the rules of evidence. The above mentioned code sections could never have been intended to apply to reports based entirely upon hearsay.

The court acted properly in excluding the report.

3. The Nonsuits.

The second counts alleged that defendant county so negligently operated at the dump a motor vehicle, a self-propelled loader, as to ignite a fire in the dump which spread to plaintiffs' properties and caused the damage complained of. Section 400, Vehicle Code, provides that a county is responsible to every person who sustains damage by injury to person or property "as the result of the negligent operation of any said motor vehicle by an * * * employee * * * when acting within the scope of his * * * employment * * *"

About 1 p. m. July 29, 1954, fire broke out in the rubbish dump owned, maintained and operated in the Santa Cruz mountains by defendant county. The general area is forested, in which there is grass and weed cover. The State Division of Forestry classifies the area as a Number One Fire Zone. In the opinion of the Chief Ranger it is not a safe place for the operation of an open rubbish disposal dump. The day of the fire was a high fire hazard one. The dump had two terraces, the upper being used by local garbage collectors and the lower by defendant and the public for disposal of all kinds of materials. The dumped material was thrown on top of the ground or over the bank. The material included wet garbage, brush, rags, bottles, cardboard, paper, shingles, wood and tree trimmings. Some of these materials created sources of ignition (bottles acting as magnifying glass) within the dump itself. Brush grew within the dump area itself and within 35 to 40 feet of a pile of brush and tree trimmings considered by one witness to be the place of origin of the fire. Prior to this fire there had been numerous fires in the dump, one of which almost escaped beyond the dump's confines. Fire in the dump was never actually out; the materials were smoldering almost constantly.

The pile of brush and tree trimmings deposited at the westerly end of the lower terrace of the dump projected onto the terrace. The caretaker had requested the defendant's road foreman in the area to send up a piece of equipment to push this material and other debris over the bank. In compliance with this request a county employee came to the dump with a scoopmobile to do the work. A scoopmobile or skiploader is a three-wheeled motor vehicle with two drive wheels in front and a steering wheel in the rear. It had a bucket on an arm which operated in front of the vehicle to pick up and drop materials and was equipped with rubber pneumatic tires. The front axle had a differential so that one of the drive wheels might spin while the other remained stationary. It was not equipped with a spark arrester but it had a muffler, which is considered a sort of arrester. The soil at the dump was sandy and a vehicle of this type is not a proper one for operation in that type of soil because of the risk of its getting stuck in the soil.

On the day in question, the scoopmobile went over the bank and became stuck as it was carrying brush off the terrace into the dump proper. Its front wheels were over the bank and resting upon brush and tree limbs, about four feet below the edge of the terrace, and its rear wheel was up on the bank, with its muffler and exhaust near the surface of the edge of the terrace. At the time the fire broke out the operator was engaged in attempting to extricate it which caused its wheels to spin. The burned out vehicle was found in the same position after the fire.

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[4] We are not dealing with expert testimony based upon assumed questions of fact. Such testimony of the Chief Ranger was admitted.

About 12:45 p. m. Ryder, a county employee, drove the scoopmobile to the dump and began working it there. While he was working Thompson, not a county employee, drove a pickup truck to the dump and unloaded it. He saw the scoopmobile working. He saw smoke but no fire between him and a station wagon and trailer. The scoopmobile was beyond them. Thompson was there about 10 minutes and left. He deemed the smoke as of no significance as there was usually smoke at the dump. Meyers, the county caretaker, testified that about the time that the scoopmobile got stuck he observed a small fire about 150 feet east of the scoopmobile. About the same time a high wind arose. Ryder tried to put the fire out with sand. Ryder, Meyers and Ericksen, also a county employee, tried to get the scoopmobile out. The fire jumped the road and hit a pine tree outside of the dump. The scoopmobile burned after the pine tree burned. Ericksen, who went down with his truck to pull the scoopmobile out, saw smoke. It was distant from the scoopmobile. Meyers left to get a heavier truck. As he did so he saw flames still distant from the the scoopmobile. When he returned the fire was all over the dump and outside it but the scoopmobile was not burning when Ryder drove into the dump with the scoopmobile he saw smoke or dust. About the time the scoopmobile got stuck the fire started at about the place where he first saw smoke. It spread from there towards the scoopmobile. After trying to put the fire out with sand, he put a log under the wheel of the scoopmobile and tried to get it out. Ericksen left with Meyers. The fire was small and still well away from the scoopmobile. Meyers returned with a neighbor, Clingan. Ryder was working desperately trying to keep the fire away from the brush by shoveling sand on it. Meyers sent Clingan to call the Division of Forestry. As he drove past the scoopmobile, it was not then on fire. The fire was in the center of the dump. The scoopmobile was in a corner of the dump.

After the fire it was noted that the burned out area in the dump fanned out in a southerly direction from the apex of the fan at the corner of the dump. The scoopmobile was in this area. At the start of the fire the wind was blowing out of the north. Normally, the point of origin of a fire is at the apex of the burned out area. It was also found that the left front wheel of the scoopmobile rested on a partially burned log approximately 8 to 12 inches in diameter, having a rounded-out depression at its point of contact with the wheel.

The cause of the ignition of the fire was not known but all of the eye-witnesses to it placed the location of its origin between 75 and 150 feet east of the scoopmobile. Defendant attributed the escape of the fire beyond the dump and established fire breaks to alleged phenomenal weather conditions which it claimed were unforeseeable.

To oppose this eye-witness testimony plaintiffs rely upon the expert testimony given by the Chief Ranger for the Division of Forestry. He testified that he had supervised and participated in the investigation of the source of ignition, discussed it with his assistant, and visited the dump after the fire had been brought under control, probably again the next day, and again several days after the discussion with his assistant. The Chief Ranger said that there was no physical evidence from which he could determine the origin of the fire. He was not asked any hypothetical questions based upon the testimony in the case. He was asked his opinion as to the possible sources of ignition of the fire. He stated: "There were two possible sources of ignition at the area of the skiploader, *assuming that the fire started at the skiploader* * * *" (Emphasis added.) One source was that "there *could have been* oil rags, wet garbage, something of that nature, that caused spontaneous ignition * * *" (Emphasis added.) The other was that he found a log approximately underneath the left front wheel that had a rounded depression in it "that led me to believe that the tire *could possibly have skidded* on that log at some time prior to the fire, so the only opinion I had left out of the elimination of the four [this refers to three other possible sources he had mentioned before] was undoubtedly it could have started from the left front wheel skidding on that log." On cross-examination he stated that the fact that after the fire was over the log appeared scorched "doesn't necessarily mean that friction caused this fire * * *" He was then asked: "* * * in respect to the causes which you gave at the skiploader, your conclusion was based solely on the assumption that the fire started at the skiploader, was it not?" He replied, "That's right." He said that *if* the fire started at the skiploader then in his opinion there were two possible sources of the fire, (1) friction of the skiploader, or (2) spontaneous combustion.

[10, 11] As said in George v. Bekins Van & Storage Co., 1949, 33 Cal.2d 834, 205 P.2d 1037, "Ordinarily an expert must base his opinion either on facts personally observed or on hypotheses that find support in the evidence." 33 Cal.2d at page 844, 205 P.2d at page 1044. The Chief Ranger stated that from his own observations he could not state how the fire started, and his assumption that the fire started from the action of the skiploader was based solely upon the assumption that the fire started at that machine. Such assumption was not based on any evidence and in fact was contrary to the evidence. As said In re Estate of Powers, 1947, 81 Cal.App.2d 480, 485–486, 184 P.2d 319, 322, "if [the expert's] opinion is not based upon facts otherwise proved, or assumes facts contrary to the only proof, it cannot rise to the dignity of substantial evidence." As in Nielsen v. Industrial Acc. Comm., 1932, 125 Cal.App. 210, 13 P.2d 517, there is "no true conflict in the evidence where that on one side consisted of opinions based upon a state of facts not shown by the record to exist while that on the other side was based upon facts actually shown to exist * * *" 125 Cal.App. at page 212, 13 P.2d at page 518; see also Alaska Packers Ass'n v. Industrial Acc. Comm., 1934, 1 Cal.2d 250, 263, 34 P.2d 716. "It has long been the rule in this state that a nonsuit may be granted only when, disregarding conflicting evidence giving to the plaintiff's evidence all the value to which it is legally entitled, and indulging in every legitimate inference which may be drawn from that evidence, the court properly determines that there is no substantial evidence to support a verdict in favor of the plaintiff. [Citations.] There is, however, a qualification on this broad general rule. It is settled that where the evidence raises an inference that a fact exists, and either party produces evidence of the nonexistence of the fact that is clear, positive, uncontradicted and of such a nature that it cannot rationally be disbelieved, the nonexistence of the fact is established as a matter of law. [Citation.] In these circumstances the inference is dispelled as a matter of law, and, if the fact inferred is necessary to establish an essential element of the plaintiff's case, a nonsuit or directed verdict is proper. [Citations.]" Leonard v. Watsonville Community Hospital, 1956, 47 Cal.2d 509, 514–515, 305 P.2d 36, 39.

The granting of nonsuits on the second counts was proper.

Third and Fourth Counts. Nuisance.

[12, 13] As pointed out by the trial court, the third counts did not state causes of action for nuisance as there are no allegations of nuisance in it. They merely allege that the fire was caused by negligence in the maintenance of the dump and in the operation of the scoopmobile. Therefore, the nonsuit on the ground that the counts did not allege nuisance was properly granted. Plaintiffs followed the suggestion of the court and filed fourth counts in which nuisance is properly alleged. While perhaps these counts allege too much in that they incorporate the allegations of the second counts, they do allege that the defendant maintained the dump in such manner as to be injurious to, and to cause an obstruction to the free use of the plaintiffs' property and so as to interfere with

the comfortable enjoyment of life and property.

[14] Defendant's first contention is that inasmuch as the maintenance and operation of a refuse disposal dump by the county is a governmental function maintained under authority of the statute[5] "Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance." Civ.Code § 3482. In Ambrosini v. Alisal Sanitary Dist., 154 Cal.App.2d 720, 727, 317 P.2d 33, it was held that that code section is not applicable to a defectively constructed sewer outfall line. The rule in California is that a public agency or municipality may be liable for the maintenance of a nuisance even though it is exercising a governmental function in the activity at issue, and any person whose property is affected or whose personal enjoyment is lessened by a nuisance may maintain an action for damages. Phillips v. City of Pasadena, 27 Cal.2d 104, 106, 162 P.2d 625. In Hassell v. City and County of San Francisco, 11 Cal.2d 168, 171, 78 P.2d 1021, it is stated that authority given a municipality by charter to have exclusive control and management of parks, including the right to erect and superintend the erection of buildings therein, does not give it the right to exercise the power in such a manner as to create a nuisance.

The fourth counts of the complaints, therefore, pleaded causes of action.

Moot?

Defendant contends that the finding of the jury on the first causes of action makes the fourth causes moot. We agree with that contention. The first counts charge, under the Public Liability Act, a dangerous and defective condition due to the accumulation of inflammable material, the habitual burning of brush at all hours of the day and night, failure to extinguish such smoldering and burning brush. The jury found against plaintiffs on this issue.

A dangerous or defective condition of the dump itself is a necessary part of the nuisance charge. Without it there could be no nuisance. To determine that would be the retrial of a matter of which the jury has already judged.

Moreover, all the acts specified in plaintiffs' fourth causes of action are identical with those specified in the first causes of action as grounds for the application of the Public Liability Act. Speaking of the liability of a municipality exercising a governmental function being limited to injuries resulting from the dangerous or defective condition of grounds, works and property, the court in Pittam v. City of Riverside, 1932, 128 Cal.App. 57, 62, 16 P.2d 768, 770, said: "Under the pleadings and facts of the instant case the liability of the municipality in the exercise of a governmental function is limited to 'injuries to persons and property resulting from the dangerous or defective condition of public * * * grounds, works and property.' Knowingly maintaining public property in such a condition that it is dangerous to the life, limb, health, or safety of the person or property of another, or the operation of municipal works upon its own property in accordance with a general scheme put in effect by municipal authorities, in such a manner that like dangers would exist, is a form of negligence. This is the doing of something in a manner in which an ordinarily prudent person would not do it." See also George v. City of Los Angeles, 1938, 11 Cal.2d 303, 79 P.2d 723, which states: "This liability is one for negligence." 11 Cal.2d at page 308, 79 P.2d at page 725.

[15–17] Plaintiffs cite several cases, among them Owen v. City of Los Angeles, 1947, 82 Cal.App.2d 933, 187 P.2d 860, Pittam v. City of Riverside, supra, 128 Cal.App. 57, 67, 16 P.2d 768, and Wilkerson v. City of El Monte, 1936, 17 Cal.App.2d 615, 624, 62 P.2d 790, to the effect that it is error in a Public Liability Act case to instruct on the subject of general negligence. However, none of these cases hold that the liability under that act is not one for negligence. The reason that it would be improper in a Public Liability Act case to instruct on negligence, as such, is that thereby a jury might be led into predicating liability on an agent's negligence, without more. Negligence may exist independent of a dangerous and defective condition of public property, but such a condition may not exist without negligence. Under both the first and fourth counts, knowledge, actual or constructive, must be proved, not merely knowledge that a garbage dump was being maintained but that it was negligently maintained. Plaintiffs contend that the jury's verdict on the first counts did not necessarily mean that the jury found that there was no dangerous or defective condition negligently maintained but that the jury might have based its verdict on a finding of lack of knowledge by defendant, pointing out that ordinarily the question of knowledge, express or implied, is a question for the jury. See Bady v. Detwiler, 1954, 127 Cal.App.2d 321, 335, 273 P.2d 941; Murphy v. County of Lake, 1951, 106 Cal.App.2d 61, 67, 234 P.2d 712. A general verdict imports a finding in favor of the winning party on all the averments of his pleading material to his recovery. It was so held in Tremble v. Tuman, 1917, 175 Cal. 696, 698, 167 P. 142, where it was contended that there was an inconsistency between the jury's findings on special interrogatories and, the general verdict. To the same effect is Price v. Bekins Van & Storage Co., 1918, 179 Cal. 326, 328, 176 P. 452. There the plaintiff sued on two counts, one for false representations, the other for conversion. The jury found for plaintiff on both counts. On appeal it was held that certain evidence was erroneously admitted, but that there was ample evidence free from error to support the first cause of action. The court then said that "A general verdict for plaintiff imports a finding in his favor on all the averments of the complaint material to his recovery" (179 Cal. at page 328, 176 P. at page 452) and that therefore it was immaterial whether or not the evidence relative to the issues in the second count was erroneously admitted. See also Shields v. Oxnard Harbor Dist., 1941, 46 Cal.App.2d 477, 491, 116 P.2d 121. In Hudgins v. Standard Oil Co., 1933, 136 Cal.App. 44, 50, 28 P.2d 433, 435, where the reviewing court reversed the action of the trial court in setting aside general verdicts in favor of the plaintiffs because of alleged inconsistency between them and the special verdicts, the court said: "It is unnecessary to cite the cases holding that all intendments are in favor of the general verdicts, and that everything necessary to be found by the jury, not otherwise controverted, will be deemed found and included therein." In Hassell v. City of San Francisco, supra, 11 Cal.2d 168, 171, 78 P.2d 1021, 1022, the court said: "'A statutory sanction cannot be pleaded in justification of acts which by the general rules of law constitute a nuisance, unless the acts complained of are authorized by the express terms of the statute under which the justification is made, or by the plainest and most necessary implication from the powers expressly conferred, so that it can be fairly stated that the legislature contemplated the doing of the very act which occasions the injury.' 46 Cor.Jur. p. 674." Under that rule the grant of power to the county to maintain and operate a refuse dump including the burning of refuse thereon, protects the county from liability for the ordinary operation of the dump. Necessarily implied in the grant of power under section 25820 is the right to operate the dump in the usual and customary manner in which similar dumps are operated. However, a dump may not be operated in a negligent manner nor in such manner as to constitute a nuisance. See Ambrosini v. Alisal Sanitary Dist., supra, 154 Cal.App.2d 720, 726, 317 P.2d 33; 63 C.J.S. Municipal Corporations § 77, pp. 69–70. But in this case there is a jury finding that the dump was not operated in a negligent manner (the only basis for nuisance charged) and that the acts upon which plaintiffs base their claim of nuisance did not occur. The finding of the jury on the factual issues under the first causes of action is determinative of the same issues under the fourth causes even though different legal conclusions might be drawn had the jury found the other way upon them.

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[5] Section 25820, Government Code, provides that the board of supervisors of a county may acquire, maintain and operate dump sites and other disposal plants for the disposal of combustible or noncombustible garbage or rubbish or both.

Under the pleadings, the evidence and the findings of the jury in this case, the charges in the fourth causes became moot.

The judgments on all counts are affirmed.

FRED B. WOOD and TOBRINER, JJ., concur.

Hearing denied; PETERS, J., not participating.

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173 Cal.App.2d Supp. 793

Jack COLLIE, Plaintiff and Respondent,

v.

William J. AUST, Willaford Doiron, Defendants and Appellants.

Civ. A. 9825.

Appellate Department, Superior Court, Los Angeles County, California.

Aug. 17, 1959.

Action against owner and driver of jeep for injuries sustained by plaintiff through negligent operation of jeep. From adverse judgment of the Municipal Court of the South Bay Judicial District, John A. Shidler, J., the driver and jeep owner appealed. The Appellate Department of the Superior Court, Swain, J., held that where owner of jeep, who was unable to go on hunting trip, loaned his jeep to plaintiff, who allowed another person to drive jeep to camp site, and plaintiff was injured through driver's negligent operation of jeep, plaintiff could not recover against jeep owner for his injuries.

Judgment affirmed as to driver and reversed as to jeep owner.

1. Automobiles 🔑181(2)

Where owner of jeep loaned it to plaintiff for use on a hunting trip and plaintiff left his automobile with jeep owner for his use, plaintiff was bailee of jeep and he was not the "guest" of person whom he allowed to drive jeep to camp site.

See publication Words and Phrases, for other judicial constructions and definitions of "Guest".

2. Negligence 🔑93(1)

Where owner of jeep, who was unable to go on hunting trip, loaned his jeep to plaintiff and plaintiff allowed another person to drive jeep to camp site and driver negligently operated jeep resulting in injury to plaintiff, plaintiff was not barred from recovering against driver by reason of fact that as bailee he had the right to control driver, and negligence of driver was not imputable to plaintiff.

3. Automobiles 🔑192(6)

Where owner of jeep, who was unable to go on hunting trip, loaned his jeep to plaintiff, who allowed another person to drive jeep to camp site, and plaintiff was injured through driver's negligent operation of jeep, plaintiff could not recover against jeep owner for his injuries. West's Ann. Vehicle Code, § 402(a, d).

Thomas M. Lynam, Los Angeles, for appellants.

James F. Ball, Los Angeles, for respondent.

SWAIN, Judge.

Five men, including plaintiff Collie and defendants Aust and Doiron, had planned a hunting trip. Doiron was not able to go on the trip, but he loaned plaintiff his jeep and plaintiff left his automobile with Doiron for Doiron's use. While driving to the camp site, Collie allowed Aust to drive the jeep. Aust negligently operated the jeep and Collie was injured. Collie sued both the driver, Aust, and the owner, Doiron, and received judgment against both. Defendants appeal from the judgment.

[1] The plaintiff claims and the court found that plaintiff was a passenger. The evidence that Doiron loaned his automobile to the plaintiff and that the plaintiff left his automobile with Doiron for his use proves that plaintiff was the bailee of the jeep. Baugh v. Rogers, 1944, 24 Cal.2d 200, 148 P.2d 633, 152 A.L.R. 1043. Neither was the plaintiff the guest of Aust. He did not accept a ride from Aust. His situation is similar to that of an owner who has been held not to be the guest of the driver while riding in his own car. Ahlgren v. Ahlgren, 1957, 152 Cal.App.2d 723, 725, 313 P.2d 88.

[2] The plaintiff is not barred from recovering against the driver, Aust, by reason of the fact that as bailee he had the right to control the driver. The plaintiff was not guilty of any actual negligence himself and the negligence of Aust is not imputed to him in this action. Ledgerwood v. Ledgerwood, 1931, 114 Cal.App. 538, 300 P. 144; Roberts v. Craig, 1954, 124 Cal.App.2d 202, 268 P.2d 500, 43 A.L.R.2d 1146.

[3] We turn to the question of the liability of the defendant owner, Doiron. The judgment against him is based on permissive use, Vehicle Code, § 402, subsection (a) of which provides: "Every owner of a motor vehicle is liable and responsible for the death of or injury to person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner, and the negligence of such person shall be imputed to the owner for all purposes of civil damages." The answer to our problem is found in subsection (d) which provides: "In the event a recovery is had under the provisions of this section against an owner on account of imputed negligence, such owner is subrogated to all the rights of the person injured or whose property has been injured and may recover from such operator the total amount of any judgment and costs recovered against such owner. If the bailee of an owner with the permission, express or implied, of the owner permits another to operate the motor vehicle of the owner, then such bailee and such driver shall both be deemed operators of the vehicle of the owner within the meaning of subdivisions (c) and (d) of this section." In other words, if the plaintiff bailee recovers against the defendant owner, the latter in turn is entitled to recover that amount from the bailee. The law does not permit this circuity of actions. It is a maxim of jurisprudence that "The law neither does nor requires idle acts." Civil Code, § 3532. We, therefore, hold that the plaintiff's action against the defendant Doiron is barred by Vehicle Code, § 402, subsec. (d).

The judgment is affirmed as to appellant Aust and reversed as to appellant Doiron. Costs are awarded to respondent against Aust and to appellant Doiron against respondent.

BISHOP, P. J., and DAVID, J., concur.